



Chapitre 7. France

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CHAPTER 7

FRANCE

David HIEZ

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1. DEFINITION AND OBJECT OF COOPERATIVES

1.1. PRELIMINARY REMARKS

1.1.1. *General Cooperative Law and Special Cooperative Laws*

It is difficult to comprehend cooperative French law as a whole because it is a mix of general law and several special laws dealing with specific kinds of cooperatives. The general law is Act 47-1775 of 10 September 1947 known as the 'cooperation statute'. The purpose of the legislature at that time was to provide a cooperative common law to replace the various previous special laws laid down over a span of fifty years. Indeed, article 30 of the law still states that there will be a codification of cooperative law, and that the 1947 Law will be the first title of the new code. The 1947 Law also contained an original provision regarding normative coordination, since its Article 2 provided that general law would have greater strength than special laws, contrary to the traditional principle *specialia generalibus derogant, non generalia specialibus*. However, that objective was not achieved, and the provision on codification is still in force. The exceptional solution of article 2 has since been repealed by L. 92-643 of the 13th of July 1992, article 2.1.¹

¹ L. 92-643 of the 13th of July 1992, art. 2.

The consequence is a large number of special laws of such an extent that it is pointless to enumerate them all.² Some of the most important examples are the following:

Agricultural cooperatives: Code rural (C.rur.), arts. L.521-1 to L.529-6 and R.521-1 to R.529-2;

Workers' cooperatives: law no. 78-763 of the 13th of July 1978 on workers' cooperative societies; commercial cooperatives: code de commerce (C.com.), art. L.124-1 to L.124-16;

Craft cooperatives: law no. 83-657 of the 23rd of July 1983 on the development of certain social economy activities, art. 1 to art. 34;

Collective interest cooperatives: law no. 47-1275 of the 10th of September 1947, art. 19*quinquies* to 19*quindecies*;

Merchants' cooperatives: C.com. arts. L.124-1 to L.124-16;

Transportation cooperatives: code des transports (C.transp.), arts. L.3441-1 to L.3441-6;

Banking cooperatives: code monétaire et financier (C.mon.fin.), art. L.512-1 to L.512-10, precisating that, in the chapter dealing with these cooperatives in this Code, each banking cooperative is submitted to different provisions; for example: C.mon.fin., arts. L.512-2 to L.512-13 for 'banques populaires'.

A cooperative must usually comply with two cooperative laws: the general law and the special law of its family. Theoretically, it is possible to create a cooperative which is not connected with a special law. Such a cooperative is only submitted to the 1947 Law, and is termed a '1947 law cooperative'. These cooperatives are very few in number, mainly because there are some advantages, for example in taxation, to be gained from referring to a special law. Moreover, the general law is not detailed, so that the drafting of its statutes is more difficult.

The complexity derives from the fact that the general law states numerous principles that are explicitly applicable only if the special law does not stipulate another solution. Moreover, even when the general law does not foresee that possibility, the usual interpretation principle requires that *specialia generalibus derogans*. Indeed, special laws often state solutions different from general law: it is not often that there is a fully opposite provision, but the import or the details of the principle differ, so that each family seems to have a fully autonomous special regulation. These specificities can only be understood if each law is related to the history of the corresponding cooperative family.

An example is the possibility to incorporate a part of the reserves in the capital,³ this possibility is envisaged by the general law,⁴ but many special laws

² There exist about thirty kinds of legally distinct cooperative.

³ For details, see section 3.5.

⁴ L. no. 47-1775 of the 10th of September 1947, art. 16 al. 3, 4.

derogate the general provision, and often forbid explicitly the incorporation.⁵ Moreover, some other special laws exclude a mechanism of the general law and state another: for example, agricultural cooperatives⁶ with similar aims but substantially different mechanisms.

In this case, it is difficult to say what the solution is in French law, since they are diverse. This is not an exceptional situation; on the contrary, it is quite common. Of course, it is always significant that the general law states one solution and not another, but when most special laws give another statement, it is superficial to refer to the general statute. In this regard, it would be pointless to itemise all the special provisions. I shall always present the general provision, and describe the most interesting special ones only when they differ, or in order to specify the frequent concrete applications of the general rule.

1.1.2. *Cooperative Law and Company Law*

French cooperative law, unlike company law, suffers from a lack of interest by doctrine. Whereas Italian, German and Spanish doctrine contains handbooks on cooperative law or substantial developments in more general books, as well as PhD dissertations on the topic, French research is meagre. For example, there exists only one handbook.⁷ This is the consequence of the weak autonomy of cooperative law, as well as being one of its causes. Legal doctrine was more developed in the first half of the twentieth century, but the adoption of the law of 1947 closed that cycle. Interest in cooperative law has been renewed with the development of the social and solidarity economy,⁸ but still remains modest. This specification is interesting only to show the weakness of the legal cooperative identity, which has strong consequences on its relationship with company law.

Article 1 of the 1947 Law states: 'A cooperative is a company created by several persons willingly associated in order to satisfy their economic or social needs by their common efforts and the creation of the necessary means'. I will detail the meaning of this definition below, but the first specification is that cooperatives are companies. The French word 'société' is very difficult to translate. Indeed, 'société' is in French a generic notion, whereas English distinguishes among different categories, such as company, partnership, but also industrial and provident societies. In business law, the terms 'société' and 'society' are *faux amis*. The precision is important, since it has major consequences, and also because

⁵ L. no. 78-763 of the 19th of July 1978, art. 26ter.

⁶ Code rural et de la pêche maritime (C.rur.), art. L.523-1.

⁷ D. HIEZ, *Coopératives Création Organisation Fonctionnement*, Delmas, Paris, 2013; 2nd ed., forthcoming, Dalloz, Paris, 2016.

⁸ That development started in 1981, but accelerated in the 2000s, culminating with L. no. 2014-856 of the 31st of July 2014 on social and solidarity economy.

it should not be an evidence of the legal nature of the cooperative. The above statement of article 1 of the 1947 Law was modified in 1992 and 2014, but the first five words, here discussed, remain similar. Therefore, the conclusion is that the qualification of ‘company’ was adopted in 1947. Before that date, the point was very actively debated. In French law, a *summa divisio* among private legal persons is the distinction between a company and an association. The definitions of companies⁹ and associations¹⁰ are opposite to each other: a company aims at the distribution of profits, whereas such distribution is forbidden for an association.

In that context, debate centred on whether cooperatives were companies or associations. The discussion was theoretically important because it was an interesting hard case to specify the distinction between the two groupings. Authors claimed that cooperatives were associations because they did not pursue the aim of profit distribution, even if the doctrine clarified that it was necessary to pay close attention to the articles and practice of each specific cooperative to make the final qualification. Indeed, in the absence of clear solutions from the legislature, the organisation and functioning of each cooperative depended on the wording of its articles.¹¹ An important and well-known case decided on the notion of ‘benefices’, included in the definition of both association and company, and categorically delineated the full opposition of association and company.¹² More interestingly, this case concerned a cooperative, more precisely a banking cooperative (‘caisse rurale de Manigod’). The judges stated that the cooperative was an association, since it did not distribute profits, even if its byelaws provided for cooperative refunds. But, as highlighted by the doctrine, the qualification was thoroughly dependent on the wording of the cooperative’s statutes and could not be extended to all cooperatives. Nevertheless, the conclusion remains that most authors and case law were in favour of the qualification of ‘association’.

However, in practice, most cooperatives choose the form of a company. They incorporate the cooperative as a company, using a form provided by company law, derogating it in their byelaws to include cooperative principles. Some special cooperative laws adopted at the beginning of the twentieth century made the same choice, and the only general provisions dedicated to cooperatives, even if cooperatives were not explicitly mentioned in them, were part of company law.¹³ The reason for this choice was not political but pragmatic. The 1901 law

⁹ Code Civil (C.civ.), art. 1832.

¹⁰ L. of the 1st of July 1901, art. 1.

¹¹ H. HAYME, *Domaines respectifs de l'association et de la société*, thèse Paris, 1907.

¹² Cass. réun., 11 mars 1914, S. 1918.1.103 – D. 1914.1.259 – J. Soc. 1915, p. 97 – Rev. Soc. 1915, p. 44.

¹³ Law of the 24th of July 1867 on commercial companies, title II variable capital companies, arts. 48 ff.; today Code of commerce (C.com.), arts. L.231-1 ff.

on associations concerned the legal recognition of associations but contained no provision regarding their organisation or their economic activities. Therefore, that structure was not very attractive for a firm and, even with its defects, company law offered a more suitable form. An attempt occurred to build a specific regulation for cooperatives, distinct from companies and associations, and a project was launched in the 1930s, but it never succeeded. In the meantime, many special cooperative laws chose simply to refer to company law. Finally, this choice was generalised in 1947, and there is today no longer any discussion in its regard, even if all authors agree that this arrangement is rather strange because cooperatives differ from companies in all main respects.¹⁴

The classification of cooperatives among companies is not original: what is original, though, is the conclusion drawn from it, which is that cooperatives are in principle subject to company law. In practice, this qualification means that, for all points not covered by cooperative law, company law is applicable. For example, the causes and the procedure of a cooperative's dissolution are regulated by company law. Of course, this application is excluded if the provisions of company law contradict those of cooperative law, but it is often difficult to decide whether or not there is a contradiction. This is decided by judges, and their poor knowledge of cooperative law often explains the preference given to company law.

A major issue is the form of company chosen by a cooperative. Theoretically, the choice is not compulsory, at least not for cooperatives established by reference to the 1947 Law, since this law gives no indication on the matter. But the choice never occurs, for two reasons: first, because the 1947-law cooperatives are very few in number; secondly, because that choice requires full and detailed organisation of the cooperative in the byelaws, which the drafters prefer to avoid. On the contrary, the special laws usually limit the choice of possible forms of company to two options: a limited liability Company ('société à responsabilité limitée', s.a.r.l.) or a public limited company ('société anonyme', S.A.). A third possibility is increasingly often proposed: the simplified stock company ('société par action simplifiée', S.A.S). Therefore, the concrete functioning of a cooperative is mainly regulated by company law, in combination with special derogating provisions of cooperative law. A cooperative must usually refer to six sets of provisions: general company law,¹⁵ general commercial company law,¹⁶ variable capital company provisions,¹⁷ the regulation specific to the form of company

¹⁴ R. SAINT-ALARY, 'Les elements distinctifs de la société coopérative', *Revue trimestrielle de droit commercial*, Paris, 1952, p. 485 f.; J. Mestre, 'Propos introductifs sur l'originalité du droit coopératif', *Revue de la recherche juridique droit prospectif*, 1996, p. 475 f.

¹⁵ C.civ., arts. 1832 ff.

¹⁶ C.com., arts. L.232-1 ff.

¹⁷ C.com., arts. L.231-1 ff.

chosen, the general cooperative law,¹⁸ and the special cooperative legislation applicable to the family to which the cooperatives belongs. It is obvious that the outcome is rather complex.

The only cooperatives with different features in this regard are agricultural cooperatives. Indeed, article L.521-1 of the Rural Code states that 'agricultural cooperative companies and their unions constitute a special category of companies, distinct from civil companies and from commercial companies'. The consequence is that agricultural cooperatives are only subject to general company law, that is to say, Civil Code arts. 1832 to 1844-17. These provisions of the civil code do not deal with many practical questions, notably organisational and financial ones. Consequently, the Rural Code provides solutions to all such matters, so that agricultural cooperative law is far more detailed than any other cooperative statute. Article L.521-1 specifies that agricultural cooperatives have legal personality and full legal capacity, which no other cooperative legislation does. The autonomy of agricultural cooperative legislation must be qualified because, in practice, it is often inspired by the public limited company law as recently reformed.¹⁹ However, this legislation is the only one in French cooperative law which tries to elaborate a full cooperative law; which is the reason why I often refer to it in what follows.

1.2. DEFINITION OF COOPERATIVE

French law gives a definition of cooperatives in general,²⁰ but it is difficult to clearly distinguish in that provision between the definition itself and the social object. Moreover, the definition has evolved since 1947; first in 1992 to extend its object so that it fit better with all cooperatives, and secondly in 2014 to provide a fully new definition. A major element of this definition relates to the qualification of a company, as explained above.²¹ An element lacking in the definition is the variability of capital.

The variability of capital is not included in the definition of a cooperative, differently from other legislations – for example Belgian law²² and Luxembourg law²³ – whereas, in practice, all cooperatives adopt the variability of capital.

Variable capital companies are regulated by articles L.231-1 to 231-8 of the '*Code de commerce*'. These provisions derive directly from the first legislation

¹⁸ L. no. 47-1775 of the 10th of September 1947.

¹⁹ D. HIEZ, 'Pas de révolution pour les coopératives agricoles', *Revue des Sociétés*, Paris, 2007, p. 53.

²⁰ L. no. 47-1775 of the 10th September 1947, art. 1.

²¹ See section 1.1.2.

²² Code belge des sociétés, art. 350.

²³ Law of the 10th of August 1915, art. 113.

concerning commercial companies.²⁴ That law contained eight articles on variable capital companies, the purpose of which was to provide a structure for cooperatives. However, cooperatives were not explicitly mentioned in the law, since cooperatives were reluctant to have their own legislation for fear that it might be a means for the government to control them and restrict their activities. The law of 1947 contained no provisions concerning the variability of capital. Therefore, variable capital is only an option for cooperatives. Theoretically, cooperatives may have a fixed capital, but it would be at odds with fundamental cooperative principles, notably the open door principle, and I know of no example of a cooperative of this kind. The 1947 Law makes only one reference to the variability of capital, which confirms that it is only an option: its article 7 states that cooperatives created as variable capital companies do not have to specify the highest amount of their capital in their articles of incorporation. That provision is only the outcome of a legislative will to reverse a controversial case law ruling²⁵ which had stated that, if the highest amount of capital was not fixed in the articles, any increase of capital should be submitted to the procedure of capital increase in fixed capital companies.²⁶

It appears that the cooperative definition as such is very poor, either referring to company law or making the variability of capital an option. Fortunately, however, if the technical substance of cooperatives is deceptive, there is more detail concerning their social object.

1.2.1. Cooperative Social Object

The cooperative social object is, in French cooperative law, the core of the definition of a cooperative. At first glance, its object is very clear and compliant with the ICA definition and principles.²⁷ Recently, the French legislature has chosen to highlight the connection between this object and cooperative principles²⁸ by referring explicitly to some of them in article 1 of the 1947 Law. However, it seems that the consequence of the creation of a new type of cooperative is that the collective interest cooperative ('société coopérative d'intérêt collectif', SCIC) has not been elucidated and has certainly not been integrated into the legal definition.²⁹

²⁴ Law of the 24th of July 1867.

²⁵ Cass. com. 6 févr. 2007, no 05-19.237, bulletin civil des arrêts de la Cour de cassation (Bull. civ.) IV, no 29; Droit des sociétés, Paris (*Dr. Sociétés*), 2007, 175, comm. Mortier.

²⁶ For an overview: D. HIEZ, 'Chronique de droit coopérative', *La semaine juridique Entreprises*, édition Entreprises, (JCP E), 2008, 2373, no. 10.

²⁷ See section 1.2.1.1.

²⁸ See section 1.2.1.2.

²⁹ See section 1.2.1.2.

1.2.1.1. The Definition of Cooperative Social Object

The social object of a cooperative is stated at the end of Article 1 of the 1947 Law. Herein resides the evolution of the article since 1947. In 1947, article 1 stated:

A cooperative is a company whose main objectives are:

1. To reduce, for the benefit of its members and by their common effort, the cost price and possibly the selling price of some products and some services, by fulfilling the function of firms or intermediaries whose remuneration would increase this cost price;
2. To improve the quality of the products provided to its members or those produced by its members and sold to the consumers.

That definition was an attempt to encompass all the activities of cooperatives, notably through the intent to abolish intermediaries between cooperatives and providers. Nevertheless, the definition has been criticised, since it prolonged the influence of consumer cooperatives whose economic weight, as well as theoretical predominance, were obvious at the time. But the situation had changed, first because of the development of producer cooperatives, and second because of the bankruptcy of French consumer cooperatives in the 1970s. Therefore, the law of 1992³⁰ added a third object to article 1:

3. More generally to contribute to satisfaction of the needs and promotion of the economic and social activities of its members as well as to their training.

Addition is not revision, and the structure of the definition remained the same. For example, it is necessary to distort the provision strongly to make it suitable for workers' cooperatives. Nevertheless, the main features of cooperatives were already present: satisfaction of the members' interests, and the common investment of cooperators in achieving that goal.

In 2014, the definition was redrafted by the law on the social and solidarity economy.³¹ It now states: 'A cooperative is a company created by several persons willingly associated in order to satisfy their economic or social needs through their common efforts and the creation of the necessary means'.

There is no substantial change in the meaning of the new provision.³² The same main elements are present: economic and social means, the common efforts. The modification seems more a simplification and the outcome is positive. However, two items have disappeared: promotion of the activities

³⁰ L. 92-643 of the 13th of July 1993, art. 1.

³¹ L. no. 2014-856 of the 31st of July 2014, art. 24.

³² See below on the collapse with the collective interest cooperative: section 1.2.1.2.

of the members, and their training. The former element can be considered implicit, since the satisfaction of the members' needs consists, for producers' cooperatives, in promotion of their activities. In regard to training, the absence in the definition is compensated by its mention among the cooperative principles to which cooperatives are submitted. It was explicitly introduced for agricultural cooperatives in regard to the board members.³³

The general object of cooperatives is duplicated in each special law, which defines the special object of the cooperatives regulated by that law. This special object is inspired by the special needs of cooperatives. For example, in law no. 78-763 of 13 July 1978 for workers' cooperatives, article 1, states that: 'Workers' cooperative companies are formed by workers of any category or professional qualification associated to perform together their profession in a firm that they manage directly or through the intermediation of representatives designated by themselves from among themselves'.

A specification is provided by article 1 of the general law: the cooperative performs its activity in any branch of human activity. This is important, since it excludes any limitation according to the activity undertaken. As regards associations or companies, the byelaws state the social object in consideration of the activity, but the law does not provide with such an indication. The general law states that the cooperative may run any activity, but most special laws set, directly or indirectly, the limitations of this activity. However, if a cooperative is not open to a specific activity, the 1947 Law remains available to give generic shape to a cooperative. An example of difficulty and controversy can be found in regard to regulated professions. For example, chartered accountants have encountered difficulties in creating a SCIC. More precisely, there is no cooperative difficulty, but the association of chartered accountants has been reluctant to register a SCIC, arguing unofficially that the cooperation required among cooperatives was in contradiction with the independent of chartered accountants.

But article 1 of the general law of 1947 was also amended in 2014 by the mention of some essential cooperative principles: voluntary and open membership, democratic governance, economic participation of members and their training, and inter-cooperation. This innovation is interesting because it emphasises the relationships between the definition of a cooperative and the cooperative principles, the latter being a means to implement the former. I will not describe all of them here, since they will be analysed in the following sections. Nevertheless, a point must be made regarding cooperative refund, which corresponds to the economic participation of members in the cooperative, since it is specifically a cooperative concept.³⁴

There follows discussion of cooperative transactions, which may be analysed as the core of the cooperative social object, since they are the substance of

³³ C.rur., art. L.523-1, created by the law no. 2014-1170 of the 13th of October 2014, art. 13 v.

³⁴ See section 1.2.2.

the economic participation of cooperators in the cooperative. This element is mentioned in the article, among cooperative principles, but as such, it is not the cooperative's social object, which is satisfaction of the members' needs. Of course, performing it requires the conduct of transactions between the members and cooperative, but it is logically second. It is true that in French law the qualification of transactions between members and the cooperative is vague. On the one hand, authors insist on the importance of the '*double qualité*' principle, which means that each member is simultaneously an associate of the company and its contractor for the cooperative transaction.³⁵ This has been recently explicitly stated for agricultural cooperatives: the relationship between the cooperator and the agricultural cooperative of which s/he is a member relies, notably, on the indivisible dual quality of service beneficiary and associate.³⁶ On the other hand, the two aspects of the relationship remain distinct since each has its own legal qualification. There should be a single contract, the contract of cooperation, but it is difficult to find more than a reciprocal influence of each relationship on the other one. Even if cooperative transactions are the core of the cooperative social object, they cannot be considered as its substance.

1.2.1.2. New Theories of Cooperative Social Object

Legal cooperative thinking is very poor in France, so that there is no real alternative proposal to define the cooperative social object. Interesting discussions took place at the beginning of the twentieth century on the main characteristics of cooperatives and, consequently, on their definition. Debates concerned the possibility of finding a common definition, whereas the relationships between the cooperators and the cooperative were rather different, as was the activity of the former in the cooperative. The interests of consumers were very different from those of enterprises and their common use of the cooperative did not necessarily have the same goals. The democratic principle, the open door, the independence from trade unions, parties or church, the distribution of surpluses, the activity with non-members, all of these questions did not receive the same answers. Depending on the cooperatives to which the authors referred, their analysis could vary. These debates were weakened by adoption of the general law and, today, they are no longer seriously conducted. The only concern of legal thinkers of the past forty years has been to describe the cooperative's specificity and to distinguish it from other groupings. The definition of cooperative has not

³⁵ L. COUTANT, *L'évolution du droit coopératif de ses origines à 1950*, éditions Matot-Braine, Paris, 1950, p. 228 ff. B. SAINTOURENS, 'Sociétés coopératives et sociétés de droit commun', *Revue des sociétés*, 1996, p. 1 ff.

³⁶ C.rur., art. L.521-1-1: 'La relation entre l'associé coopérateur et la coopérative agricole à laquelle il adhère ... repose, notamment, sur le caractère indissociable de la double qualité d'utilisateur de services et d'associé...'.

been seriously renewed either by updating the distinction with companies,³⁷ or by comparing it with other groupings such as economic interest groupings,³⁸ or even by choosing a focus to tackle the cooperative identity.³⁹

The innovation has come from practice and the creation by the legislature of a new cooperative: the collective interest cooperative. Partly inspired by the Italian social cooperative, this new form has been established⁴⁰ by promoters of the solidarity economy in order to create a bridge between association and cooperative. Its importance is symbolised by its integration into the general law of 1947.⁴¹

Collective interest cooperatives are first, defined as cooperatives, but their social object differs from the general one, and this has very important consequences, theoretically and practically. Article 19^{quinquies} of the 1947 Law states that their objective is 'the production or the supply of collective interest goods and services which contain a dimension of social utility'. The key expression is 'social utility', the definition of which is not yet fully fixed. This concept, as well as that of 'collective interest', is distinct from, and somehow intermediate between, general and individual interest. Consequently, it is considered to fit very well with social solidarity⁴² as the third pillar next to the public and capitalist sectors. The concept is often used to assess the activities of social and solidarity economy enterprises, in a perspective opposite to the social impact assessment mechanism.⁴³ Such a method had been decided for collective interest cooperatives, since their creation was subject to verification of their social utility by the state,⁴⁴ but that provision was abrogated in 2012.⁴⁵

In this new kind of cooperative, it is clear that the social object is no longer, or at least not only, the satisfaction of the needs of the members. Here, the cooperative is explicitly targeted on third parties; the beneficiaries of the SCIC are welcome to become members, but membership is not a condition to obtain the services or goods,⁴⁶ nor are the services or goods defined in consideration of the members alone. This has major practical consequences, such as the absence

³⁷ MESTRE, n. 14 above; SAINTOURENS, n. 35 above.

³⁸ H. AZARIAN, *Coopérative, groupement d'intérêt économique et association*, thèse, Université Paris V, 2000.

³⁹ M. HÉRAIL, *Contribution à l'étude du lien coopératif au sein des sociétés coopératives*, thèse, Université Rennes I, Paris, 1999.

⁴⁰ L. no. 2001-634 of the 17th of July 2001, art. 36.

⁴¹ L. no. 47-1775 of the 10th of September 1947, arts. 19^{quinquies} f.

⁴² D. HIEZ and R. LAURENT, 'La nouvelle frontière de l'économie sociale et solidaire: l'intérêt général?', RECMA, Paris, 2011, no. 319, p. 36.

⁴³ M. PARODI, 'L'utilité sociale pour éclairer la face cachée de la valeur de l'économie sociale', RECMA, Paris, 2010, no. 315, pp. 40-55.

⁴⁴ L. no. 47-1775 of the 10th of September 1947, art. 19^{terdecies}.

⁴⁵ L. no. 2012-387 of the 22nd of March 2012, art. 26.

⁴⁶ L. no. 47-1775 of the 10th of September 1947, art. 19^{sexies}.

of cooperative refund.⁴⁷ It is the translation of the Italian experience but also an attempt to provide a solution for the big associations, which have important economic activities for which the cooperative form seems more suitable.

The consequence of creating that new kind of cooperative and its integration into the general cooperative law has not been seriously considered. Because of the importance of special cooperative types in French law, authors have merely noted the creation of a new type, without studying its compatibility with the general definition. The two definitions are at least partly contradictory. But it cannot be claimed that the SCIC is an exception, a marginal cooperative, since the legislature made the choice of inserting it into the general law, which is true for no other cooperative except the European cooperative society. The new definition provided by article 1 of the 1947 Law did not take any innovation into account, since it focused only on the needs of the members. Some legislative innovations and cooperative concerns can be mentioned as a starting point for a future and more inclusive definition. First, if the members remain the core of the cooperative, the exclusivism rule has been restricted, and the cooperative may conduct 20% of its transactions with non-members.⁴⁸ Secondly, increasing attention is paid to multi-membership, and notably the inclusion of employees among members, for example in agricultural cooperatives.⁴⁹ Finally, partly because of the pressure applied by corporate social responsibility interests, cooperatives are increasingly keen to emphasise their attention to the community. Lastly, the SCIC are characterised more by multi-membership than social utility, since the latter is rather extensible and no longer considered as a precise delimitation. The true criterion of the SCIC is comprised more in its regulation itself, notably the obligation to allocate 57.5% of the surplus to an indivisible reserve.⁵⁰ In short, there is no longer an opposition between the SCIC and other cooperatives, only a clearer targeting of SCIC on the community. Simply, that unity has not yet been translated into the legal definition.

1.2.2. *Cooperative Advantage and Ways to Assign it to Members (Cooperative Refunds)*

Cooperative refund is evoked by the general cooperative law,⁵¹ but it is not defined. Generally, it is a distribution of a portion of surplus to cooperators, in proportion to their cooperative transactions with the cooperative. Legally, its distribution is not compulsory for the cooperative. This is discussed by authors,

⁴⁷ L. no. 47-1775 of the 10th of September 1947, art. 19*nonies*, which excludes application of article 15 of the same law.

⁴⁸ L. no. 47-1775 of the 10th of September 1947, art. 3.

⁴⁹ C.rur., arts. L.522-3 1 L.522-4; JCP E 2015, 1607, no. 45, obs. D. Hiez.

⁵⁰ See section 3.5.

⁵¹ L.47-1775 of the 10th of September 1947, art. 15.

and it has been debated within the cooperative movement, but the goal may be the development of cooperatives, which may not require the distribution of all the surpluses. The only exception is the workers' cooperative, for which the special law states that at least 25% of the surplus must be distributed to all the employees,⁵² that is to say, the cooperators but also non-cooperator employees. The form of that distribution is not defined by law, but it is distinct from the remuneration of share capital. The law proposes three methods of distribution: proportionately to the salary, to the working time, or equally. The attribution to all the employees, members or not, contradicts the qualification of cooperative refund, but that solution is the outcome of a bargain between the workers' cooperative organisation and the government by which the former obtained a tax exemption on the distributed amounts, these amounts being considered as a kind of employee participation in the profits of enterprises. The cooperative refund is certainly rooted in the principle of the economic participation of cooperators in the cooperative, as provided both by the ICA cooperative principles and article 1 of the cooperative general law. That link is obvious in the prohibition of cooperative refund in the SCIC: because the beneficiaries of the goods or services provided by the cooperative are not necessarily, and even not mainly, cooperators, there is no reason to provide for the distribution of surplus in proportion to the cooperative's transactions.

1.2.2.1. Provision and Regulation of Cooperative Refunds

The mechanism of cooperative refund is provided by the general cooperative law. The 1947 Law (art. 15) states that the distribution of the surplus is not possible among the associates, but in proportion to the transactions realised by each member with the cooperative or proportionate to the work that s/he did for it. As such, this provision does not compel cooperative refund, but it forbids any distribution different from that framework. This means that any remuneration of shared capital cannot be considered as distribution of surplus.⁵³ The proportion established between the distribution and the cooperative transactions implies the prohibition of distribution of surplus related to transactions with clients, i.e. with non-cooperators.⁵⁴ This provision is the only example in the general law of a distinct regulation for transactions with cooperators and with non-cooperators, despite the importance of the exclusivism principle.⁵⁵ Article 15 contains a last provision which allows the remuneration of the director, that is, the employee in charge of the direction of the cooperative, in proportion to the transactions or the profits, if so provided by the byelaws.

⁵² L. no. 78-763 of the 19th of July 1978, art. 33.

⁵³ See section 3.6.

⁵⁴ L. no. 47-1775 of the 10th of September 1947, art. 15. al. 2.

⁵⁵ L. no. 47-1775 of the 10th of September 1947, art. 3; see section 1.3.2.

Special regulations are not usually more precise, except for workers' cooperatives. In these cooperatives, in addition to the mechanism explained above,⁵⁶ the law⁵⁷ limits the cooperative refund to the workers employed in the cooperative for at least three months during the last annual accounting or who have at least six months of length of service. Moreover, it is possible to favour employees with longer length of service, though within the limit of double the amount.

Finally, some special laws, notably those on agricultural cooperatives, specify that a cooperative refund cannot be attributed to the non-cooperators.⁵⁸ The provision can be analysed in relation to the proportion established between the distributed amount and the cooperative transactions: as the non-cooperators perform no cooperative transaction with the cooperative, they cannot receive any cooperative refund. Even if the general law does not provide the same specification, it is uncontested that the rule is general: the general law is silent on this point,⁵⁹ since at the time when the provision was drafted, the general law did not recognise non-cooperators, so that the specification was useless. Therefore, only a special provision could allow the distribution of cooperative refund to non-cooperator members, like for example those of workers' cooperatives.⁶⁰ More technically, some regulations allow the distribution of cooperative refund by the attribution of new shares, for example in craft cooperatives.⁶¹ If this provision appears neutral, it may be an argument in the debate on the nature of cooperative refund.

1.2.2.2. Concept/Legal Nature of Cooperative Refunds

Because the distribution of cooperative refund is not compulsory,⁶² it is determined by factors such as, first, the byelaws of the cooperative, and second the decision taken by the appropriate organ, usually the members' meeting. The various special cooperative laws do not give more details, except that such a distribution is subject to the condition of available surplus; that is to say, the allocation to the reserve comes first.

The pre-eminence of cooperative refunds and returns on shared capital is not clear.⁶³ In the case of agricultural cooperatives, for example, it is provided that the members' meeting first decides on the distribution of shared capital

⁵⁶ See above section 1.2.2.

⁵⁷ L. no. 78-763 of the 19th of July 1978, art. 33 al. 4.

⁵⁸ C.rur., art. L.522-4.

⁵⁹ L. no. 47-1775 of the 10th of September 1947, art. 15.

⁶⁰ See section 3.6.

⁶¹ L. no. 83657 of the 20th of July 1983, art. 26.

⁶² See section 1.2.2.1.

⁶³ D. HIEZ, n. 7 above, no. 121.15

return, and then on the distribution of the cooperative refund.⁶⁴ This debate is important, both practically and also theoretically. Indeed, the legal nature of the cooperative refund has never been clearly analysed. It can be considered either as a kind of distribution of surplus, or as a payback and an element in the price of goods or services.

The latter qualification relies on strong arguments. It is proportionate to the cooperative transactions and, to use a French expression, it is a '*trop perçu*', that is to say, it corresponds to the amount of money that the cooperator gave to the cooperative to receive a good or a service in addition to the real cost for the cooperative. If it is said that a goal of the cooperative is to provide its members with goods and services at the lowest cost and with the best quality, then any money that the cooperative accounts for at the end of the yearly accounting is an illegitimate surplus. In other words, the cooperators paid too much and the overpaid price must be reimbursed. Obviously, that reimbursement can only be proportionate to the cooperative's transactions, since the excessive amount of money given by the cooperators to the cooperative occurred for the cooperative's transactions.

In the pure French cooperative doctrine, as it was first defined by Charles Gide,⁶⁵ this means that a cooperative distributes absolutely no profit.⁶⁶ Cooperative refunds are not such a distribution, but even the return on shared capital is only the payment for the service provided by the shareholders with the capital brought. The return may include no dividend, but is only a cost for the cooperative.

This is very important in practice. Indeed, it should imply a wide tax exemption for cooperatives, and should not be considered a revenue for the cooperator, but rather an *a posteriori* reduction of price. This reasoning can be considered as the ground for the exclusion of the cooperative refund from the taxable profit of cooperatives which are not exempt from taxation.⁶⁷ However, some case law has found that in order to decide on the application of another provision, the cooperative refund is not a price element but a kind of profit distribution.⁶⁸ Therefore, in the end, it is difficult to decide the nature of the cooperative refund in French law. Recently, agricultural cooperatives have faced difficulties because of the complexity of fixing the prices of crops, for which the cooperatives were suspected of being opaque; they have been allowed to include determination of the procedures in their byelaws, but with the additional obligation to provide

⁶⁴ C.rur., art. L.524-2-1.

⁶⁵ Ch. GIDE, *Les oeuvres de Charles Gide*, vol IV in *Coopération et économie sociale 1886-1904*, edited by P. Devillers, L'Harmattan, Paris, 2001, p. 312 ff.

⁶⁶ GIDE, n. 65 above.

⁶⁷ Code général des impôts (CGI), art. 214.

⁶⁸ CAA Nantes, 2 févr. 2012, 11NT00684; D. HIEZ, 'Droit coopérative', JCP E, 2013, 1689, no. 9.

individual information for each cooperator.⁶⁹ In the end, qualification of the money thus distributed has not been tackled.

1.3. COOPERATIVE SOCIAL OBJECT AND MEMBERSHIP

In 1947, the principle laid down in the law was clear: all members of the cooperative were cooperators, and all the users of the cooperative were members. This was the exact application of the exclusivism principle, with its strictest interpretation.⁷⁰ In that context, the situation was clear: there was an indivisible link between cooperative object and membership. The definition of a cooperative still states that the cooperative aims at the satisfaction of the social and economic needs of its members, and this definition contains in itself that indivisible link. The coherence of the general law has, since its adoption, been mitigated by some special laws which state otherwise, but that contradiction is now within the general law itself because of some new provisions. Therefore, it is now necessary to specify the scope of the link between the social object and membership. This concerns both the diversity of members and the exclusivism principle.

1.3.1. *The Diversity of Members*

In 1947, the general cooperative law recognised only one category of members: the cooperators. In 1992, with the first major reform of the 1947 Law, the legislator created the category of member investor.⁷¹ Hitherto, only very few special cooperative laws had admitted such possibility. It was notably the case of workers' cooperatives: the possibility was already evident in 1915, in the first law on workers' cooperatives,⁷² with some restrictions intended to ensuring the control of the cooperative by cooperators. The mechanism remained the same with the major reform of 1978.⁷³ That mechanism has become part of the general cooperative law, even if its form is not precisely the same.

In 1992, a new article 3*bis* was inserted in the law of 1947. It explicitly stated the existence of these investor members. The provision did not use that wording but defined the new category of members as natural or legal persons who do not aim at the conduct of cooperative transactions with the cooperative, but who wish to contribute to achievement of the cooperative's objectives through the provision of capital. That innovation has been much debated since it created

⁶⁹ C.rur., art. L.631-24.

⁷⁰ L. no. 47-1775 of the 10th of September 1947, art. 3.

⁷¹ L. no. 47-1775 of the 10th of September 1947, art. 3*bis*.

⁷² L. COUTANT, n. 35 above, p. 59 ff.

⁷³ L. no. 78-763 of the 19th of July 1978, art. 5.

a cleavage among the members of the cooperative.⁷⁴ Some special cooperative laws exclude the application of the new article 3*bis*, such as the Rural Code for agricultural cooperatives.⁷⁵ However, this does not signify the absence of investor members, but rather the application of a special regulation with its own restrictions. I will not deal with these specificities but only refer to the general provision, pointing out that its application is in practice quite rare.⁷⁶ The reason for this is probably not the mistrust of cooperatives themselves but the lack of interest among investors, as well as the creation by cooperatives of subsidiaries taking the form of companies.

Article 3*bis* regulates the rights and obligations of the investor members, and determines their relationships with other members. Its main goal is to limit the power of investors in order to protect the control by cooperators. Explicitly, article 3*bis* provides no limitation to the capital that a non-cooperator may subscribe. However, investors may not have more than 33% of the voting rights in the members' meeting, and 49% if the investors are themselves cooperatives. There is no general provision concerning a restriction of investor members on the board; only special indirect provisions deal with this question, for example in workers' cooperatives, in which non-cooperators may not have more than one-third of the seats.⁷⁷

The debate on investor members has hidden the more general question of the diversity of members. Indeed, investor members are not the only category of possible non-cooperators. Many special laws provide for such members, defining them as persons interested in the activity of the cooperative,⁷⁸ for example employees in all cooperatives except workers' cooperatives, and retired cooperators.

The only exception concerns a specific cooperative: the collective interest cooperative.⁷⁹ In the wording of the regulation adopted in 2001, this cooperative may contain five categories of members: users, employees, volunteers, public bodies, and investors.⁸⁰ A collective interest cooperative must comprise at least three of these categories, among which must be users and employees. That provision was redrafted in 2014.⁸¹ The multi-stakeholder perspective of the collective interest cooperative has not been removed, but its precise composition has become more flexible. The members are persons who contribute to the

⁷⁴ B. PIOT, 'Une réforme en profondeur de la loi du 10 septembre 1947', RECMA, Paris, 1993, nos. 44–45, p. 36.

⁷⁵ C.rur., art. L.522-3.

⁷⁶ D. HIEZ, 'Les instruments de fonds propres des coopérative – vingt ans d'innovation législative', RECMA, Paris, 2005, no. 295, p. 20.

⁷⁷ L. no. 78-763 of the 19th of July 1978, art. 15.

⁷⁸ C.rur., art. L.522-3.

⁷⁹ See section 1.2.1.2.

⁸⁰ L. no. 47-1775 of the 10th of September 1947, art. 19*septies*.

⁸¹ L. no. 2014-856 of the 31st of July 2014, art. 33.

activity of the cooperative, and the five categories are now only examples, which means that other categories may be considered. However, the five categories do not remain the same: producers (i.e. undertakers producing outside the cooperative), employees, users, volunteers and public bodies. Therefore, investors have disappeared as such, probably because, in practice, the investors are public bodies. Instead of three minimum categories, a cooperative now contains at least two categories: users, and employees or, if there are no employees in the cooperative, producers.

Although these details are important for the specific identity of the collective interest cooperative, they are less significant for the general cooperative objective. The point in this regard is the focus on the diversity of non-cooperators. Many special laws refer to such members, but these provisions have remained in the shadows. The 2014 law on social and solidarity economy redrafted article 3*bis* of the 1947 Law, and extended the category of non-cooperators. Its definition remains the same: persons who do not aim at the conduct of cooperative transactions with the cooperative but who wish to contribute to achievement of the cooperative's objectives. Nevertheless, two modifications have been introduced. First, employees are explicitly mentioned as possible non-cooperators, even if that was already possible with the previous wording. Second, and more importantly, whereas the contribution to achievement of the cooperative's objective was only foreseen by the subscription of capital, that subscription is now only one example of contribution. This means that article 3*bis* no longer deals with investor members but, more generally, with non-cooperators. All the consequences of that innovation have not yet been drawn.

1.3.2. *The Exclusivism Principle*

The exclusivism principle means, first, that the cooperative conducts cooperative transactions with its members. This implies two things: on the one hand, cooperators are the core members and their status flows from the addition of their membership and the contract that they conclude with the cooperative to regulate their transactions, and on the other hand, the cooperative should have no cooperative transaction with non-members.

In regard to the status of the cooperator in the cooperative as such, the general cooperative law is entirely silent. This is partly due the fact that the activities are related to the different categories of cooperatives. Otherwise, some explanation can be found in the social object contained in each special law. Nevertheless, this means that there is no general theory on the nature of the legal relationship between the cooperative and each cooperator.

It is uncontroversial that French law complies with this double relationship, or the double quality principle.⁸² On the one hand, each member is an associate

⁸² See section 1.2.1.1.

in the cooperative; on the other, s/he is an economic partner. If these two relationships are connected, the technical consequences have not been seriously investigated.⁸³

The relationship between the cooperative and its members is firstly defined by the contract, which contains the reciprocal obligations of the two parties. Of course, this applies to the contract itself, but also its regulation by the law, depending on the qualification of the contract. For example, workers' cooperatives conclude employment contracts with their cooperators, cooperative banks make loans, agricultural cooperatives conclude sales, etc. In this respect, labour law or consumer law applies as soon as the legal conditions are fulfilled. The integration of this contract into the cooperative context is not considered to require the application of a different legal regime. In other words, even in a cooperative, the employee or the consumer is a weak party which requires special protection. Sometimes, the cooperative legislation conflicts with other regulations, and difficulties arise in deciding which must prevail; and some solutions stated by case law may be discussed. This concerns, for example, the notion of the annual percentage rate of charge on consumer loans concluded between a cooperative bank and one member. The courts state that the acquisition of shares in the cooperative bank, required to obtain the loan, is included in the calculation of this annual percentage rate.⁸⁴ Authors criticise this solution, since it does not take at least two specificities into account: first, the acquisition of shares implies membership and all its rights; secondly, the share may be reimbursed in the case of dismissal. This point is interesting since it shows the limits of the distinct application of the regime of the contract to transactions. It fails to take serious consideration of the cooperative context in which the contract takes place. If the cooperators may appear to be a weak party, it must not be forgotten that they specifically chose to be members of a cooperative to compensate for their weakness by collective action.

In fact, the nature of the contract cannot be reduced to that ordinary qualification, and all the rules of contract law do not apply. For example, in workers' cooperatives, if the obligation to apply for membership has been stated in the byelaws of the cooperative and in the employment contract with a non-cooperator employee, the non-application for membership by a non-cooperative employee implies his/her automatic dismissal,⁸⁵ as opposed to labour law.

⁸³ D. HIEZ, n. 7 above, nos. 31.28 f.

⁸⁴ Cass. com., 7 févr. 2012, no. 11-10.833: JurisData no. 2012-001699; Contrats, Contrat Concurrence Consommation, Paris (conc. consom.), 2012, comm. 138, obs. G. Raymond; JCP E 2012, 489, note J. Lasserre Capdeville; Cass. 1re civ., 24 avr. 2013, no. 12-14.377: JurisData no. 2013-007986; JCP E 2013, 1408, note J. Lasserre Capdeville; Contrats, conc. consom. 2013, comm. 171, obs. G. Raymond; JCP E, 2013, 1689, no. 18, obs. D. Hiez; JCP E, Paris, 2015, 1607, no. 5.

⁸⁵ L. no. 78-763 of the 19th of July 1978, art. 9.

The legislation on agricultural cooperatives also provides very interesting examples, and shows the weakening of cooperative identity. A question has arisen regarding the transfer of ownership of the crop brought by the cooperators to the cooperative in order for them to be sold by the cooperative. Until the 1970s and 1980s, it was clear that a cooperative was the representative of its members and that, therefore, the ownership of the crop was never transferred to the cooperative.⁸⁶ Until the 2000s, the courts favoured the opposite solution,⁸⁷ even if it was never decided that there was a sale contract.⁸⁸ The statutes of agricultural cooperatives enforced by a decree of the Ministry of Agriculture state explicitly that ownership is transferred to the cooperative.⁸⁹ This solution is important both technically and theoretically: it means that the cooperative is now recognised as an intermediary, which is contrary to its definition in the 1947 Law. It must be specified that, recently, this provision has been considered void because it cannot rely on any legislative provision.⁹⁰

A more general example concerns the exclusion of the cooperative: whereas this is a social decision, i.e. connected with membership of the cooperative, it may rely on the non-execution of the contract between a member and the cooperative.

The question of the obligation to transact with the cooperative is not treated by general law either. It arises differently in different kinds of cooperatives. In workers' cooperatives, for example, to be a cooperator a member must be an employee and, therefore, must supply his/her labour; if s/he is not an employee, s/he can only be investor. In cooperatives of enterprises, such as craft, merchants' or agricultural cooperatives, the obligation to bring or provide oneself with certain goods is the substance of the contract between the cooperative and each member. The obligation therefore exists necessarily, even though the sanction of non-execution may vary.

The equal treatment of members is not stated anywhere, even if it seems to be natural. Nevertheless, it is a question that I have considered and that I would need to check with a rapid empirical enquiry to be absolutely sure. Very few cases refer to that obligation of non-discrimination.⁹¹

⁸⁶ G. GOURLAY, *Cooperatives agricoles*, Litec, Paris, 1983, nos. 73 and 73bis.

⁸⁷ Cass 1re civ., 13 févr. 2001, no. 98-20317 and 98-20319, Bull. civ. I no. 36 p. 22; revue Dalloz affaires Paris (D. aff.), 2002 388, note M. Michalaukas; Rev. sociétés 2001 834, note B. Saintourens; bulletin Joly Sociétés, Paris (Bull. Joly), 2001, §161, note G. Gourlay.

⁸⁸ Cass. com., 11 juil. 2006, no. 05-13103, Bull. civ. IV no. 181 p. 199; revue de droit rural, Paris (RD rur.), 2006, comm. 332, note J.-J. Barbiéri ; gazette du palais, Paris (Gaz. Pal.), 6 janv. 2007, no. 6, p. 26, note P. Goni; D. Hiez, 'Chronique de droit coopératif', JCP E, 2007, 1907, no. 28 obs. L. Gros.

⁸⁹ Art. 3 1. of the ratified statutes, enforced by the *arrêté* of the 23rd of April 2008. The transfer of property has become an option for the cooperatives: *arrêté* of the 31st of March 2016.

⁹⁰ CE, 11 juin 2014, 3ème et 8ème SSR, no. 365623, inédit; JCP E, 2015 1623, no. 7, obs. D. Hiez.

⁹¹ Cass. civ. 1re, 10 avr. 2013, no. 12-11725, inédit; JCP E, 2015, 1623, no. 16, obs. D. Hiez.

The second aspect of exclusivism is the prohibition of cooperative transactions with non-members. The general principle was rigorously stated in article 3 of the 1947 Law, after having been strongly debated at the end of the nineteenth century concerning consumer cooperatives because of tax consequences. Today, the principle is less rigid, and it remains only a distinction between open and closed cooperatives which relates to the clients of the cooperative. Of course, open cooperatives totally respect the open door principle.

Three categories of cooperatives are entirely open: consumer cooperatives,⁹² cooperative banks,⁹³ and workers' cooperatives.⁹⁴ Properly speaking, the conditions required for the creation of a workers' cooperative are, in this respect, quite light: two cooperators if it takes the form of a limited liability company or of a simplified stock company, seven if a public limited company. Fortunately, the proportion of cooperators is far higher in practice and in collective interest cooperatives.⁹⁵ Note that the solution is similar for the collective interest cooperatives in housing:⁹⁶ All other cooperatives are totally or partially closed. The only totally closed cooperatives were, in practice, the merchants' cooperatives,⁹⁷ and cooperatives referring only to the 1947 Law. Others are mainly dedicated to their members but a part of their activities may be realised with non-members, usually 20%. A simplification was introduced by the 1947 Law, since its article 3 now stated that proportion as the general rule, and it was extended to the merchants' cooperatives.⁹⁸

The sanction of this restriction is not limited to tax law, even if the non-application of the tax advantage is very efficient:⁹⁹ for example, in agricultural cooperatives, if a cooperative has more than 20% activities with non-members, it allows the high council of an agricultural cooperative to disqualify its assent to the cooperative.¹⁰⁰

Apart from any sanction, the first consequence of cooperative transactions with non-members should be the adoption of specific rules concerning them. The general law is rather poor. Its only statement deals with the prohibition on including in cooperative refunds the surpluses arising from these activities with non-members.¹⁰¹ Some special laws are more detailed. For example, in craft cooperatives¹⁰² and in agricultural cooperatives,¹⁰³ the cooperative must have

⁹² Law of the 7th of May 1917, art. 2.

⁹³ Only since the 1980s, with the possibility to realise any bank transaction.

⁹⁴ L. no. 78-763 of the 19th of July 1978, art. 5.

⁹⁵ L. no. 47-1775 of the 10th of July 1947, art. 19*sexies*.

⁹⁶ Code de la construction et de l'habitation (C.const.hab.), art. L.422-3-2.

⁹⁷ C.com., art. L.124-2.

⁹⁸ C.com., art. L.124-2.

⁹⁹ CGI, art. 207 for example.

¹⁰⁰ C.rur., art. L.523-1.

¹⁰¹ L. no. 47-1775 of the 10th of September 1947, art. 15.

¹⁰² L. no. 83-657 of the 20th of July 1983, art. 10.

¹⁰³ C.rur., art. L.525-2.

a special account for the cooperative transactions with non-members. Even if the general law does not provide the same solution, it is required by the special treatment to which these transactions are subject. The new decree has adopted that solution, which now applies to any cooperative.¹⁰⁴ But the above-mentioned special laws go further, and allocate the surpluses from these transactions to a special reserve subject to special rules.¹⁰⁵ These solutions cannot be generalised.

A weakness of French cooperative legislation is the absence of any provision on the definition of cooperative transactions with non-members. Strictly speaking, French law never uses the expression 'cooperative transactions'; it refers only to transactions. Certainly, when the law deals with transactions with non-members, it does not consider any transaction, for example the purchase of a computer by an agricultural cooperative, but there is no proper conceptualisation.

1.4. INDIRECT MUTUALITY (IN COOPERATIVE GROUPS)

The question of the cooperative group is crucial for cooperatives, and is directly connected with its social object. The details will be examined in section 5, but it is useful to explain what is at stake right now. The regulation of cooperative groups has been expected of cooperative organisations for more than a decade, but there has been no agreement on what it is or should be. In practice, the most significant development has adopted the form of subsidiaries, and more precisely capitalist subsidiaries.

This is especially true in the three most powerful categories: agricultural, banking and merchants' cooperatives. In agricultural cooperatives, for example, even if there are no reliable data, it may be half of the activity of the cooperative groups which are achieved in the subsidiaries. Consequently, cooperatives have lobbied for the integration of these activities in their area. In the meantime, they are keen on the flexibility that they find in the capitalist rules and therefore reluctant to develop authentic cooperative groups. The legislature has recently created a cooperative group specifically for workers' cooperatives but it is too early to say if it will be used; and even if it is, the impact will be rather slight, considering the economic importance of these cooperatives.

This evolution began in the 1980s and was, at that time, rather controversial, at least among authors. The strongest arguments against the creation of cooperatives were connected to the cooperative's identity through the question of its social object. Some authors simply denied the validity of such creation and, technically, the defence organised by the cooperative organisations was rather weak.

¹⁰⁴ Decree no. 2015-594 of the 1st of June 2015, art. 2.

¹⁰⁵ L. no. 83-657 of the 20th of July 1983, art. 25; C.rur., art. L.522-5 al. 3.

Nevertheless, the economic impact of the evolution was too important to allow a rational debate. No specific legislation was adopted, and no special provision included in the major reform of 1992, but special provisions were foreseen to secure the mechanism when its legality could not already rely on explicit or implicit authorisations. For example, law 2001-420 of the 15th of May 2001 added three words to the article L.124-1 of the code of commerce for merchants' cooperatives: the activities that a merchants' cooperative may undertake are undertaken by it 'directly or indirectly', that is, through subsidiaries. Agricultural cooperatives legislation has gone further about subsidiaries, and the cooperative is allowed to distribute to its members dividends deriving from the subsidiary.¹⁰⁶ This can be analysed as an increasingly financial perspective of cooperation; it is presented by the agricultural cooperative organisations as an attempt to create a new link between a cooperative's members and its subsidiaries. Anyway, the emergence and the development of subsidiaries has clearly affected the cooperative identity, and the evolution is likely to continue.

2. COOPERATIVE GOVERNANCE

2.1. THE FRAMEWORK OF COOPERATIVE GOVERNANCE

To open this section, the importance of governance must be underlined, and especially the 'one person/one vote' principle. Of course, governance cannot be summarised in that principle, even as the core of its democratic feature. However, it is today a crucial question for cooperatives, for three main reasons. First, it is an easy criterion with which to distinguish cooperatives from companies and something that laypersons can easily understand. Secondly, it is a point of debate with social enterprises, which emphasise more the social purpose of the enterprise and do not pay specific attention to the collective dimension. These two observations explain the emphasis placed by cooperatives on governance to highlight their identity. The third reason for the importance of governance is that it is a relevant example of the possible gap between the rule and its application and its effectiveness. Indeed, many cooperatives, especially the biggest ones, encounter difficulties in applying this democratic principle. Therefore, most of the criticisms addressed to cooperatives focus on governments. In the meantime, aware of the risk of blurring their own identity, cooperative organisations make important efforts to improve their democratic functioning. This section thus has a potentially controversial dimension in the French debate.

To provide a picture of French cooperative governance, I will first describe its framework. Then, I will go into the details of its organisation, starting with

¹⁰⁶ C.rur., art. L.523-5-1.

its core, the members, continuing with its organs, and finishing with brief discussion of dispute resolution between cooperatives and members.

2.1.1. Cooperative Governance and Cooperative Identity

I have already stressed the link between these two issues; and French law,¹⁰⁷ since the last reform in 2014, highlights it by dealing with these two aspects in the same article 1 of the 1947 Law. Even if there are derogations to the one person/one vote principle, no one claims that there is an attack on the democratic principle itself. The example of the collective interest cooperative is meaningful. Whereas its definition does not fit well with the definition of the cooperative, the same democratic principle applies. Even if the one person/one vote principle may be adjusted, it remains present, and compulsory. It is true that one may wonder whether the democratic principle is part of the cooperative identity, even though not its core. Indeed, the democratic principle is probably the most common rule among all cooperatives. But the democratic principle is far wider than governance, being connected with both financial questions and control and cooperative auditing. Therefore, while democratic governance cannot sum up the cooperative identity, it appears more to be a means to achieve the cooperative objective. However, it still makes an important link with collective interest cooperatives (called 'general interest cooperatives' in the PECOL) and others. Problematically, this questions the link stated between democratic governance and the objective of members' satisfaction, since in collective interest cooperatives, democratic governance is dynamic in the absence of the same objective.

However, French cooperative thought has been elaborated on the basis of that link, perfectly translated into the new article 1 of the 1947 Law.

The definition of the cooperative's object states that the cooperative aims at satisfying the members' needs 'by joint effort of said members'. This feature is very important for governance. Firstly, it refers to the collective dimension of cooperatives, since their internal organisation depends on the collectivity of the members. But, more importantly, needs must be satisfied by the beneficiaries. This means that the cooperative's activities will be carried out by the members, and that cooperatives are managed by the cooperators. This is precisely what is called the 'double quality' principle.¹⁰⁸

This point is important because it is visible in practical debates, and it requires reference to the nature of cooperatives. One author calls it '*genus cooperatis*'.¹⁰⁹

¹⁰⁷ See above section 1.2.1.1.

¹⁰⁸ See above section 1.2.1.1.

¹⁰⁹ F. ESPAGNE, 'Restructuration des coopératives, filialisations, fusions, prises de participation', lettre du 8 août 2001; S. DE VENDEUIL, 'Les entreprises coopératives se modernisent', JCP E 1993, act. 100213.

A good example of such debates concerns the validity of subsidiaries: amid the silence of the law, the latter are considered legal or illegal depending on the opinion of authors concerning the importance of the concept of joint effort of members.¹¹⁰ Indeed, the common efforts of the members imply their involvement, which is absent in the case of subsidiaries. In other words, the major problem with subsidiaries is the absence of democratic governance and of members' control.

2.1.2. *Cooperative Governance and Company Law*

The connections between cooperative law and company law have been highlighted.¹¹¹ However, *prima facie*, there is a clear opposition between cooperatives and companies concerning governance, as illustrated by the one person/one vote principle. Therefore, one might conclude that, about governance, company law has a very marginal application. That would be wrong.

Indeed, the 1947 Law addresses only a few issues relating to governance. It deals with the democratic principle, devotes a few words to the membership and the members' meeting, and no more – and all this in about ten articles, compared to the hundreds in company law. The explanation can be found in the purpose of the legislature in 1947: the aim of this Act was not to establish a full framework for cooperatives, but rather to define the cooperative's specificities as derogations to company law. Many points were considered as neutral and, therefore, possibly extended from companies to cooperatives. It is interesting to note that the last reform of 2014, which has insisted on the specificity of cooperative governance, has automatically reinforced, albeit slightly, the distinction with respect to company law.¹¹²

Consequently, two sets of issues must be distinguished. Some of them, considered to be connected with the cooperative identity, are ruled by the cooperative law, but most governance issues are seen as the simple regulation of any organisation and consequently neglected by cooperative law. They are therefore only considered by company law. Aside from the 1947 Law, special cooperative laws provide some additional provisions, but most of them are derogations or adjustments to the rules stated in the 1947 Law, and do not give any precision to the topics left to company law.

It must therefore be underlined that important freedom is given to the byelaw drafters. This is not true in company law, notably for public limited companies, for which the legislation is considered to be particularly rigid. By contrast, cooperative law gives important freedom to the byelaws in both

¹¹⁰ See section 5.5.

¹¹¹ See section 1.1.2.

¹¹² D. HIEZ, 'La nouvelle orientation du droit cooperative avec la loi économie sociale et solidaire', *Journal des sociétés*, 2015, no. 128, pp. 28 ff.

the 1947 Law and the provisions dealing with variable capital companies in the Code of Commerce.¹¹³ However, the will of the founders is, first of all, expressed in the choice of the kinds of company that cooperatives will adopt: mainly limited liability companies, public limited companies, and simplified stock.¹¹⁴ Indeed, general company law contains few provisions on governance because this question depends on the kind of company concerned.

The plurality of applicable laws in cooperative governance causes major difficulties when trying to devise provisions of cooperative law and company law. In principle, cooperative law prevails over company law, since the former is the special law which derogates from the latter. But it is not always easy to determine what the exception is and what the rule is. The remuneration of board members before the 2014 Law is a good example.¹¹⁵ The 1947 Law contained no provision on this matter, and neither did articles L.231-1 ff. on variable capital companies. Some special cooperative laws contained provisions inspired by the idea of limiting, if not prohibiting, remuneration of the board members. In this case, if there was no provision in the byelaws, two contradictory interpretations were possible: either the special laws containing provisions about remuneration were the expression of an implicit cooperative principle, derogating to the free determination of remuneration in company law, or the special cooperative provisions limiting this remuneration were derogations to a general principle applicable to both companies and cooperatives.

Another question likely to arise is whether there exist rules regarding governance in the byelaws. Theoretically, byelaws can regulate this point to some extent, since cooperative law gives more autonomy to the byelaws than company law does. Nevertheless, choosing a kind of company is an expression of that autonomy. Therefore, it can be analysed as filling the gap in cooperative law by reference to the regulation of the kind of company chosen. Specificities appear for agricultural cooperatives, first of all because they are more distinct from company law, but also because their byelaws are ratified by the Ministry of Agriculture and are therefore compulsory for all agricultural cooperatives. These ratified byelaws have consequently become a significant piece of agricultural cooperative law.

2.2. MEMBERSHIP

Because cooperatives are oriented to their members, their services and also their mechanisms of control, the members are logically the core of the cooperative.

¹¹³ C.com., arts. L.231-1 ff.

¹¹⁴ I will only refer to these kinds of companies, others being less frequent among cooperatives.

¹¹⁵ The 2014 law introduced a provision on it in article 6 of the 1947 Law: see section 2.4.1.

Therefore, most attention is paid to membership in order to determine who the members are, but also because the manner in which membership is acquired and terminated is highly indicative of the identity of a cooperative. In spite of the importance of membership regulation in cooperative law, the 1947 Law contains only few provisions, referring to the statutes.¹¹⁶ Therefore, rules must be sought mainly in special cooperative laws, company law, and the provisions on variable companies. This regulation will be described by distinguishing the acquisition and termination of membership.

2.2.1. *The Acquisition of Membership*

The way membership is acquired depends strongly on the variability of capital. I have explained that the general cooperative law does not impose capital variability on cooperatives,¹¹⁷ even if most special cooperative laws do so, and all the statutes. Therefore I will only deal with variable capital cooperatives.

The cooperative principle stated by ICA is open membership, but its application is very flexible and must be reconciled with control by the cooperative of new applications for membership. The general law of 1947 does not provide any solution, but refers explicitly to the statutes (art. 7).¹¹⁸ The regulation of variable capital companies is not particularly more precise. It exempts these companies from any publication of the new members,¹¹⁹ whereas it would require a modification of the statutes in any other company. But, again, there is nothing about the possible conditions laid down to acquire membership. Special cooperative laws go further. Some of them define the possible members,¹²⁰ so that applicants who do not comply with the definition cannot be admitted. Even when no such definition is stated, an organ is usually designated to enrol the applicants. This is the case, for example, of workers' cooperatives.¹²¹ The competent organ is the members' meeting, which decides by majority; any application from a worker employed in the cooperative for at least one year must be examined and, if rejected, can be renewed each year. No specification is given concerning the reasons why an application may be rejected, and no appeal is envisaged. The appeal is replaced by the possibility to renew the application. In regard to examination of the application, the common opinion is that the members' meeting has discretionary power, only limited by the prohibition of

¹¹⁶ L. no 47-1775 of the 10th of September 1947, art. 7.

¹¹⁷ See above section 1.2.1.

¹¹⁸ Before the 1992 reform, article 3 of the 1947 Law provided for admission by the members' meeting, deciding the conditions required to modify the statutes. That precision has been removed, since all special laws derogated the provision, and, therefore, it was never applied.

¹¹⁹ C.com., art. L.231-3.

¹²⁰ L. no. 83-657 of the 20th July 1983, art. 6, for example for craft cooperatives.

¹²¹ L. no. 78-856 of the 19th of July 1978, art. 7.

discrimination, or abuse of right.¹²² Many special laws provide similar solutions, even when some conditions are laid down for membership.¹²³ When the special cooperative law is silent, no provision can be found in company law, since the regulations on the diverse kinds of possible company deal with the variability of members. Therefore, the only provision is article 7 of the 1947 Law, so that the solution must be found in the statutes. In the case of its silence, and only if the special law gives no other indication, the application is automatically admitted. The discussion has arisen in doctrine because of the debate on whether cooperatives are partnerships or capital companies.¹²⁴ The survival of the cooperative, despite the death or bankruptcy of a member, is favourable to the qualification of a capital company, whereas the control of applications highlights the *intuitu personae* and therefore makes the cooperative closer to a partnership. To sum up this point, cooperatives are expected to be open to new applications, but the law attributes them the power to decide whether the applicant fits with the *affection cooperatis*, and this decision is discretionary. Some special laws provide details on the procedure, but the statutes usually have wide latitude in defining it.

Before the 2014 reform, the 1947 Law had established equilibrium between the attacks on exclusivism and the free control of new applications (art. 3). This article stated the exclusivism principle, but recognised the possibility to derogate. However, in this case, it stated also that non-members who had cooperative transactions with the cooperative were to be admitted when applying for membership. While removing the absolute exclusivism principle, the new article 3 also eliminated the mechanism of easy acquisition of membership. Regardless, the old provision did not have significant effects. Special laws did not contradict it, nor do they now; but they do not give any additional provision which should clarify the modes of its application. Furthermore, article 3 itself stated that such admissions must comply with the conditions laid down by the statutes. This did not allow the statutes to contradict article 3 by attributing the cooperative a discretionary power to admit or refuse the applicants, but only to determine the additional elements not provided for by the laws. Only workers' cooperatives law deal with this question.¹²⁵ If the applicant has been employed by the cooperative for at least one year (that is to say, s/he is a non-member employee) the application must be examined by the members' meeting.¹²⁶ There is therefore an incentive for applications by non-member users but no obligation

¹²² D. HIEZ, n. 7 above, nos. 42.16 and 43.22.

¹²³ L. no. 83-653 of the 20th of July 1983, art. 9, for example, for craft cooperatives; C.rur., art. R.522-2, for agricultural cooperatives.

¹²⁴ L. COUTANT, n. 35 above, p. 31 ff.

¹²⁵ L. no.78-763 of the 19th of July 1978, art. 7.

¹²⁶ If the condition is not fulfilled, the application may be examined and rejected by the board of directors.

for the cooperative to accept them. Admission to workers' cooperatives must also be voted by the majority, which means that a positive decision must be adopted. But, apart from that special rule, the non-members who perform cooperative transactions with the cooperative are treated like any applicant.

Two special laws organise a transitional membership for new members, named '*période probatoire*' in craft cooperatives.¹²⁷ During the period of one year, the cooperator has the same rights and obligations as others, but s/he or the cooperative may terminate membership in the end by derogation to statutory provisions that can impose a longer term for membership. That possibility aims at better knowledge of the obligations of membership before its definitive validation. It is difficult to reach a conclusion as to the usefulness of the provision: it does not seem to be often used in craft cooperatives; and in agricultural cooperatives, where it is perhaps more meaningful because of the usual long-term engagement clause, that possibility was introduced only in 2014. In any case, the purpose of the provision must be assessed by reference to the termination of membership.

2.2.2. *Termination of Membership*

Just as it is possible to become member of a cooperative, it is also possible to terminate membership. There are two circumstances in which membership may be terminated: withdrawal and expulsion.

Withdrawal is a right for members and is one of the main features of cooperatives. It is provided for by the variable capital company law,¹²⁸ without any possible statutory derogation. Only financial restrictions can limit it in relation to the regulations on the decrease in capital.¹²⁹ Nevertheless, some adjustments are allowed through definition of a minimum period of membership. This is particularly the case of agricultural cooperatives. Neither the law nor the ratified statutes specify the length of the period, and it is often the cause of litigation. The cooperative tends to impose a long-term engagement, while some members withdraw before the term provided.

In order to face the future, a cooperative makes forecasts concerning the amount of transactions that it will conduct, and imposes a fixed-term contract on its members. This contract is the cooperation contract, which both implies the obligation to perform transactions and confers the status of member. Consequently, the member is not allowed to withdraw before termination of the contract.

Several questions arise for which answers can be found mainly by referring to agricultural cooperatives. The first question concerns the maximum contract

¹²⁷ L. no. 83-653 of the 20th of July 1983, art. 9 and agricultural cooperatives C.rur., art. L.521-3.

¹²⁸ C.com., art. L.231-6.

¹²⁹ C.com., art. L.231-5.

duration, in order to ensure that the right to withdraw is not indirectly contested. At first, the courts limited the term to fifty years, but it was decided in the 1970s that the contract should not last longer than the duration of professional life (approximately twenty-five to thirty years).¹³⁰ Some judges and authors claimed a shorter term, usually ten years,¹³¹ but to date the *Cour de Cassation* has declined that claim.

The second question concerns the circumstances in which a member is allowed to withdraw before termination of the contract. The law only specifies two situations: *force majeure* and justified reason.¹³² The law empowers the board to decide if the condition is fulfilled, with a possible appeal before the members' meeting, but a claimant may go before the court to ask for a judicial control.

A similar difficulty occurs when an agricultural cooperative member decides to sell his/her farm before termination of the cooperation contract and the buyer does not apply for membership. On the one hand, ownership of the farm allows the owner to sell; on the other, it can be an easy way for him/her to terminate the contract and evade his/her obligations. Therefore, the law makes the member responsible for the refusal of the buyer to become a member by substitution.¹³³

A final provision can be mentioned in regard to workers' cooperatives: the statutes may state, if it is also mentioned in the employment contract, that the non-member employee must apply for membership. In this case, the statutes may decide that the absence of application is considered to be automatic resignation by the employee.¹³⁴ This solution is a strong derogation to labour law. In practice, it is not used by workers' cooperatives.

The second instance of termination of the cooperation contract is expulsion by the cooperative. This mechanism, which is exceptional among companies, is also envisaged by the variable capital company regulation.¹³⁵ The article subjects the possibility to an explicit statutory provision. The 1947 Law only adds the requirement that the statutes must specify its conditions.¹³⁶ The statutes may designate the organ competent to decide on the expulsion when special laws do not specify it. Many special laws do so, but it is difficult to identify a general solution because of the diversity of the special laws on this issue. Nevertheless, the tendency is to substitute the competence of the members' meeting¹³⁷

¹³⁰ D. HIEZ, n. 7, nos 91.30 f.

¹³¹ M. HÉRAIL, n. 39 above, nos. 39 and 556.

¹³² C.rur., art. R.522-4.

¹³³ C.rur., art. R.522-5.

¹³⁴ L. no. 78-673 of the 19th of July 1978, art. 9.

¹³⁵ C.com., art. L.231-6.

¹³⁶ L. no. 47-1775 of the 10th of September 1947, art. 7.

¹³⁷ This principle is stated by article L.231-6 of the Code of Commerce itself. It is still recognised in the old cooperative laws: for example, the law of the 7th of May 1917, art. 1, for consumer cooperatives.

in order to attribute it to the board.¹³⁸ The main question remains determination of the circumstances in which a cooperative may expel one of its members. At the beginning of the twentieth century, case law ruled that the members' meeting had discretionary power, meaning that judges could not review the motives justifying the decision of expulsion. That analysis has been cast aside and several special laws specify the requisite conditions. Article R.522-8 of the Rural Code requires, for instance in agricultural cooperatives, 'serious reasons', particularly if the cooperator member has been sentenced to criminal penalties, if s/he has seriously damaged or attempted to damage the cooperative by unjustified acts, or falsified the crop delivered to the cooperative. If the idea of fault provides an acceptable description of the general solutions, it must be interpreted broadly. First, the fault may be committed in performance of the cooperative's transactions, as well as in fulfilling obligations connected to membership. Secondly, the fault may have no direct link with the cooperative; it is sufficient for it to have caused damage to the cooperative.¹³⁹

Finally, procedural conditions have been laid down. They require that the member to be expelled must be summoned to be heard by the organ competent to decide on the expulsion. A recent case nevertheless raises doubts concerning the sanction in the case of absence of summons, since the Cour de Cassation has decided that it cannot make the expulsion void.¹⁴⁰ Of course, damages remain, but if the expulsion is not void, they can only compensate the absence of hearing, which means that they will be far lower.

A link can be established between the evolution of substantial and procedural conditions. Previously, expulsion was considered to be a discretionary power of the group, for which reason it was decided by the members' meeting. But, that analysis has been gradually abandoned: expulsion has become an administrative sanction applied by the board. Consequently, the procedure of the decision has been regulated, and its motivation may be scrutinised.

Finally, the importance of membership is visible in the minimum number of members required to create a cooperative. The number may vary, but the common rule is the prohibition of single-member cooperatives. Farmers' cooperatives require seven members in principle, but four are enough if it is an equipment-sharing or livestock-raising cooperative, and two for a union of agricultural cooperatives.¹⁴¹ The general cooperative law does not deal with this

¹³⁸ For example, in agricultural cooperatives, or in merchants' cooperatives (C.com., art. L.124-10).

¹³⁹ For example, falsification concerning a crop delivered to another company has been considered a fault justifying expulsion from the cooperative, because it reveals the dishonesty of the farmer and could create confusion about loyalty of the cooperative: Cass. civ. 1re, 3 mars 2011, no. 10-11.529, NP; Rev. sociétés 2011. 635, note M. Menjucq.

¹⁴⁰ Cass. com., 4 déc. 2012, no. 11-27667, inédit; JCP E, 2013, 1031, note B. Dondereau; Dr. Sociétés, Paris, 2013, com. 45, obs. H. Hovasse; JCP E 2013 1703, obs. D. Hiez.

¹⁴¹ C.rur., art. R.522-1.

question, so that an answer can only be found in company law. There, the solution depends on the type of company that the founders have chosen. The distinction is between the limited liability company and the public limited company: the former requires only two members, whereas the latter cannot be created with fewer than seven members,¹⁴² but the threshold of seven was reduced to two in 2015 for public limited companies other than those whose securities are admitted to trading on a regulated market.¹⁴³ One difference remains, since the maximum number of members is one hundred in limited liability companies.¹⁴⁴ If the number of members is higher, the company has one year to reduce that number, or to convert to another type of company; otherwise the company is declared void. This limitation makes the limited liability company inappropriate for cooperatives likely to have many members, such as consumer cooperatives. Because they are often quite poor, at least at the beginning, they do not choose the public limited liability company, which is heavy and expensive, and prefer the form of civil company.¹⁴⁵

2.3. MEMBERS' RIGHTS AND OBLIGATIONS

2.3.1. *Rights and Obligations*

Every member has rights and obligations in the cooperative. These rights and obligations concern both the cooperative's transactions and its functioning. The two aspects are connected, and it is not always possible to distinguish them. Moreover, they are interdependent. It could appear that the cooperative's transactions impose more obligations on cooperators, contrary to the functioning of the cooperative. This would mainly create rights. However, what may look like rights are also duties, since participation in the cooperative's governance is also an obligation. Moreover, if the first obligation of cooperators is to participate in cooperative transactions, this also creates rights for them. An example is provided by a recent case.¹⁴⁶ A farmer decided to engage in organic agriculture and then to join an equipment-sharing agricultural cooperative ('Coopérative d'utilisation de matériel agricole'). Thereafter, the European Regulation became more exigent, so that the cooperative's equipment no longer complied with the requirements. Therefore, the cooperator withdrew before the end of its contract, and the cooperative sued him. Considering that the cooperative had an obligation to satisfy its members' needs, and that the new European Regulation

¹⁴² C.com., art. L.525-1.

¹⁴³ Ibid., until the 12th of September 2015.

¹⁴⁴ C.com., art. L.223-3.

¹⁴⁵ C.civ., arts. 1845 ff.

¹⁴⁶ Rennes, ch. 1, 10 juin 2014, no. 13/02341; Jurisdata 2014-022085; JCP E, 2015 1607, no. 13.

was not a '*force majeure*', the court decided that the cooperator was entitled to withdraw because the cooperative had not fulfilled its own obligations. Of course, the obligations of the members are more visible because they are more often not executed, but they also have rights.

2.3.2. *Members' Voting Rights*

The one person/one vote principle is very well known and enforced in French law; it was reinforced in 2014, since it is now, symbolically, mentioned in article 1 of the 1947 Law. It is developed in articles 4 and 9 of the 1947 Law, and some special regulations reiterate the principle.¹⁴⁷ It does not require much explanation. It must nevertheless be emphasised that French cooperative law stipulates equality among cooperators (art. 4) and does not allow any difference in voting rights depending on personal characteristics such as length of membership. The one person/one vote principle is highly symbolic but, in the end, does not sum up the wide scope of democratic control.

More interesting are derogations to the principle, firstly because they demonstrate that cooperative law is not ideological but pragmatic and based on experience, and secondly because they are a barometer of the strength of the principle.

Firstly, the meaning of equal voting right is different in the case of unions of cooperatives.¹⁴⁸ In these, the weight of each cooperator of the union is taken into account in order to ensure equality among primary cooperators. The law offers a choice between two ways to calculate the voting rights of the cooperators: either in proportion to the number of primary members of the various cooperatives, or in proportion to the amount of cooperative transactions carried on by each member of the union (art. 5). The first derogation is not considered, properly speaking, as derogation to the one person/one vote principle, but as a necessary adjustment to a particular situation.¹⁴⁹

More substantial derogations are present in some special cooperative laws which allow the statutes to attribute more voting rights to some cooperators. This possibility may be found, for instance, in agricultural cooperatives,¹⁵⁰ collective interest cooperatives when they are organised by class of members,¹⁵¹ or some cooperative banks.¹⁵² These examples remain derogations, but they are sufficiently numerous and varied to mitigate the principle. Nevertheless, apart

¹⁴⁷ L. no. 78-763 of the 19th of July 1978, art. 14, for workers' cooperatives; L. no.835657 of the 20th of July 1983, art. 14, for craft cooperatives.

¹⁴⁸ L. no. 47-1775 of the 10th of September 1947, art. 9.

¹⁴⁹ L. COUTANT, n. 35 above, pp. 234 ff.

¹⁵⁰ C.rur., art. L.524-4.

¹⁵¹ L. no. 47-1775 of the 10th of September 1947, art. 19octies.

¹⁵² Code monétaire et financier (C.mon.fin.), Art. L.512-5; C.mon.fin., art. L.512-81.

from some cooperative banks, for which the law simply allows a capitalistic voting right, some rules regulate the derogations to the principle. First, the number of additional voting rights may never be proportionate to the subscribed capital; it is instead proportionate to the quantity of cooperative transactions carried on with the cooperative. Secondly, the proportion of voting rights cannot exceed certain limits: for example, 5% for agricultural cooperatives.

Special attention should be paid to the collective interest cooperative, since it furnishes an alternative understanding of the one member/one vote principle that should inspire other cooperative organisations. Article 19^{octies} of the 1947 Law reiterates the general principle of article 1. However, it gives it a special meaning when the collective interest cooperative has chosen to function in classes of members; in this case, the principle means that each member has one vote in his/her class. The collective voting right of each class may be defined unequally by the statutes. Three limits are laid down: one class may not have more than 50% of the voting rights; one class may not have less than 10% of the voting rights; and the voting rights may not be proportionate to the subscribed capital. During the negotiations on the 2014 reform, some cooperative organisations lobbied for introduction of a class system as a general provision, for example to welcome and regulate employees as cooperators in cooperatives other than workers' cooperatives. However, they failed.

The strongest derogation to the one member/one vote principle relates to the non-cooperator members (in practice, investors), members usually named 'members of article 3bis'. While some specific non-cooperator members were recognised in certain cooperatives before 1992,¹⁵³ only workers' cooperatives were generally allowed to have investor members.¹⁵⁴ The general provision on these investor members was integrated into the 1947 Law in 1992.¹⁵⁵ If the new provision is innovative, since it creates a new category of member, its main purpose is to regulate their voting rights. These investors may never have more than 35% of the voting rights. This limit is fixed at 49% if the investors are themselves cooperatives. Within these limits, it is allowed to distribute voting rights among these non-cooperator members in proportion to the subscribed capital. Despite the strong debates in 1992, no serious problem arose in practice, because this category of members is almost non-existent.

The organisation of the members' meeting has not been regulated by the cooperative law as such, even if some provisions deal with it. The general cooperative law of 1947 is almost entirely silent on the matter. Its sole provision concerns distance voting.¹⁵⁶ It allows, if not stated differently in special laws,

¹⁵³ For example, farmers' trade unions in agricultural cooperatives.

¹⁵⁴ See section 1.3.1.

¹⁵⁵ L. no. 47-1775 of the 10th of September 1947, art. 3bis.

¹⁵⁶ L. no. 47-1775 of the 10th of September 1947, art. 10.

voting by mail. It also states, with the same limit, that members taking part in the meeting by video-conference are taken into consideration for the quorum and calculation of the majority. But it states nothing about the quorum and the majority themselves. Nor does article 7 of the 1947 Law mention these points in its reference to the statutory provisions. Some special cooperative laws give some specifications, for example for merchants' cooperatives¹⁵⁷ and agricultural cooperatives.¹⁵⁸ But most of them do not deal with these questions, or they provide very few rules. In these cases, it is necessary to refer to company law; and, again, the rules will differ according to the kind of company chosen by the cooperative. It is useless to describe the rules in detail.¹⁵⁹ The merchants' cooperatives provide a good example of the general tendency. Firstly, the quorum is fixed at one-third of the members, but at half of the members for modification of the statutes. The required majority is half of members, but two-thirds for modification of the statutes. A different rule is provided for consumer cooperatives, which have the most numerous members, and for which a quorum of one sixth of members is required.¹⁶⁰ However, these rules may differ more or less in other cooperatives, and here is probably one of the best examples of the complexity and opacity of French cooperative law, for which there is no rational justification.

2.3.3. *Mechanisms for Member Control*

Surprisingly, no general provision deals with mechanisms of member control. Of course, some mechanisms may be related to it, but they are not presented as such in the cooperative law. The attention of cooperative law seems to be concentrated on the protection of cooperators against investor members. Besides the limitation of article 3 bis,¹⁶¹ some provisions aim at limiting the capital subscribed by investors. Thus, cooperative certificates, and non-voting preference shares,¹⁶² may not represent more than half of the equity.¹⁶³ Some special laws add further protections related to the minimum participation of cooperators or maximum participation of non-cooperators. For example, in craft cooperatives, if modification of statutes requires a majority of two-thirds of members, it is also stated that this majority must contain at least half of crafts.¹⁶⁴ Similarly, in workers' cooperatives, when there are non-cooperator members, these may not

¹⁵⁷ C.com., arts. L.224-8 1 L.124-9.

¹⁵⁸ C.rur., art. R.524-15.

¹⁵⁹ For an overview, D. HIEZ, n. 7 above, nos. 102.17 ff.

¹⁶⁰ L. of the 7th of May 1917, art. 4.

¹⁶¹ See section 2.3.1.

¹⁶² See section 3.3.2.

¹⁶³ L. no. 47-1775 of the 10th of September 1947, art. 19tervicies.

¹⁶⁴ L. no. 83-657 of the 20th of July 1978, art. 16.

constitute more than one-third of members of the board.¹⁶⁵ These rules reveal the fear of domination by non-cooperator members in the cooperative, but, they also reveal the lack of consideration given to the mechanisms necessary to ensure positive control by members on the cooperative. Therefore, it is more useful to indicate them, since many exist in French law, even if they are dispersed.

There is no cooperative general rule concerning the frequency of members' meetings, except for agricultural cooperatives.¹⁶⁶ Company law requires an annual meeting and an extraordinary meeting if an exceptional decision has to be taken. Nor is there a specific rule concerning the call of the members' meeting, usually made by the manager, even though it is also possible for some members to do it themselves: for example, one-fifth of members may convene the members' meeting in agricultural cooperatives.¹⁶⁷ Similarly, nothing special is foreseen concerning the agenda of the meeting, which is usually established by the organ which convenes the meeting.

Some mechanisms are established to favour members' participation in meetings. Postal voting is allowed,¹⁶⁸ even if its framework has not been defined. The only precision introduced by the 2014 reform is a reference to the form regulated for public limited companies. Electronic voting was first regulated in agricultural cooperatives, by copy paste of the regulation for public limited companies. The 2014 reform generalised that possibility with a new provision in article 10 of the 1947 Law, but details are only available for cooperatives which chose the form of public limited company. As in the case of companies, proxies are possible. It is difficult to find a general rule on their limits for they differ considerably according to the kind of cooperative.

The organisation and functioning of administration and/or management is not regulated by the cooperative law as such, even if the 1947 Law provides an unusual qualification. Its article 6 states that the cooperative is governed by representatives ('*mandataires*'). The wording was established in 1947, at a time when the institutionalist theories had not influenced company law; but it has never been changed. It is analysed as the sign of the strong dependence of managers on the members. In practice, however, because the cooperative law is silent on the concrete functioning, cooperatives must refer to the regulation of the kind of company that they have chosen, so that the general provision has no effective consequence. article 6 specifies that managers are appointed and removed by the members' meeting, for a maximum of six years. The only qualification required to take part in the election is membership. The only applicable provision is the maximum length of the representatives' mandates;

¹⁶⁵ L. no. 78-763 of the 19th of July 1978, art. 15.

¹⁶⁶ C.rur., art. R.524-12.

¹⁶⁷ For example, one-fifth of members may call the members' meeting in agricultural cooperatives C.rur., art. R.524-12.

¹⁶⁸ L. no. 47-1775 of the 10th of September 1947, art. 10.

and the prevalence of cooperative law, as special, over company law contradicts the solution in principle applicable to limited liability companies.¹⁶⁹

Another very traditional mechanism is the division of the members' meeting into sections, which vote separately and designate delegates who compose the general meeting of the cooperative. The purpose is to facilitate participation by the members in the meeting, in consideration of the size of the cooperative, its geographic area, and, sometimes, the diversity of business within the cooperative. All meetings take place at the same time with the same agendas. Separate meetings decide each item, and designate delegates who will assemble for the general meeting. Although very attractive in its purpose, especially for big cooperatives, this mechanism is rather complex and its use is decreasing. However, many special cooperative laws provide details on it. Agricultural cooperatives have a particular rule: the section meetings are proposed as an answer to the problem that cooperatives may face in satisfying the quorum requirement:¹⁷⁰ in the section meetings, no quorum is required.

If external control has an important function in the control of members themselves, notably through the information and analysis that it provides to them,¹⁷¹ a major condition for an efficient effective internal control is the good information of members.

2.3.4. *Members' Information*

The question of information of members is essential in cooperatives, at least if the democratic principle is to be taken seriously. Nevertheless, there is absolutely no provision on this matter in general cooperative law and very few in special laws. Therefore, the only obligations come from company law. They are very common and do not deserve further attention. The cooperative's members may access the company's documents and may obtain copies of them. However, some changes have occurred, not because of a cooperative claim, but by the extension of recent innovations in company law (inspired by theories of corporate governance) to cooperative law. Agricultural cooperatives first,¹⁷² then the 1947 Law,¹⁷³ integrated these considerations. The new general provision imposes on all cooperatives the requirement that the members' meetings take notice of the report on the cooperative's activity; however, it is not stated if the report is written or may be oral. The only more substantial provision is a reference to the obligation of information about the company's social and environmental impact, by the board to the general meeting in public limited companies, extended to

¹⁶⁹ C.com., art. L.223-18.

¹⁷⁰ C.rur., art. R.524-16.

¹⁷¹ See section 4.4.

¹⁷² C.rur., art. L.524-2-1.

¹⁷³ L. no. 47-1775 of the 10th of September 1947, art. 8.

cooperatives which satisfy the conditions stated in this provision.¹⁷⁴ Overall, the obligation of information stated in the law is poor, and, whereas most reforms result from lobbying by cooperatives themselves, these have been imposed on them as if being a cooperative means, by itself, a concern for the members.

The only interesting obligation of information has been created for agricultural cooperatives, not about the cooperative itself but about the transactions with members. The origin of the innovation is the recent regulation on relationships between producers and traders, in an attempt to improve the situation of farmers facing crisis. The cooperatives have obtained exemption from the obligation of individual contracts, with their compulsory provisions, but they must include the same provisions in their statutes.¹⁷⁵ This provision is supposed to ensure access to the appropriate information for all the cooperators. This general information has been complemented by the obligation for the cooperative to provide each cooperator with individual information about its engagement and its forms.¹⁷⁶ What is interesting here is the conjunction of collective and individual tools to inform about collective and individual businesses. As such, these difficulties are not new.

2.3.5. *Education*

While the information of members is necessary to allow them to exercise effective control on their cooperative, education is crucial as well. However, until very recently, the French cooperative law paid no attention to this point. A change is perhaps on the way. Firstly, the 2014 reform introduced a reference to training in article 1 of the 1947 Law, among the main cooperative principles. Nevertheless, that provision is too general to have any concrete consequence. More technically, for agricultural cooperatives, during the first year of their mandate, training necessary for accomplishment of their mission is proposed to members of the diverse organs.¹⁷⁷ Many questions may arise concerning the application of this new provision, but its purpose is excellent.

2.4. THE DIVISION OF POWERS AMONG THE COOPERATIVES' ORGANS

French cooperative law is unclear on members' obligations and rights, but the choice of the legislature has been clearer concerning the organs of the cooperative.

¹⁷⁴ C.com., art. L.225-102-1; listed companies and very big cooperatives are concerned.

¹⁷⁵ C.rur., art. L.631-24.

¹⁷⁶ C.rur., art. L.521-3.

¹⁷⁷ C.rur., art. L.524-3-1.

Theoretically, this means broad freedom for a cooperative's founders, since the 1947 Law refers only to the statutes.¹⁷⁸ In practice, however, because nearly all cooperatives are subject to a special cooperative law, and because all special cooperative laws impose the choice among a few kinds of companies, the definition of organs and their relationships are fully provided by the regulation of these companies. Therefore, one finds mainly two organisations (for limited liability companies and for public limited companies).

2.4.1. *Power of a Cooperative's Board and Civil Liability*

Only the distribution of competences between the members' meeting and the board is, more or less, common to all cooperatives, with few authentic cooperative rules. Sovereignty pertains to the members' meeting; leadership to the representatives. Moreover, the prevalence of the members' meeting is stronger in cooperatives than it is in companies, since the collectivity of cooperators is considered to be the cooperative's identity, the cooperative being nothing more than the collectivity of the cooperators. The general competences of the assembly are mainly defined by company law. Article 8 of the 1947 Law attributes to the assembly at least approval of the accounts, reception of the representatives' report, and appointment of the representatives. Other dispersed provisions attribute additional competences to the members' meeting, such as the distribution of surpluses,¹⁷⁹ the designation of the beneficiary of net assets in the case of winding up.¹⁸⁰ Under company law provisions, the members' meeting is also competent to decide when the existence or the nature of cooperative is at stake: dissolution, amendment of the statutes, conversion or merger. Some more specific decisions concern the cooperative's specificities, for instance incorporation of the reserve in the capital, or the issuance of cooperative certificates.¹⁸¹

By contrast, administration of the cooperative depends fully on the kind of company chosen. Limited liability companies ('Société à responsabilité limitée') are managed by a director ('gérant'), usually only a single natural person, even though this may be several persons. Public limited companies can be organised according to two different systems: either the one-tier or the two-tier system. As for companies, the former system is far more usual in French cooperatives. However, one particular rule introduces part of the two-tier system into medium-sized cooperatives. In workers' cooperatives¹⁸² and craft cooperatives,¹⁸³ when

¹⁷⁸ L. no. 47-1775 of the 10th of September 1947, art. 7.

¹⁷⁹ C.rur., art. L.522-4-1 for agricultural cooperatives.

¹⁸⁰ L. no. 47-1775 of the 10th of September 1947, art. 19.

¹⁸¹ See sections 3.3.2 and 3.5.

¹⁸² L. no. 78-763 of the 19th of July 1947, art. 16.

¹⁸³ L. no. 83-657 of the 20th of July 1983, arts. 18, 19.

the cooperative has adopted the form of a limited liability company and is composed of more than twenty members, a supervisory board is elected by the members' meeting. Moreover, in the case of craft cooperatives, it is specified that, when there are fewer than twenty members, the same function is fulfilled by the members' meeting itself. The supervisory board is subject to another condition in craft cooperatives: the direction of the cooperative is carried on by a single director if there are fewer twenty members; it is not carried on by more than three directors if there are more than twenty members. This reveals mistrust in a single direction. However collective direction is technically complex, and somewhat dangerous, in limited liability companies, since each director has full competences, and a decision by one director may contradict that of another.

It may be questioned whether the mission of the board in public limited companies differs in cooperatives and capitalist companies. The provisions are the same, but there is no doubt that the 1947 Law imposes another orientation on the distribution of competences between the members' meeting and the board, notably through the generic wording of representatives.

In public limited companies, the board is competent to intervene on any topic, and has to define the company's policy. This does not fit with the spirit of the 1947 Law, since the board members (or the manager) are only representatives of the members. The regulation of agricultural cooperatives, the only one in which governance is detailed, usually inspired by the provisions on public limited companies, states that the board ensures the cooperative's management and correct functioning¹⁸⁴ when the code of commerce states that the board determines the orientations of the company.¹⁸⁵ In other words, it moderates the importance of the board.

In spite of the cooperative's specificities, the institutionalist theories have also influenced cooperative law. Hence, whereas the competences should be defined by the statutes, nobody contests that the code of commerce provisions on engagements *vis-à-vis* third parties are applicable. The clearest rule is for public limited companies:¹⁸⁶

In its dealings with third parties, the company is bound even by acts of its board of directors which do not come within the purview of the company's corporate mission, unless it can prove that the third party knew that a specific action was extraneous to that mission or, given the circumstances, could not have been ignorant of that fact, and mere publication of the memorandum and statutes does not constitute such proof.

Traditionally, the counterpart of power is liability. Liability of board members or directors is regulated both by cooperative law and company law. A general

¹⁸⁴ C.rur., art. L.524-3-1.

¹⁸⁵ C.com., art. L.225-35.

¹⁸⁶ C.com., art. L.225-35.

liability principle for managers is provided for in company law, applicable in the absence of a contradictory rule in cooperative law. In limited liability companies,¹⁸⁷ as well as public limited companies¹⁸⁸ and agricultural cooperatives,¹⁸⁹ managers are liable for faults committed at the time of the cooperative's foundation when it implied the nullity of company, for any breaches of the law or of the statutes, and for any errors of management. Cooperative law adds some special liabilities to ensure the application of its own rules. The general law¹⁹⁰ provides for specific liability in the case of infringement of cooperative principles, such as the use of the surplus in contradiction to the rules laid down in the 1947 Law, or infringement of the rules concerning the conversion of the cooperative into a company.

2.4.2. Board Functioning

The cooperative's management depends on the kind of company chosen, since cooperative law contains only very general provisions. Therefore, it is again necessary to distinguish between public limited companies and limited liability companies. As explained above, limited liability companies are managed by a director ('*gérant*') and public limited companies by a board of directors. It is permitted to have several directors in limited liability companies, and this allows the involvement of more members in the management. However, it is risky, for in the case of dispute the cooperative may face crisis and, in the worst scenario, may be dissolved by a judge. In public limited companies, the board of directors is composed of at least three members and at most eighteen,¹⁹¹ the precise number being determined in the statutes. In the case of a tier system, the directorate may be composed of only five directors,¹⁹²

Whatever the form of the company, officers are members of the cooperative.¹⁹³ The same provision states that the statutes shall specify the duration of the mandate, which cannot exceed six years. Some special laws provide for a shorter duration, notably for agricultural cooperatives, for which board members are elected for two, three or four years depending on the provision of the statutes.¹⁹⁴

¹⁸⁷ C.com., arts. L.223-10 and L. 223-22.

¹⁸⁸ C.com., art. L.225-249.

¹⁸⁹ C.rur., art. L.524-5-1.

¹⁹⁰ L. no. 47-1775 of the 10th of September 1947, art. 26.

¹⁹¹ C.com., art. L.225-17. In agricultural cooperatives, the members are at least three, without any limit; this is fixed by the statutes.

¹⁹² C.com., art. L.225-58.

¹⁹³ L. no. 47-1775 of the 10th of September 1947, art. 6.

¹⁹⁴ C.rur., art. R.524-2.

2.4.3. *Mechanism for the Election of the Board of Directors*

The requirement of cooperative membership in order to take part in an organ is a major rule to ensure the members' control, but the cooperative law gives no more details. Only some special cooperative laws are more substantial, notably the 1978 law on workers' cooperatives (art. 1), since it states that cooperatives are managed, directly or indirectly, by their members. But other special laws contain no such provision. The 1983 law on craft cooperatives, refers to the representatives, members or not,¹⁹⁵ but the provision does not deal specifically with the composition of the board. Nevertheless, cooperative laws ensure the control of the cooperatives' members and, more precisely, of cooperators. Indeed, many provisions state that the majority of managers shall be cooperator members, as opposed to non-cooperator members (such as investors). It is even sometimes mandatory that the president be a cooperator.¹⁹⁶

The only recent requirement comes from company law, more precisely the public limited company regulation, and it concerns age and gender.¹⁹⁷ The legislation on agricultural cooperatives partly duplicates the provisions for public limited companies.¹⁹⁸ These provisions contain an optional rule: two-thirds of the board members shall be aged less than seventy. In any case, the statutes shall contain rules dealing with age. There is no specific provision concerning gender in agricultural cooperatives, but cooperatives which have chosen the form of a public limited company must contain at least 40% of males or females. This rule is new and will not be applicable before 2018. It will only concern public limited companies with at least 500 employees or whose turnover or balance sheet exceeds 50 million euros. In the case of infringement of such rules, the sanction is the voiding of the election, but it cannot mean the voiding of the decisions taken by the wrongly composed board.

2.4.4. *Remuneration of Board Members*

An important question today is the remuneration of the director or board members. Depending on whether the cooperative is viewed as either a firm undertaking business or as a disinterested organisation oriented only to the satisfaction of its members' needs, remuneration will or will not be considered with favour. The point has become more sensitive because the managers' remuneration in big firms is increasingly controversial, and cooperatives are expected to be different. The general cooperative law does not provide a clear

¹⁹⁵ L. no. 83-653 of the 20th of July 1983, art. 21.

¹⁹⁶ L. no. 83-653 of the 21th of July 1983, art. 18.

¹⁹⁷ C.com., art. L.225-19.

¹⁹⁸ C.rur., art. L.524-2.

indication; it seemingly does not deal with the remuneration of representatives but of employees in charge of direction. Several special rules are more detailed. Some of them specify that remuneration shall be compensation for the time spent managing the cooperative.¹⁹⁹ The Code of Commerce adds a procedural condition²⁰⁰ for merchants' cooperatives: the obligation to determine a maximum amount for the global remuneration of board members, and the yearly decision of the members' meeting on the precise remuneration.

The 2014 reform introduced a general provision²⁰¹ stating that these positions are unpaid and allow only, when justified, the reimbursement of expenses and the compensation of the time dedicated to administration of the cooperative. Control by the members' meeting is ensured, since it decides each year on the global amount available for these remunerations. Again, the application of the provision shows its imprecision, but the orientation is clear.

2.5. DISPUTE RESOLUTION BETWEEN MEMBERS AND THE COOPERATIVE

In the French tradition, there is a link between the existence of a community and the desire of its members to be judged by their peers; this is still visible within fishing communities (*prud'homie de pêche*). Therefore, arbitration administered by cooperative organisations appears to be the suitable dispute resolution mode. Nevertheless, the general cooperative law contains no provision on the matter. In the meantime, that silence does not preclude arbitration, since it is always possible to conclude an arbitration agreement in the areas in which people are free to dispose of their rights.²⁰² The Rural Code explicitly allows agricultural cooperatives to conclude such agreements;²⁰³ technically, the precision is useless. In practice, it is among worker's cooperatives that a general organisation of arbitration can be found. Without any special provision in the law, the general confederation of workers' cooperatives (CGSCOP) has inserted an arbitration clause into the statutes that it imposes on its members.²⁰⁴ The CGSCOP can attract nearly all the workers' cooperatives, so that the arbitration has obtained an important influence therein. In application of that clause, all the members of workers' cooperatives must go before the court of arbitration for any dispute on membership or cooperative transactions.

¹⁹⁹ C.rur., art. L.524-3, for agricultural cooperatives.

²⁰⁰ C.com., art. L.124-6.

²⁰¹ L. no. 47-1775 of the 10th of September 1947, art. 6, para. 2.

²⁰² C.civ., arts. 2059–2061.

²⁰³ C.rur., art. L.521-4.

²⁰⁴ Art. 43 of the statutes: *Guide Juridique les SCOP*, Scop Edit, Paris, 2013, p.607.

Interesting questions arise concerning the status of members in these cooperatives. Because arbitration is allowed for disputes about rights that their holders may freely dispose, and because labour law is one topic on which there is no free disposition of rights, there are debates concerned to distinguish questions related to labour law and those directly connected to membership. The problem exists only because French law adds the labour contract to membership, and the competence of the labour judge demonstrates the difficulties that it creates. The best example is the situation of the directors of workers' cooperatives, since these are considered by the law to be employees. Hence the disputes that they may have with the cooperative may go before the arbiter or the judge.

3. FINANCIAL STRUCTURE

3.1. FRAMEWORK OF THE COOPERATIVE FINANCIAL STRUCTURE

3.1.1. *The Cooperative Financial Structure and Cooperative Identity*

French law complies with the ICA Principles regarding financial structure as it does on other matters. The social object of the cooperative, targeted on satisfaction of its members' needs, is the main explanation of the cooperative's financial structure. It is characterised by pursuit of the development of the cooperators through the cooperative, which means that the financing can only be a tool in that development. Whereas the variability of capital is not compulsory,²⁰⁵ most detailed rules on financing are related to that variability (notably the important reserves and their partial indivisibility), demonstrating again that this is part of the cooperative identity. The primacy of the person over capital, because of the pursuit of the satisfaction of members' needs, justifies the absence of dividends: the only remuneration of shares consists in interest, and the surpluses may only be distributed through the mechanism of cooperative refund. These principles are safeguarded, when the cooperative is liquidated, by the disinterested distribution principle.

Just as the cooperative identity is opposed to the company's social object, so the financial structures are contradictory. Even the variability of capital, whereas it is allowed for companies other than public limited companies,²⁰⁶ is in practice used only by cooperatives or by neighbouring companies. The principles and mechanisms evoked above demonstrate the opposition with company

²⁰⁵ See above section 1.2.1.

²⁰⁶ C.com., art. L.231-1.

law. Nevertheless, the evolution of recent decades has been characterised by the importation into cooperative law of techniques deriving from company law. The phenomenon is not typically French; it is perfectly described as the 'companisation' of cooperatives. Based on a claim by cooperative organisations that they lacked financing, a major reform of the 1947 Law was adopted in 1992.²⁰⁷ None of the cooperative principles was reversed, but most of them were mitigated: admission of investor members, possible incorporation of reserves in the capital, possible conversion of a cooperative into a company, creation of new shares or financial securities. With that reform, the legislature confirmed the 'companisation', but, in practice, the consequences were not significant, since cooperatives did not make significant use of the new facilities.²⁰⁸ However, 'companisation' did not slow down, but it took another route: the creation of subsidiaries. Anyway, political recognition of the social and solidarity economy, as well as the financial crisis, have redirected attention to cooperative identity, and the new major reform of 2014 did not continue with the orientation of the previous one. Relaxation of the cooperative principles has not been removed, but the experience showed that they did not create particular excesses.

3.1.2. *The Cooperative Financial Structure Regulation*

The cooperative financial structure is laid down in the cooperative law, in the 1947 Law for general principles, and in the special laws for the details on financial structure. Company law is applicable to cooperatives, like the more general law, but in this respect cooperative law clearly contradicts the general law so that there is no room for its application. Nevertheless, some points are not dealt with in cooperative law (or very few): for example, subscription of the capital. The two main points are the minimum capital subscribed, and the liability of members. There are very few provisions on these in cooperative law, and most solutions come from company law. It is not provided by the general company law, but depends on the kind of company chosen by the cooperative.

Finance refers also to taxation and accountability, even if these questions will not be the focus here. In principle, cooperatives are subject to the general law. Some adjustments exist, but they are considered as derogations to the equal treatment principle.

²⁰⁷ L. no. 92-643 of the 13th of July 1992. Major commentaries: M. JEANTIN, 'Loi relative à la modernisation des entreprises coopératives', *Revue trimestrielle de droit commercial*, 1993, 119; C. VIENNEY, 'Identité coopérative et statut juridique', *RECMA*, Paris, 1993, nos. 44–45, p. 89; G. GOURLAY, 'La modernisation des entreprises coopératives par la loi du 13 juillet 1992', *Dr. Sociétés*, 1992, p. 1; B. PIOT, n. 74 above.

²⁰⁸ H. AZARIAN, 'Tentative de bilan d'application de la loi du 13 juillet 1992 à certaines catégories de coopératives', *Dr. Sociétés*, 1998, chron. 11; D. HIEZ, n. 76 above.

3.2. THE COOPERATIVE SHARE CAPITAL

3.2.1. *The Nature of Cooperative Share Capital*

The question of the nature or the function of capital has never been seriously discussed in cooperative law, except to deal with its variability. No cooperative can be created without any capital, even if it can be very low. This point could have been interpreted as the consequence of the feeble importance of capital in cooperatives, compared to the cooperative transactions with members; but it must today be related to the continuous decrease of capital in companies. It is now possible to create a limited liability company with only one euro, and even public limited companies can be created with only 37,000 euros.²⁰⁹ It is common in cooperatives for the reserves to far exceed the capital itself, and the function and regulation of reserves are probably more characteristic of cooperatives.

The requirement of capital is probably the main difference between cooperatives and mutuals, since mutuals have no capital and cannot have it. Apart from this feature, however, the object and the governance of both organisations are very similar.

The function of cooperative capital has not been studied. Spontaneously, as in companies, it would be considered as the guarantee for the cooperative's creditors. Nevertheless, the doubts that arise concerning that function in companies are far more convincing in cooperatives. Instead of considering cooperatives to be economically weak because of their capital, it would be more exact to wonder whether their capital fulfils an economic function. The function related, in company law, to the governance and the rights of associates has no room in cooperatives; the sole function of share capital is the existence of cooperatives itself and the membership.

Less attention has been paid to the capital itself than to the shares that compose it. Firstly, they are explicitly not a basis for individual rights of members. The only derogation to that principle is that the acquisition is a *sine qua non* condition to acquire membership. Moreover, the original legal nature of the share in a cooperative is highlighted. The capital of cooperatives can only be represented by 'parts sociales',²¹⁰ in opposition to 'actions'. Usually, in company law, these 'parts sociales' represent capital in partnerships, whereas 'actions' do so in capital companies. The originality of cooperatives is that, even if they choose the form of a public limited company, which is the most common capital company, do not have 'actions' but 'parts sociales'. The transfer of these 'parts sociales' is very restricted,²¹¹ if not forbidden.²¹²

²⁰⁹ C.com., art. L.224-2.

²¹⁰ L. no. 47-1775 of the 10th of September 1947, art. 11.

²¹¹ L. no. 47-1775 of the 10th of September 1947, art. 11.

²¹² See section 3.3.3.

Moreover, the value of a share is fixed in the statutes, and cannot evolve according to the prosperity of the cooperative. Therefore, the right of redemption of the member refers only to the nominal value.²¹³

3.2.2. *The Minimum Cooperative Share Capital*

Even if cooperatives are not legally defined as variable companies,²¹⁴ all of them are so in practice, and their legal regime can only be understood on that basis. Before variation, capital must exist. This exigency derives from the structure of the company, and it depends first on company law, subsidiarily on cooperative law. There is no specific rule on limited liability companies, so that they may be created with only one euro. Public limited companies require a capital of 37,000 euros but, for them, cooperative law provides a lower requirement: half of the capital required for capital companies,²¹⁵ i.e. 18,500 euros.

Special cooperative laws make some specifications because they define the minimum amount of a share or the minimum number of shares to become a member. These provisions indirectly fix a minimum capital, but it is so low that it is insignificant. In workers' cooperatives, for example created with the form of limited liability companies, the regulation fixes the value of a share at between 15.24 and 76.22 euros,²¹⁶ and at least two members are required, so that the minimum capital is 2x15.24 euros, i.e. 30.48 euros.

Apart from these legal requirements, the minimum capital of variable capital companies must be stated in the request for enrolment on the company register.²¹⁷ More exactly, the provision requires indication of the amount of capital below which it cannot decrease. This amount cannot be higher than the subscribed capital at the moment of creation, or lower than the legal minimum capital.

No provision considers the payment of special fees to acquire membership, but some special cooperatives do so in order to compensate the efforts made by previous members before the arrival of the new members, from which they take advantage.

3.2.3. *The Consistency of the Cooperative Share Capital*

There is no specific publicity for the capital, but it derives from the general rules on publicity for companies. Firstly, the starting capital is publicised with the

²¹³ L. no. 47-1775 of the 10th of September 1947, art. 19; see section 3.4.4.

²¹⁴ See section 1.2.1.

²¹⁵ L. no. 47-1775 of the 10th of September 1947, art. 27 al. 2.

²¹⁶ Decree no. 79-67 of the 18th of January 1979 on the shares issued by workers' cooperatives, art. 1. The amount of the shares is still fixed in francs, so that the legal conversion is so precise.

²¹⁷ C.com., art. R.123-53.

statutes in the company register.²¹⁸ Secondly, the third parties are constantly informed about the variability of the capital, since the cooperative must mention the qualification of 'société cooperative' in any document that it uses²¹⁹ and, when it has a variable capital, it must be also mentioned.²²⁰ Then, the evolution of the capital necessarily appears in the accounting, which is publicised to be annexed to the company register, for limited liability companies²²¹ as well as for capital companies.²²² A recent derogation has been introduced for micro-enterprises, as defined in article L.223-16-1 of the Commerce Code: they do not have to hold the accounting annex,²²³ and they may choose to make their accounting not accessible to the public.²²⁴ Indirectly, cooperatives are concerned. Nevertheless, because agricultural cooperatives are not commercial and civil companies, a special provision has been necessary to extend that derogation to micro-agricultural cooperatives.²²⁵

The cooperative law pays attention to the release of subscribed capital. It takes the possible poverty of members into account, and allows members to release only part of the subscribed capital immediately. That provision is also the consequence of the predominance of man on capital in cooperatives, which requires to facilitate the acquisition of membership to people unable to release immediately the subscribed capital. Whereas the different forms of companies are regulated differently, the cooperative law provides a general rule.²²⁶ The provision distinguishes contributions in cash and in kind. The former may be released at the subscription for one quarter and completed during the next five years, whereas the latter must be fully released immediately. Company law also envisages this distinction, even if its regulation differs.

Attention is usually paid in companies to the evaluation of goods, when contribution is made in kind. In the silence of cooperative law, company law applies. The mechanism is the external evaluation of the goods by an auditor designated by the associates, imperatively in public limited companies²²⁷ and optionally in limited liability companies²²⁸ if any good's value is less than 30,000 euros²²⁹ and if all of the goods' value is less than half of the share capital; the evaluation of goods is included in the statutes. Unless the associates confirm the evaluation of the external auditor they are responsible for the evaluation.

²¹⁸ C.com., art. R.123-53.

²¹⁹ L. no. 47-1775 of the 10th of September 1947, art. 22.

²²⁰ C.com., art. L.231-2.

²²¹ C.com. art. L.232-22.

²²² C.com., art. L.232-23.

²²³ C.com., art. L.123-16-1.

²²⁴ C.com., art. L.232-25.

²²⁵ C.rur., art. L.524-6-6.

²²⁶ L.no. 47-1775 of the 10th of September 1947, art. 12.

²²⁷ C.com., arts. L.225-8 and L.225-14.

²²⁸ C.com., art. L.223-9.

²²⁹ C.com., art. D.223-6-1.

The general cooperative law makes no provision for contributions in service, so that, in principle, the company law applies. Such contributions are allowed²³⁰ except in public limited companies.²³¹ However, these contributions are not taken into account for the capital itself, even if they allow the associates to receive dividends.²³² This solution is generally approved because of the difficulty of evaluating them, and the impossibility for creditors to seize them.²³³ In the silence of cooperative law, the same rules apply. Nevertheless, there is some resistance against such contributions in cooperatives, since the services provided to the cooperative are the consequence of membership and therefore cannot be part of the capital.²³⁴ The argument is persuasive and may explain the silence of both the law and authors. Some special laws are more precise, notably in the case of workers' cooperatives, since the regulations refer to contributions in cash or in kind as the only ones possible.²³⁵ It should be pointed out, however, that the possible obligation to subscribe new shares, released by a subtraction from salaries, resembles a contribution in service. Moreover, cooperative transactions should not be likened to contributions to the collective benefit of cooperatives, even if these transactions are part of it. There is one situation in which contribution in service is indubitable: a new cooperative – the inhabitants' cooperative²³⁶ – has introduced an original rule for these cooperatives.²³⁷ Their members may contribute in service but these contributions are integrated into the capital. These contributions are specially regulated,²³⁸ and the procedure will be specified by a decree which has not yet been issued.

3.2.4. *The Variability of Cooperative Share Capital*

Since the capital is variable, it may increase or decrease without any amendment of statutes²³⁹ or any publicity.²⁴⁰ In variation, attention is paid mainly to the decrease in capital, and the reason seems to be the risk of losses for creditors. Several rules apply. First, the capital may not decrease below the minimum capital fixed in the statutes and indicated in the company register.²⁴¹ Secondly,

²³⁰ C.civ., art. 1832.

²³¹ C.com., art. L.225-3.

²³² C.civ., art. 1843-2.

²³³ Nevertheless, some recent debates have gone further and integrated these contributions in the capital: L. DURIT-PONTIER, 'Repenser les apports en industrie', *Les petites affiches*, 3 juil. 2002, no. 132; Poracchia, note sous Cass., civ. 1e, 30 mars 2004, *Rev. sociétés*, 2004, p. 855.

²³⁴ M. HÉRAIL, n. 39 above, no. 622.

²³⁵ L. no. 78-763 of the 19th of July 1978, art. 27.

²³⁶ C.const.hab., L.201-1 ff.; created by the law no.2014-366 of the 22nd of March 2014.

²³⁷ C.const.hab., art. L.201-13.

²³⁸ Nature of services, date of subscription and of possible transfer.

²³⁹ C.com., art. L.231-1.

²⁴⁰ C.com., art. L.231-3.

²⁴¹ C.com., art. R.123-53.

the capital may not decrease to less than a quarter of the maximum amount reached by the capital since the cooperative's creation.²⁴² The mechanism is similar for cooperative banks, but the threshold is stricter: three quarters of the maximum capital reached.²⁴³

A question has arisen concerning the maximum amount of capital: should it be specified in the statutes? In 2007. The Cour de Cassation issued a positive answer.²⁴⁴ The consequence was as follows: provided that the statutes did not fix a maximum amount of capital, the increase of capital required amendment of the statutes and, if not, was void. The solution was unexpected, useless, and with a doubtful legal grounding. The legislature amended the 1947 Law²⁴⁵ to reverse the solution.²⁴⁶

The purpose of the control of the variation of capital is to take the variability of capital seriously. Variation of membership implies variation of capital. Therefore, the stricter the control on the variation of capital, the less the open-door principle is enforced. In the meantime, the control of capital is a necessity, first for creditors, but also for members. Much debate was provoked in the mid-2000s by the international accounting norms (IAS32), and their analysis of variable capital as debts.²⁴⁷ To avoid this qualification, it was proposed to restrict the right of withdrawal, so that the cooperative would not be obliged to reduce its capital. In other words, accounting considerations induced substantive amendments. In practice, however, in France, the international accountability regulation had no concrete effect on the legislation. Cooperative banks were the most active in the struggle against the new international regulation, but none of them demanded a legislative amendment; the prohibition on decreasing capital below three quarters of the highest amount of capital is good protection. The only amendment which is claimed to be related to IAS32 concerns the bylaws ratified for agricultural cooperatives to ensure that the cooperative can control the withdrawal of cooperators.²⁴⁸ The connection is, however, not so clear, or, at least so it has not far had important consequences in practice.

The sanction differs according the rule which has been infringed. Provided that cooperatives are companies, cooperative law is indirectly reluctant to pronounce the dissolution of a cooperative. This may only happen when a provision states so explicitly. This is the case of article 27 line 3 of the 1947 Law if the minimum capital for public limited cooperatives has not been subscribed. The article provides solutions to try to avoid that sanction: if any interested

²⁴² L. no. 47-1775 of the 10th of September 1947, art. 13.

²⁴³ Ibid.

²⁴⁴ Cass. com. 6 févr. 2007, no. 05-19237; Bull. civ. IV no. 29; JCP E, 2008, 2373, no. 10.

²⁴⁵ L. no. 47-1775 of the 10th of September, art. 7.

²⁴⁶ L. no. 2008-649 of the 3rd of July 2008, art. 23.

²⁴⁷ J.-C. DETILLEUX and C. NAETT, 'Les coopératives face aux normes comptables internationales: le cas de l'IAS32', RECMA, Paris, 2005.

²⁴⁸ D. HIEZ, n. 7 above, no. 91.25.

person may claim it, including the public attorney, the judge may order the dissolution only if the minimum capital is not reached on the day that s/he states, and s/he may grant a six months delay, renewable once, to the cooperative. In other circumstances, solutions are less rigorous and more individual. First, if a member has not released his/her subscribed capital, either the cooperative sues him/her to obtain the payment, or it renounces to the release and, after a formal notice, the membership is terminated.²⁴⁹ The last circumstance is when a member wants to withdraw, whereas the redemption of his/her shares would decrease the capital below the minimum statutory amount. In this case, a balance must be struck between the various interests: it is not allowed to deprive the member of his/her right of withdrawal, and it is not allowed for the cooperative to decrease its share capital. Therefore, if conditions of withdrawal are fulfilled, the membership is terminated. This means that the member has no further duty towards the cooperative, notably in regard to cooperative transactions. In agricultural cooperatives, it is explicitly the board's task to decide the date of redemption, which cannot be more than five years after the termination of membership.²⁵⁰ Theoretically, the problem may remain at that date but, in practice, if the share capital had not increased during that time, it is certain that the cooperative will be wound up.

While attention is paid to a decrease of capital because of its danger, an increase is fortunately possible as well. This increase in capital may occur, apart from when the number of members grows, when the cooperative decides to incorporate part of the reserves into the share capital,²⁵¹ or when it decides to attribute a cooperative refund through the creation of new shares.²⁵² It also happens in the case of the subscription of new shares. No provision of the general cooperative law allows a cooperative to impose the subscription of new shares to meet its financial needs. Some special laws may provide for compulsory additional subscriptions. The first case concerns agricultural cooperatives, because of the obligation for any cooperator to hold a number of shares proportionate to its activities with the cooperative.²⁵³ Therefore, if the activity increases, the cooperator will have to acquire new shares. The second case concerns workers' cooperatives, because the acquisition of membership may only be conditioned by the acquisition of one share.²⁵⁴ As compensation, the statutes may require the acquisition of new shares.²⁵⁵ However, this requirement must be imposed by the statutes themselves, and does not depend on the decision of any cooperative organ; therefore, it cannot depend on the needs of the cooperative. Nevertheless, in any cooperative,

²⁴⁹ L. no. 47-1775 of the 10th of September 1947, art. 12.

²⁵⁰ C.rur., art. R.523-6.

²⁵¹ See section 3.5.

²⁵² See section 3.6.

²⁵³ C.rur., art. L. 521-3.

²⁵⁴ L. no. 78-763 of the 19th of July 1978, art. 6.

²⁵⁵ Ibid.

it is always possible for a member to acquire new shares, with the consent of the competent organ if required, but no member may be obliged to do so.

3.2.5. *Structure of Capital and Cooperative Autonomy*

Autonomy from state housing cooperatives.

The autonomy of cooperatives is an important ICA Principle which may disqualify an organisation from being a cooperative. In relation to the cooperative object and governance, it is ensured by, and reinforces, the members' control. Hence it resides in the financial structure, with some special provisions. In principle, because members obtain no right depending on the amount of share capital to which they have subscribed, no limit is set on their acquisition. However, even if political equality is respected, important economic differences may allow some members to put pressure on others, and cooperative law paid a special attention to that concern in regard to investor members. However, the only general limit does not concern some categories of members, but rather some categories of financial securities in the capital or in assets. The amount of capital corresponding to non-voting preference shares and to cooperative certificates cannot be more than 50% of the total share capital.²⁵⁶ In addition, the cooperative certificates cannot be more than 50% of the total capital of the previous financial year.²⁵⁷

I have already mentioned the restrictions on the political rights of investors in cooperatives, as well as the maximum participation of some representations of share capital. Some more specifications are provided in special legislation – for example, in regard to workers' or craft cooperatives. The former allow long-time investors to be members. In compensation, the 1978 law provides the guarantee that the cooperators (workers) have the majority on the board (art. 15). A similar solution is stated in the 1983 law for artisanal cooperatives (art. 18). The Rural Code provides a close but more balanced solution. When there are some investors, on the one hand it makes their presence on the board compulsory; on the other, it restricts that presence to one-third.²⁵⁸

3.3. THE DIVERSIFICATION OF FINANCIAL SECURITIES

3.3.1. *The Different Classes of Shares*

The financial structure of cooperatives may seem particularly simple, if one considers the uniformity of cooperative share capital. The financial needs of

²⁵⁶ L. no. 47-1775 of the 10th of September 1947, art. 19*ter*vicies.

²⁵⁷ L. no. 47-1775 of the 10th of September 1947, art. 19*sep*decies.

²⁵⁸ C.rur., art. L.524-1.

cooperatives have not been entirely forgotten, but the law focuses on the creation of attractive securities. Until 1992, the cooperative law provided for only one class of shares, which conferred membership.²⁵⁹ The 1992 law created two new classes of shares inspired by the diversification of shares or stocks in company law. The traditional shares are now named 'A-shares'^{260,261} to establish their link with membership and the ensuing obligations of cooperative transactions.

The first new kind of share is a specific benefit share ('parts sociales à avantage particulier').²⁶² Preference shares may only be subscribed by members, but when subscribed, they are freely transferable among them. They confer on their holders the specific benefits defined in the statutes, in compliance with cooperative principles. The law provides no specification at all of these possible specific benefits. It is uncontroversial that, contrary to the preference shares of company law, the specific benefit may not consist in additional voting rights, since it would not comply with the 'one member one vote' cooperative principle. The benefit is therefore necessarily financial: it can be a higher interest rate, within the general limit provided for by the law,²⁶³ a preferred attribution of interest in the case of low surpluses, a restricted responsibility, a preferred attribution of reserves within the general limit provided for by the law.²⁶⁴ The aim of this new class is to encourage cooperators to invest by granting them more rights than they would have with basic shares.

The second new class of shares consists of 'non-voting preference shares'.²⁶⁵ These may be subscribed by any person (a member or non-member), but not cooperators. The holders of such shares will receive interest before any other shareholder. But – and this has been rather controversial in the legislative process – the counterpart is that the holder has no voting rights. This has no effect when the non-voting preference shares have been subscribed by members, since any new subscribed share cannot confer any additional voting rights on them, voting right being independent of the number of shares held. But, in the case of subscription by non-members, this new class of shares means the cooperative comprises the unusual category of full investor member without any political function. The non-voting preference shareholders do not take part in the members' meeting, but they assemble in a special meeting which designates a representative who attends the members' meeting, without any voting rights. However, no limitation on their right may be adopted by the cooperative except with the consent of the non-voting preference shareholders' special meeting.

²⁵⁹ L. no. 47-1775 of the 10th of September 1947, art. 11.

²⁶⁰ In agricultural cooperatives, they are termed 'transaction shares' ('parts d'activité').

²⁶¹ C.rur., art. R.524-14.

²⁶² L. no. 47-1775 of the 10th of September 1947, art. 11 al. 3.

²⁶³ See section 3.6.

²⁶⁴ See section 3.5.

²⁶⁵ L. no. 47-1775 of the 10th of September 1947, art. 11bis.

Because the political disability of these shareholders is balanced by their economic preference, the former is conditioned by the latter. In other words, if these shareholders do not receive their remuneration for three successive years (because of losses by the cooperative), their voting rights are restored.

No significant amendment has been adopted since 1992 in the financial cooperative system. However, an overall reform of shares was enacted in 2004 for company law,²⁶⁶ with the purpose of simplifying the numerous classes of shares. To replace the various classes that had been progressively created in company law, the legislature decided to have a single special class of shares – preference shares²⁶⁷ – whose flexibility allowed them to fit with all the previous mechanisms. No provision dealt with cooperative law, and the issue of whether cooperatives could issue these new shares was discussed.²⁶⁸ No provision prohibited it, and provided that the issued shares complied with cooperative principles, they could replace the previous specific benefit shares and non-voting preference shares, at least in public limited cooperatives, since preference shares may only be issued by capital companies. Indeed, one cooperative bank decided to issue such preference shares with success in 2012.²⁶⁹

3.3.2. *Other Financial Securities*

Beside the three classes of cooperative shares, the 1992 law created a new financial security: the associate cooperative certificate,²⁷⁰ which completed the investment cooperative certificate created a few years before.²⁷¹ These two classes are very close, the main difference being that the associate cooperative certificates may only be issued by cooperative banks and subscribed by the issuing cooperative's members.²⁷² These certificates are securities without voting right, and they are freely transferable. The members' meeting of the cooperative decides yearly on their remuneration, which cannot be less than the interest attributed to the shares.²⁷³ However, because they are explicitly defined as attached to a portion of capital, they are subject to the general limitation on the capital's remuneration.²⁷⁴ Therefore, their attractiveness resides in the conferred

²⁶⁶ Ord. no. 2004-604 of the 20th of June 2004.

²⁶⁷ C.com., arts. L.228-11 ff.

²⁶⁸ D. HIEZ, 'L'incidence de l'introduction des actions de préférence sur le droit coopératif', *Dr. Sociétés*, Paris, 2005, étude 8.

²⁶⁹ P. PRUD'HOMME, 'Les actions de préférence d'une société coopérative anonyme', *RECMA*, Paris, 2013, no. 327.

²⁷⁰ L. no. 47-1775 of the 10th of September 1947, art. 19*ter*vicies.

²⁷¹ L. no. 87-416 of the 17th of June 1987; today L. no. 47-1775 of the 10th of September 1947, art. 19*sexdecies* to 19*duovicies*.

²⁷² L. no. 47-1775 of the 10th of September 1947, art. 19*ter*vicies.

²⁷³ L. no. 47-1775 of the 10th of September 1947, art. 19*vicies*.

²⁷⁴ See section 3.6.

rights on the reserves.²⁷⁵ They are issued for the lifetime of the cooperative, but the issuance agreement foresees their possible anticipated redemption.²⁷⁶

The last class of financial securities consists of participatory notes ('titres participatifs').²⁷⁷ These were created by law no. 83-1 of the 3rd of January 1983 in order to facilitate investments in companies held by the state, in cooperatives, and later in mutuals. They are transferable securities. They resemble a mix of shares and bonds. As bonds, they may be redeemed, and their holders assemble in a special meeting, which is a legal person. As shares, their remuneration is partly variable, and their holders receive ample information and consultation.

3.3.3. *The Legal Regime of Shares*

Whatever the kind of company chosen by the cooperative, its shares have a single legal regime, whereas the company may be a partnership or a capital company. However, since there are different classes of shares, their regime may differ. The question of their transfer is therefore regulated differently depending on the class of shares.

A-shares are nominative.²⁷⁸ Therefore, they may only be transferred with the agreement of the cooperative.²⁷⁹ The provision refers to the statutes to stipulate if the agreement must be given by the board or by the members' meeting. Some special cooperative laws state it explicitly.²⁸⁰

The specific benefit shares are freely transferable among members.²⁸¹ It is debatable whether they may be transferred to non-members, since article 11 forbids the subscription by non-members but does not evoke acquisition. The answer is, to me, positive, but it is not certain that there is room for application in practice.

The regime of the non-voting preference shares is not so explicit.²⁸² The provision only states that these shares may be subscribed or acquired, so that they are certainly transferable. But it is not specified if the transfer is free or requires the cooperative's consent. In the silence of the provision, reference must be made to the spirit of the text or to the nature of the share. Of course, because these shares are targeted on investors, their free transferability is necessary not to deter the latter from subscription. Their nature is not defined, and authors

²⁷⁵ L. no. 47-1775 of the 10th of September 1947, art. 19*duovicies*.

²⁷⁶ L. no. 47-1775 of the 10th of September 1947, arts. 19*novodecies* and 19*sexdecies*.

²⁷⁷ C.com., arts. L.228-36 and L.228-37.

²⁷⁸ C.com., art. L.231-4.

²⁷⁹ L. no. 47-1775 of the 10th of September 1947, art. 11 al. 1.

²⁸⁰ In agricultural cooperatives, the competent organ is the board: C.rur., art. R.523-4.

²⁸¹ L. no. 47-1775, 10th September 1947, art. 11 al. 2.

²⁸² L. no. 47-1775 of the 10th of September 1947, art. 11*bis*.

have claimed that they are securities.²⁸³ Because the cooperative certificates are explicitly securities,²⁸⁴ they are also freely transferable.

Neither the general cooperative law nor special ones deal with the transfer of shares *mortis causa*. The grounds for regulating the hypothesis of death of a cooperator are set out in variable capital company regulation:²⁸⁵ there is no dissolution of the cooperative; it remains without the deceased. This is one of the provisions that mitigates the doctrinal qualification of partnership.²⁸⁶ The same provision applies in the case of bankruptcy of a cooperator. Agricultural cooperative law duplicates the provision.²⁸⁷ Therefore, death terminates membership, so that there is no possible transfer, but the heirs may easily apply for membership if they fulfil the required conditions. The solution differs for new shares, since these are not linked to the quality of cooperator, and transferability does not have the same meaning for them. The Rural Code is significant in this regard, since the provision referred to above is situated in a section dealing specifically with cooperators.

3.4. MEMBER CONTRIBUTIONS TO CAPITAL

3.4.1. *Obligation to Release Capital*

As such, the subscription of capital is an obligation, since it is a condition to become a member. The subscription amounts to at least one share, to which other subscriptions or fees may be attached.²⁸⁸ In principle, the member must release one quarter of his/her subscribed capital.

Proof of membership is an interesting point, because it highlights the implications of the subscription of shares. If subscription is a condition to become member, its proof also establishes membership. Unlike in companies, the discussion usually arises in cooperatives when a cooperator wants to terminate membership before the end of the agreed period. To escape his/her obligations, the person claims that he/she is not a member. Case law considers the members' register established by the cooperative as valuable proof.²⁸⁹ But it is not the only possible proof, and execution of the cooperative's obligations and participation in the cooperative's organs are also efficient.

²⁸³ B. PROT, n. 74 above.

²⁸⁴ L. no. 47-1775 of the 10th of September 1947, art. 19*sexdecies*.

²⁸⁵ C.com., art. L.231-8.

²⁸⁶ See section 1.1.2.

²⁸⁷ C.rur., art. R.522-6.

²⁸⁸ See section 3.2.2.

²⁸⁹ Cass. civ 1re, 18 déc. 2001, no. 99-17.510, Bull. civ. I, no 325.

3.4.2. *Nature of the Contribution*

French cooperative law does not envisage different rights for members depending on the reason why shares have been subscribed, notably if it was a compulsory or voluntary subscription. Rights depend only on the nature of the subscribed shares.²⁹⁰ These rights are regulated in the case of wind-up,²⁹¹ and these provisions are extended to other cases of membership termination.

Apart from the subscription of capital and payment of fees, another case is financial flow between cooperators and the cooperative: the payment for cooperative transactions. To facilitate the relations, the cooperative and the cooperator maintain a running account. This mechanism also exists in company law, but its function is far more important in cooperative law because of cooperative transactions. It suffers reluctance in company law because of the risk of illegitimate financial transactions between the company and its associates. For cooperatives, it is almost a necessity, even if there may be difficulties in distinguishing the flows related to the cooperative's transactions and to membership, such as capital release or cooperative refund.

3.4.3. *Recording*

There are few provisions on recording. There are none in the general cooperative law, and if some can be found in company law, they deal with accounting but not recording. The only recording that is foreseen concerns agricultural cooperatives.²⁹² The cooperative keeps a record of the cooperators which lists the cooperators and their capital, with specification of the kinds of shares that they hold.

3.4.4. *The Members' Rights on Capital*

In French law, there is no contribution to capital other than shares and cooperative certificates. The rights of their holders depend, therefore, on the classes of rights. Political power is strictly connected to membership, that is to say, to A-shares. Only information may be requested by other holders.²⁹³ In regard to financial rights, shareholders have no right because payment of interest as distribution of the cooperative refund is conditioned to a decision taken by the annual members' meeting. In principle, a member is allowed to withdraw at any time and, in this case, is redeemed of his/her shares. The principle for

²⁹⁰ See section 3.3.1.

²⁹¹ See section 3.7.

²⁹² C.rur., art. R.522-2.

²⁹³ See section 2.3.3.

redemption is the nominal value of the shares fixed in the statutes.²⁹⁴ The rule has been contested as too rigorous, especially in the case of inflation. In its general attempt to make cooperative investment more attractive, the 1992 reform therefore mitigated the provision by introducing the option for cooperatives to create a special divisible reserve²⁹⁵ on which outgoing members have rights. This new right has two limits: first, it benefits only a member whose membership has lasted at least five years; second, the added value may not be higher than the rise applicable to a life annuity. Other mechanisms may indirectly increase the rights of members in the case of termination of membership, such as the incorporation of reserves in capital, or the distribution of cooperative refund by the creation of shares.²⁹⁶ It can be only added that a member is allowed, under the same conditions as for withdrawal, to ask for the redemption of some of his/her shares.²⁹⁷ This option may even be more open, since it does not imply the termination of membership. Therefore, limits to that termination do not apply. This option is only conditioned by the control on the reduction of capital.²⁹⁸

In regard to the holders of special shares or cooperative certificates, these may hold rights, either to preference over ordinary shareholders, or to positive or negative benefits as defined in the issuance agreement.

Agricultural cooperatives law contains an original provision. When such cooperatives have subsidiaries (which they control or not), they may distribute the dividends that they receive, fully or partly, to their members.²⁹⁹ The distribution may constitute the special benefits of shares defined by the 1947 Law article 11. In this case, these special benefit shares can have been issued as such or derive from a conversion of ordinary shares subscribed by a cooperator in addition to its obligation. The benefit for members is subject to two limits: first, dividends are attributed in priority to compensate losses of the cooperative if there are any; second, the benefit for members may not be higher than 2% more than the general limit for interest to shares.³⁰⁰

3.4.5. *Cooperative and Cooperator Liability*

The liability of cooperative members does not differ from the one of shareholders in companies. The members' liability depends on the kind of company; and for the three most common kinds, liability is limited to the subscribed capital. In other kinds of companies, such as civil companies, liability is in principle

²⁹⁴ L. no. 47-1775 of the 10th of September 1947, art. 18.

²⁹⁵ See section 3.5.

²⁹⁶ See section 3.6.

²⁹⁷ C.com., art. L.231-1.

²⁹⁸ See section 3.2.2.

²⁹⁹ C.rur., art. L.523-5-1.

³⁰⁰ See section 3.6.

unlimited. However, either special laws restrict that liability³⁰¹ or the statutes may define the liability of members.³⁰² Reference to the statutory provisions to define the liability of members is absolutely derogatory of any rule, and it may be questioned, with regard to the protection of third parties, since no publicity is provided for them except through the company register.

In practice, in the case of bankruptcy of a cooperative, the members will not be reimbursed for their shares because they will cover the losses. Even if there is no bankruptcy of the cooperative, the members may suffer consequences from the cooperative's losses. They may do so firstly if membership is terminated, but sometimes even before. When membership terminates, the consequence may be that, if there is a loss on the cooperative's annual accounting, the reimbursement of its shares will be reduced proportionately to the losses.³⁰³ However, the statutes may provide that these losses are primarily compensated by an incorporation of divisible reserves. Losses do not affect only members whose membership terminates because they must be compensated provided that members want to avoid wind-up. Whilst general cooperative law does not distinguish among losses, some special laws do, depending on their origin, related or not to cooperative transactions.³⁰⁴ The former are, in principle, distributed among cooperators in proportion to their cooperative transactions, (art. 24) whereas losses from transactions with non-members are in priority compensated by the reserve supplied with profits from these transactions with non-members (art. 25). This point is closely connected with the status of the diverse reserves, and the absence of general rules makes it difficult to find common provisions for the compensation of losses. Finally, more generally, even after termination of membership, the liability of the member may remain, for five years, for the debts existing at the time of the termination.³⁰⁵

3.5. RESERVES

All companies must allocate part of their profits to reserves, but the importance and the nature of these reserves are different for cooperatives. Obviously, this particular regulation is connected to the specificity of capital itself.³⁰⁶ General cooperative law provides that the cooperative shall allocate 15% of its surpluses to a compulsory reserve, named 'legal reserve'.³⁰⁷ This allocation is compulsory

³⁰¹ For example, for fishing cooperatives, ten times the amount of subscribed capital: C.rur., art. L.931-14.

³⁰² L. no. 47-1775 of the 10th of September 1947, art. 7.

³⁰³ L. no. 47-1775 of the 10th of September 1947, art. 18 al. 3.

³⁰⁴ L. no. 83-657 of the 20th of July 1983, arts. 24 and 25.

³⁰⁵ C.com., art. L.231-6.

³⁰⁶ See above section 3.2.1.

³⁰⁷ L. no. 47-1775 of the 10th of September 1947, art. 16.

unless the reserve is equal to or higher than the share capital. This obligation may be completed by the statute, and even when it goes further than the limit and is no longer compulsory, it is not forbidden to maintain the annual allocation. The more hesitation there is about the function of share capital as guarantee for creditors, the more this function is attributed to the legal reserves. The regulations on craft cooperatives even state it explicitly.³⁰⁸

Special laws provide specifications. They usually do not derogate concerning the amount of the reserves except in the case of collective interest cooperatives. For these latter, the allocation to the legal reserves is, as a whole, 57.5% of their surpluses.³⁰⁹ Conversely, other laws set a ceiling, as in the case of craft cooperatives.³¹⁰ Moreover, workers' cooperatives benefit from a tax deduction on the sum allocated to the legal reserves.³¹¹ This provision is derogatory and does not refer to a general favour by tax law for cooperative reserves because of their indivisibility. The provision for workers' cooperatives is the outcome of successful lobbying by the workers' cooperative organisation to integrate this allocation to reserves into the tax favour for the contribution by enterprises to the constitution of funds for employees. Because of that tax advantage, workers' cooperatives usually attribute to the legal reserves the maximum amount allowed, that is, one-third of their surpluses.³¹²

The general cooperative law does not distinguish between the various legal reserves, even if the wording uses the plural, meaning that the cooperative may create several reserves. Some special cooperative laws are more precise. However, none of them provides for a reserve dedicated to education and training; that possible purpose is not even mentioned. Among the specifications established, the most common concerns the reserve supplied with profits from the transactions with non-members. The agricultural cooperative legislation is particularly significant, since it provides for many reserves, and it thus becomes unclear – revaluing the balance sheet reserve,³¹³ special indivisible reserve,³¹⁴ legal reserve³¹⁵ – and article L.523-2-1 refers to at least five reserves or categories of reserves. This does not mean that all these reserves differ, because they are sometimes defined by their content or their regime; but it certainly demonstrates that there is no clear thinking on the detailed functioning of reserves and their role.

³⁰⁸ L. no. 83-657 of the 20th of July 1983, art. 23.

³⁰⁹ L. no. 47-1775 of the 10th of September 1947, art. 19*nonies*.

³¹⁰ L. no. 83-657 of the 20th of July 1983, art. 23.

³¹¹ CGI, art. 237*bis* A.

³¹² L. no. 78-763 of the 19th of July 1978, art. 33.

³¹³ C.rur., art. L.523-7 al. 1.

³¹⁴ C.rur., art. L.523-7 al. 2. C.rur., art. L.522-5 al. 3. It is unclear if these two reserves are only one.

³¹⁵ C.rur., art. L.523-2.

One special reserve must be mentioned, since it is provided for in the general cooperative law.³¹⁶ Since 1992, that provision has allowed cooperatives to create a reserve to be distributed among the cooperators who leave the cooperative (withdrawal or expulsion). The right of each member in that reserve, when so stated, is proportionate to his/her contribution to the capital. Nevertheless, it is limited through reference to an official index.³¹⁷ Moreover, only members of the cooperative for at least five years have this right. This reserve is not compulsory and its allocation is additional to the allocation to the legal reserve. The creation of this reserve must be provided for in the statutes, which is only allowed if they do not provide for the possible incorporation of reserve in the capital (see below). In practice, this reserve is rare, principally since the incorporation of reserves is more attractive.

The destination of the reserves is not regulated. Therefore, in the silence of the law, this destination is free; the only limit concerns its indivisibility. The destination is decided by the board of directors. Some special laws provide restrictions.

First, some special laws stipulate the autonomy of the reserves supplied with the profits from transactions with non-members. This is notably the case of farmers' cooperatives³¹⁸ and craft cooperatives.³¹⁹ It means that these reserves cannot be used, at least at first, to compensate the losses due to transactions with members. Whereas the Rural Code details the reserves that must be used to compensate them, the 1983 law states that, if these losses cannot be compensated by the legal reserve (designated as indivisible account) they must be immediately divided among members. If they not, they must be either compensated by the capital or postponed to the next financial year. However, it must be noted that no provision of the general law imposes such restrictions, so that these two pieces of legislation appear to be derogatory.

The reserves are indivisible and therefore cannot be distributed to the members, with the exception of the special reserve. This rule had no derogation until 1992, and remains a very strong principle. Besides its traditional place in the general cooperative law,³²⁰ it is now highlighted by the reference in article 1. This provision is more explicit on the meaning of the rule, since it states its purpose: the development of the cooperative and of its members.³²¹ Moreover, the indivisibility of reserves is considered to be a general feature of social and solidarity economy enterprises, and so is the priority attribution of profits to the

³¹⁶ L. no. 47-1775 of the 10th of September 1947, art. 18 al. 2.

³¹⁷ The life annuity, stated by the Ministry for the Economy. It was about 2 or 3%; it is 0.1% for 2016.

³¹⁸ C.rur., art. L.522-5 al. 3.

³¹⁹ L. no. 83-657 of the 20th of July 1983, art. 25.

³²⁰ L. no. 47-1775 of the 10th of September 1947, art. 16.

³²¹ L. no. 47-1775 of the 10th of September 1947, art. 1.

development of the enterprise.³²² Therefore, it is a condition for a company to be registered as a social and solidarity economy enterprise.³²³

The indivisibility of reserves is stipulated both during the life of the cooperative and at the time of its winding-up. A special solution is provided when the cooperative is converted into a company, a mechanism strictly regulated by the general cooperative law.³²⁴ In this case, the indivisible reserves of the cooperative are allocated to a special reserve of the company, which is itself indivisible for ten years. The purpose of this rule is to deter conversion into a company in order to distribute the reserves among the members. The rule is stricter for workers' cooperatives, for which, in the case of conversion, the cooperative's reserves remain definitely indivisible.³²⁵

An indirect derogation to the indivisibility was introduced into the general cooperative law in 1992.³²⁶ This article allows the statutes to envisage the possibility of incorporating a part of the reserve into the capital. This new capital has no special nature; nor is it subject to special rules. This increase of the capital implies the issuance of new shares, distributed to the members in proportion to their contribution to the capital, or an increase of the nominal value of each share. Therefore, the increase of capital benefits the members, who will receive the redemption of their shares when leaving the cooperative. Nevertheless, the incorporation is limited by the law. First, this is only possible if provided for in the statutes. Secondly, the decision must be taken by the members' meeting. Thirdly, its amount is limited. The first incorporation may not be more than half of the reserves existing at the end of the financial year before the members' meeting. Subsequent incorporations may not be more than half of the additional amount of the reserves since the last incorporation. Finally, to be noted is that the choice, by the statutes, to allow the incorporation precludes some other mechanisms, such as the creation of a divisible reserve (see above), or the issuance of cooperative certificates.³²⁷

3.6. SURPLUSES

The general cooperative law does not provide any definition of surpluses. Some special laws are more precise, but their concrete provisions differ from one to another. For craft cooperatives, it is stated that the credit balance of the

³²² L. no. 2014-856 of the 31st of July 2014, art. 1 I.

³²³ L. no. 2014-856 of the 31st of July 2014, art. 1 II.

³²⁴ L. no. 47-1775 of the 10th of September 1947, art. 25.

³²⁵ L. 78-763 of the 19th of July 1978, art. 3*bis*.

³²⁶ L. no. 47-1775 of the 10th of September 1947, art. 16 *als.* 3 and 4.

³²⁷ L. no. 47-1775 of the 10th of September 1947, art. 19*tervicies*. That provision is specific to members' cooperative certificates, and it is debated whether it should be extended to the cooperative investment certificates: D. HIEZ, 'Certificats coopératifs', *Encycl. Dalloz, rép. Sociétés*, Paris, 2015, nos. 31, 32.

annual accounting, decreased by the delayed losses, are the net surpluses.³²⁸ For workers' cooperatives, they are defined as the net revenue of the financial year minus the overhead expenses and loads of the year, including amortisation and provisions.³²⁹ The differences are not significant, but they illustrate the lack of conceptualisation in cooperative law. The only unanimous opinion concerns the opposition between surpluses and profits, and, indeed, the cooperative law never refers to profits. The distinction has been thoroughly discussed by the French thinker on cooperation, Charles Gide,³³⁰ and it has become the common opinion. Even if profits are not pursued as such, when they exist, it is necessary to state their allocation. As for companies, this is a decision taken by the members' meeting.³³¹

The general cooperative law provides some indications;³³² it enumerates the possible allocations, but does not explicitly state their order: reserve fund, interest on shares, cooperative refund, divisible reserve, and subsidy. The first allocation is to the legal reserve, since the law makes it compulsory and states its conditions and extent.³³³ It is unclear if the distribution of cooperative refund comes next, or the distribution of interest on shares. General cooperative law refers only to the applicable provisions of the law and, naturally, in their numerical order, so that it does not seem meaningful. If one looks at special cooperative laws, they are not unanimous: for instance, workers' cooperative legislation evokes the cooperative refund before the interest on shares,³³⁴ whereas in the case of farmers' cooperatives a law provides the exact opposite.³³⁵ Indeed, the law usually does not make the order of distribution compulsory; but when it is not silent, it only provides the order of the decisions taken by the members' meeting. Only the allocation to reserves is compulsory. The distribution of interest to shares, as well as the distribution of cooperative refund, is optional, if not otherwise provided in the statutes.

Although the cooperative refund is very important in cooperative thinking (see above 1.2.2), there are relatively few details on its functioning. Therefore, it is mainly up to the statutes to define its conditions. Only the workers' cooperative regulation make its distribution compulsory, for at least 25% of the net surpluses,³³⁶ whereas it is forbidden for general interest cooperatives.³³⁷

³²⁸ L. no. 83-657 of the 20th of July 1983, art. 22.

³²⁹ L. no. 78-763 of the 19th of July 1978, art. 32.

³³⁰ Ch. GIDE, n. 65 above.

³³¹ C.rur., art. L.524-2-1.

³³² L. no. 47-1775 of the 10th of July 1947, art. 16.

³³³ See above section 3.5.

³³⁴ L. no. 78-763 of the 19th of July 1978, art. 33.

³³⁵ C.rur., art. L.524-2-1.

³³⁶ L. no. 78-763 of the 19th of July 1978, art. 33 al. 3. See above section 1.3 for the detailed conditions.

³³⁷ L. no. 47-1775 of the 10th of September 1947, art. 19*nonies* al. 4.

In French law, the cooperator is not entitled to any cooperative refund. It depends entirely on the decision taken by the members' meeting. Statutory provisions may grant a right to the cooperators, but they must then specify the limits of the mechanism.

Some special laws lay down a special procedure for the attribution of cooperative refunds. For craft cooperatives, for example, if cooperative refunds are allocated, the members' meeting may decide to allocate them not in money but in shares.³³⁸ The attractiveness of the mechanism is that the members receive an advantage and, in the meantime, the cooperative distributes no cash.

The distribution of interest to the shareholders is more detailed. The basic provision is article 14 of the 1947 Law, which sets a limitation on this interest: it shall not be higher than the average rate of return on private company bonds ('*taux moyen de rendement des obligations des sociétés privées*': TMO).³³⁹ This rate is stated by the Ministry of Economy, and depends on the economic situation. For several years, it was about 4% per year, but it has decreased in recent years and was about 2% in 2015. The principle of the restriction is the main reason to distinguish it from dividends. In fact, the distribution of interest is not a right for members, and statutes may even forbid it. However, this can also be considered a minimum remuneration for the available capital. The general cooperative allows, in the event of insufficient results for a financial year, the deduction of the monies required to complete the interest provided for by the statutes, either from the reserve funds, or from the results of subsequent financial years, without, however, going beyond the fourth subsequent ones.³⁴⁰ The restriction of remuneration makes investment in cooperative capital not very attractive, which is why the 1992 reform created new shares. The continuous decrease in the average rate of return on private company bonds made the situation unsustainable for cooperatives. An amendment to article 14, allowing the attribution of two points more than the TMO, was voted by the parliament at the end of 2015, but it has been considered illegal by the constitutional court, for procedural reasons. An analogous provision has been adopted.³⁴¹

To be noted is the particularity of workers' cooperatives. Indeed, their legislation explicitly excludes application of the maximum rate stated in the general cooperative law.³⁴² Instead, these special laws provide for a double proportionate maximum: the money allocated to the legal reserves, and the money distributed as cooperative refunds. Therefore, in practice, principally

³³⁸ L. no. 83-657 of the 20th of July 1983, art. 26.

³³⁹ L. no. 47-1775 of the 10th of September 1947, art. 14. In French cooperative law, this rate is better known as the TMO.

³⁴⁰ L. no. 47-1775 of the 10th of September 1947, art. 17.

³⁴¹ L. no. 2016-1691 of the 9th of December 2016 – art. 113, which has amended art. 14 of L. no. 47-1775 of 10th of September 1947.

³⁴² L. no. 78-763 of the 19th of July 1978, art. 33 al. 4.

because of the fiscal incentive to maximise the allocation to the reserves, the remuneration of capital is usually, in workers' cooperatives, 33% of surpluses. First, this may be far more than the interests distributed in other cooperatives. Secondly, the proportion established between the interest and surplus makes the mechanism comparable to dividends. This qualification is sometimes debated, even if there is no concrete consequence.³⁴³

General cooperative law provides for the use of the remainder, if the previous allocations have not exhausted the surpluses.³⁴⁴ The cooperative has two options: either allocation to a reserve, or attribution in the form of a subsidy, either to other cooperatives or unions of cooperatives, or to works of public or professional interest. This ensures the disinterested principle of cooperative functioning, since no distribution among members is possible, except the restricted legal provisions.

3.7. DISSOLUTION AND LIQUIDATION

There is no specific rule on dissolution in cooperative law except on the allocation of the net assets. Therefore, the applicable regulation is company law. Even farmers' cooperative law, usually more complete, provides for no additional precision. There are no specificities on causes of dissolution, nor about the applicable procedure. The only particularity comes from the variable capital regulation: whatever the form of the cooperative, the bankruptcy of one of its members cannot entail dissolution of the cooperative.³⁴⁵ The most common cause of winding-up is the bankruptcy of the cooperative itself; the decision of members and nullity of the cooperative are far less frequent causes. In the case of bankruptcy, the procedure is conducted before a judge, and the liquidator must be a person enrolled in the controlled profession of judicial liquidator. In the case of a liquidation decided by the members of the cooperative, there are no special rules. The only restrictions on being a designated liquidator are the prohibition for persons who have been sentenced and can no longer be director of a company.

The only cooperative rules on winding-up deal with the net assets. These net assets are defined, implicitly, as the assets remaining after clearance of the liabilities and redemption of the paid up capital. This definition complies fully with cooperative principles. No distribution is allowed among members, and the assets are attributed either to another cooperative or to a social and solidarity economy enterprise.³⁴⁶

³⁴³ D. HIEZ, n. 7 above, no. 123.15.

³⁴⁴ L. no. 47-1775 of the 10th of September 1947, art. 15.

³⁴⁵ C.com., art. L.231-8.

³⁴⁶ L. no. 47-1775 of the 10th of September 1947, art. 19.

Very few specifications are provided by special laws. The main derogation concerns the merchant cooperatives.³⁴⁷ The Minister of Commerce may allow these to distribute the net assets among their members. For a merchants' cooperative whose social object is to run the common administration of a commercial zone, in the conditions regulated in articles L.125-1 and by the Commercial Code, that distribution among members is even the rule.

4. EXTERNAL CONTROL

4.1. INTRODUCTION

Cooperative audit³⁴⁸ has developed in French law in different ways according to the type of cooperative type. There used to be almost no common rule on the circumstances in which audit was required, its consequences, or the status of the auditor, not even with regard to the necessity to carry out auditing. These differences can be explained by history, sometimes also because of the particular nature of the cooperative's activities. In the meantime, even if the cooperative audit was considered a support for the cooperative's development, its proximity to other mechanisms of control was highlighted. Moreover, the object of the audit was unclear, since there were very few provisions in the general cooperative law, and the provisions of special cooperative laws were various. In the 1980s, a first attempt was made to create a general legal regime,³⁴⁹ but the outcome was not very convincing.

One of the major points of the 2014 reform of cooperative law dealt with the cooperative audit.³⁵⁰ Full regulation was introduced into the general cooperative law.³⁵¹ Several points remain unclear, but, now, there is a general regime. It is too early to draw any conclusion on the consequences of the reform, but at least it provides more coherence.

4.2. EXTERNAL AUDIT AND COOPERATIVE AUDIT

4.2.1. *General Financial Audit*

By principle, French law provides the obligation to carry out an external audit, the substance of which is financial, as imposed by European law. First, every

³⁴⁷ C.com., art. L.124-14.

³⁴⁸ Designated as '*révision*' in French law.

³⁴⁹ D. no. 84-1024 of the 23rd of November 1984 on the cooperative auditing procedure for some categories of cooperatives.

³⁵⁰ L. no. 2014-856 of the 31st of July 2014, art. 25 I 3°.

³⁵¹ L. no. 47-1775 of the 10th of September 1947, arts. 25-1 ff.; D. no. 2015-706 of the 22nd of June 2015; D. no. 2015-800 of the 1st of July 2015.

enterprise must publish its accounts, with third parties allowed to access them.³⁵² Only some enterprises, depending on their size and/or their legal type, must carry out a financial audit by a statutory auditor. This general rule applies also to cooperatives. All public limited companies must carry out a financial audit, whereas only limited liability companies do so when they exceed some thresholds.³⁵³ Therefore, there is a difference between the cooperatives which must nominate a statutory auditor and others; and this may impact on the role of the cooperative audit.

4.2.2. *Financial Audit and Cooperative Audit*

Strictly speaking, cooperative audit exists only during the cooperative's life; it is termed 'révision'. Until 2014, most cooperatives were subject to the cooperative audit, except for banking cooperatives and merchants' cooperatives, as well as cooperative established under the single 1947-law, because that 1947-law contained no provision about it. The object of the cooperative audit was very ambiguous, since two different, if not opposite, purposes were provided for.

Most special cooperative laws, which provided for such an audit, defined it as the analytical study of the financial situation and the management ('gestion') of the cooperative. Note that the French word 'gestion', which is translated by 'management', refers to the financial dimension, not to the cooperative's features proper. Nevertheless, the regulation of this audit, provided by *décret* no. 84-1027 of the 23rd of November 1984, was more comprehensive. Its article 1 defined the cooperative audit as the critical and analytical study of the situation and functioning of the cooperative, based on its annual accounts, and considering the cooperative's specific features. The accounts are no longer the object of the control but only its basis. The second paragraph of the same article specifies the frame by stating the purpose of the audit: to verify compliance with cooperative principles, and especially to assess the participation of members in the cooperative's transactions and management. The Rural Code has been even more precise for agricultural cooperatives since 2006. It now defines the audit as control of compliance of their situation and functioning with cooperative rules.³⁵⁴ The terminology is not fully different but it does not refer at all to the financial aspects. That precision is the consequence of the clear distinction, provided for today, between the financial audit, regulated for agricultural cooperatives with some derogation to other enterprises, notably the authorisation for special cooperative federations to achieve the financial audit itself, and the cooperative audit.

³⁵² Some derogations are stated, however, for micro-enterprises: see above section 3.2.3.

³⁵³ C.com., art. L.223-35.

³⁵⁴ C.rur., art. L.527-1.

The regulation completely changed in 2014 because introduced into the general cooperative law was a provision which sought to cover the entire range of cooperatives. Whilst it does not provide an explicit definition of the cooperative audit, it serves its purpose: to verify compliance by the organisation and functioning of cooperatives with cooperative principles and rules and with members' interest, as well as with applicable special cooperative regulations, and, if useful, to propose corrections.³⁵⁵ Therefore, any financial consideration has been removed and the scope is now purely cooperative. The provisions of the decree of 1984 are implicitly abrogated, and, if they are still in force, the provisions of the Rural Code are no longer derogations but only specific modalities.

Some other types of control may occur before the creation of the cooperative, especially when the registration requires official assent. These are not cooperative audit as such, but they have several features in common with it.

4.2.3. *Assent for Creation and Cooperative Audit*

Audits before registration do not exist as such in company law, so this cannot be applicable to cooperatives either. The only control concerns evaluation of contributions in kind, for which a special auditor may be required. But this is not a general audit. The only general control concerns the very formal compliance with statutes.

Cooperative law does not provide for any audit as such before registration. However, some special cooperatives have to fulfil conditions to be registered as a cooperative. It is stated thus for farmers' cooperatives,³⁵⁶ fishing cooperatives³⁵⁷ and workers' cooperatives.³⁵⁸ Assent was required for the registration of a collective interest cooperative before its registration as a cooperative, but this requirement was abrogated in 2012.³⁵⁹ Indeed, it was argued that the requirement of an assent, because of its complexity and the risk of not being renewed after five years, was one of the reasons for the small number of these cooperatives created.

In these cases, there is no external audit as such, and its procedure is not regulated. The law specifies only the documents to be provided to the registering body. They are the statutes, the activity of the cooperative, the identities of the members of the board, and some details on the social capital and the value and

³⁵⁵ L. no. 47-1775 of the 10th of September 1947, art. 25-1 al. 1.

³⁵⁶ C.rur., art. L.525-1 and R.525-1 ff.

³⁵⁷ C.rur., art. L.931-11 C.rur. and decree no. 87-368 of the 1st of June 1987 on the assent and control of fishing cooperatives.

³⁵⁸ L. no. 78-763 of the 19th of July 1978, art. 54, and decree no. 93-1231 of the 10th of November 1993 on the recognition of the status of workers' cooperative.

³⁵⁹ See above section 1.2.1.2. The assent was given by the prefect, who determined whether the cooperative pursued social utility.

number of shares. Information concerning the existing subsidiaries must also be provided.

In the case of workers' cooperatives, some additional information is required:³⁶⁰ the number of shareholders employed in the cooperative³⁶¹ and the number of shares that they hold; the number of shares and the identity of the shareholder with the highest number of shares; a list of non-cooperator members, their identities and the number of shares that they hold and their voting rights.

In farmers' cooperatives, the cooperative must provide the list of co-operators and the qualities which entitle them to be such. But here the control is far more important, perhaps because the assent, given by the cooperative movement itself, resembles a cooperativism certificate. Therefore, the cooperative candidate provides two more documents: a report explaining the economic, social and territorial interest of the project, and a certificate provided by a federation competent for the cooperative audit assessing the compliance of the statutes with law, regulation and cooperative principles.³⁶²

The number and the nature of the documents required can only be understood by considering the purpose of the control. This depends on the special cooperative laws. For farmers' cooperatives, article L.525-1 of the Rural Code states that the registering body must assess compliance with the ratified statutes, as well as with cooperative rules and principles, but also coherence between the project and the economic context. The latter element is very important, since it confers on the registering authority the power to decide on the opportunity of the project.

The other special cooperative laws do not provide such details, and it must be concluded that the control is, therefore, only formal.

Another point must be discussed, because the assent comes after registration on companies' registries: the consequence of the refusal of assent. Indeed, legal personality is conferred by that registration, so that the assent or its refusal has no effect on it.

However, refusal of the assent certainly forbids use of the name of cooperative or, at least, of the special cooperative regulated by the special law. It also deprives the cooperative enterprise of the existing legal benefits, notably from tax law. Nevertheless, the Cour de Cassation has stated, concerning workers' cooperatives, that the status of the director remains regulated by the workers' cooperative legislation.³⁶³ In other words, if, despite the absence of assent, the cooperative carries out its activities, the absence of assent cannot bring any losses to third parties; cooperators are not likely to be considered as third parties.

³⁶⁰ D. no. 93-1231 of the 10th of November 1993, art. 2.

³⁶¹ Recall that, in workers' cooperatives, there is no rule on exclusivism.

³⁶² C.rur., art. R.525-3.

³⁶³ Cass. Soc., 23 September 1992, no. 90-40002, inédit (not published in the Bulletin des arrêts des chambres civiles de la Cour de Cassation).

More specific controls exist because of the follow-up by the registering body. The clearest concerns workers' cooperatives, for which registration on a list established by the Ministry of Labour can be revised each year. For that purpose, the workers' cooperative must provide annual information: first, an update of the information that it provided for the registration, and then the annual accounts and the cooperative audit report every five years.³⁶⁴ It must also provide information on the distribution of surpluses, and, if any, its subsidiaries. The mechanism is more flexible for agricultural cooperatives. No periodic information must be provided, but the registering body may, at any time, require a control, which can conclude with disqualification of the registration.

4.3. THE CONDITIONS FOR COOPERATIVE AUDIT

The main new provision is the obligation to conduct a cooperative audit for all cooperatives. It used to be considered an obligation specific to some cooperative families, whereas it now appears like a cooperative specificity, with particular consequences for all cooperatives.³⁶⁵ However, some cooperatives are exempted from the obligation. In practice, the general rule is that the cooperative audit is compulsory only for some cooperatives, by reference to some thresholds, but some special laws provide for a wider obligation. The thresholds for which a cooperative audit is optional, but otherwise provided by the statutes, concern the activity of the cooperative, and consist in the full balance sheet, pre-tax revenue, the number of employees or members.³⁶⁶ The decree states that the thresholds are two cooperative members and 30,000 euros of pre-tax revenue,³⁶⁷ but it provides special thresholds for most cooperatives: agricultural cooperatives,³⁶⁸ merchants' cooperatives,³⁶⁹ banking cooperatives,³⁷⁰ consumer cooperatives.³⁷¹ For some special cooperatives, the cooperative audit is compulsory, whatever their size: general interest cooperatives,³⁷² craft cooperatives,³⁷³ housing cooperatives.³⁷⁴ The regulation is somewhat more complex for workers' cooperatives; they are subject to the general principle, without any concrete threshold, but exempted if, being a limited liability company or a simplified stock company, they are

³⁶⁴ D. no. 93-1231 of the 10th of November 1993, art. 4.

³⁶⁵ See section 4.5.

³⁶⁶ L. no. 47-1775 of the 10th of September 1947, art. 25-1 al. 2.

³⁶⁷ D. no. 2015-800 of the 1st of July 2015, art. 1.

³⁶⁸ C.rur., art. R.525-9-1.

³⁶⁹ C.com., art. R.124-1.

³⁷⁰ C.mon.fin., art. R.512-1.

³⁷¹ D. no. 2015-800 of the 1st of July 2015, art. 5.

³⁷² L. no. 47-1775 of the 10th of September 1947, art. 19*duodecies*.

³⁷³ L. no. 83-657 of the 20th of July 1983, art. 29.

³⁷⁴ C.const.hab., art. L.422-3.

subject to other thresholds and have to designate a statutory auditor.³⁷⁵ This is confusing, since cooperative audit and audit by a statutory auditor do not pursue the same goal.

The cooperative audit must be conducted, in principle, each five years, provided that the statutes do not require a shorter term.³⁷⁶

Apart from this cooperative audit, public bodies perform a general control. The cooperatives must provide, on the request of their dedicated ministry, all justifications that facilitate the control of the compliance of their functioning with the law.³⁷⁷ These justifications mainly designate their accounts, but also any other useful document. The provision of wrong information is an offence committed by the managers of the cooperative. This rule is specific to cooperatives, and it is related to the special relation between them and the state, a mixture of mistrust and additional control because of their special advantages.

Besides the periodic audit, some occurrences require additional cooperative audits. First, a cooperative audit is compulsory if the cooperative is in deficit for three consecutive years, as well as if in one year the losses are more than half of the maximum amount reached by the capital since the creation of the cooperative.³⁷⁸ Secondly, the cooperative audit may be required by one-tenth of members, one-third of the administration board or the supervisory board members, the registering body, and the Ministry for Social and Solidarity Economy.³⁷⁹ Some special laws require additional cooperative audit. For instance, the agricultural cooperative legislation does so in two main situations. Two occurrences require the external audit: first, deciding on the incorporation of reserves into the capital;³⁸⁰ secondly, preparing for a merger.³⁸¹ Indirectly, the workers' cooperative regulation requires such an audit when a cooperative wants to convert into a company.³⁸²

4.4. THE COOPERATIVE AUDITING PROCEDURE

The cooperative law does not provide many details about the procedure; the decree does to some extent. The general cooperative law states that the president of the court may require designation of the auditor by the manager of the cooperative, under penalty.³⁸³ One may conclude that the auditor is designated

³⁷⁵ C.com., Art. L.221-9 and R.221-5.

³⁷⁶ L. no. 47-1775 of the 10th of September 1947, art. 25-1.

³⁷⁷ L. no. 47-1775 of the 10th of September 1947, art. 23.

³⁷⁸ L. no. 47-1775 of the 10th of September 1947, art. 25-1 al. 3.

³⁷⁹ L. no. 47-1775 of the 10th of September 1947, art. 25-1 als. 4-8.

³⁸⁰ C.rur., art. L.523-1.

³⁸¹ C.rur., art. L.526-4.

³⁸² D. no. 93-1231 of the 10th of 1993, art. 5.

³⁸³ L. no. 47-1775 of the 10th of September 1947, art. 25-2.

by the manager or the board, and not by the members' meeting. This is indirectly confirmed for agricultural cooperatives, since, in the case of merger, the auditor is designated by a common decision taken by all the boards.³⁸⁴ However, the general rule provided by the decree is designation by the members' meeting;³⁸⁵ the importance of the choice of the auditor justifies this solution.

The content of the audit is determined by its purpose. It consists in the critical and analytical examination of the cooperative's organisation and functioning with regard to cooperative principles as defined by the 1947 Law, and to applicable special cooperative rules, as well as with regard to analogous enterprises.³⁸⁶ In order to allow the auditor to achieve his/her mission, the same article obliges the cooperative to communicate all documents necessary for the examination.

The outcome of the audit is the drafting of a report, whose content is determined by the decree.³⁸⁷ Generally speaking, the report takes the specificities of the cooperative into consideration.³⁸⁸ More precisely, the report contains: a description of the development and methodology of the audit, a justified opinion on the compliance of the cooperative and, if the report concludes to the non-compliance, proposals for corrections and, if necessary, an order to comply. In the end, the law provides only that the audit report be addressed to the organs of administration and management, and to the central managing body for banking cooperatives.³⁸⁹ Moreover, it is accessible to all the members and debated in the members' meeting.

4.5. THE CONSEQUENCES OF COOPERATIVE AUDIT

The new provisions pay more attention to the follow-up on the audit. It seems that the legislature feared that the audit was not useful in and of itself, and that it tried to attribute positive consequences to it, through a complex procedure, if the auditor concludes that the cooperative does not comply with cooperative principles and rules and with members' interest, as well as with applicable special cooperative regulations.³⁹⁰ In this case, s/he may order the cooperative to comply. S/he transfers the proposal received from the cooperative as s/he did for his/her report. If s/he does not receive a significant answer, s/he submits the question to a higher cooperative organisation and, if insufficient, to the court, or to the registering body, the Ministry for Social and Solidarity Economy or

³⁸⁴ C.rur., art. R.526-8.

³⁸⁵ D. no. 2015-706 of the 22nd of June 2015, art. 10.

³⁸⁶ D. no. 2015-706 of the 22nd of June 2015, art. 11.

³⁸⁷ D. no. 2015-706 of the 22nd of June 2015, art. 12.

³⁸⁸ Legal form, size, organisation, activity, special regulation.

³⁸⁹ L. no. 47-1775 of the 10th of September 1947, art. 25-3.

³⁹⁰ L. no. 47-1775 of the 10th of September 1947, arts. 25-3 and 25-4.

the Ministry for the specific cooperative. These three latter bodies are entitled to order the compliance and, if there are no answers within one month, to call an extraordinary members' meeting, which will make the requisite decisions. In the end, if an appropriate functioning is not restored, dissolution may be pronounced. Undoubtedly, the legislature has sought to establish a balance between the autonomy of cooperatives and the necessary public control, but the outcome is far too unclear.

A second outcome has been established for the auto-operative audit, in relation to the inclusion of cooperatives among social and solidarity economy enterprises. For all these enterprises, a guide on good practice shall be adopted by the social and solidarity economy high council, and the members' meetings of all of them will debate on compliance of their enterprise with the guide each year.³⁹¹ This has been introduced to try to fill the gap observed between law and practice. And, cleverly, cooperatives have managed to replace that obligation with the mechanism of cooperative audit.³⁹² The solution is coherent and will exempt cooperatives from being subject to two procedures whose purposes are partly similar.

4.6. THE COOPERATIVE AUDITOR

The general cooperative law does not provide many details, nor do special laws. The recent decree,³⁹³ however, tries to give full regulation of this status, so that I will mainly refer to it in this section.

4.6.1. *The Selection of the Auditor*

The auditors are natural or legal persons selected by the Ministry for Social and Solidarity Economy for a five-year term, after the cooperation high council's advice, and enrolled on a list accessible through a website (art. 3). They must demonstrate their honesty and their competence (art. 1). This latter consists in three years of experience in cooperative law, economics, finance and management, although persons who have been the representative of a cooperative for two consecutive years are exempted from demonstrating their competence (art. 2 II). The required documents are listed (art. 2) and the procedure is fixed (art. 3). To be noted is that the assent may be attributed to a legal person, provided that it demonstrates its honesty, and the honesty and competence of the natural person that will conduct the audit on its behalf. An indirect control is regulated because, in the case of infringement of cooperative principles and rules or other conditions for assent, the ministry may remove its assent (art. 4).

³⁹¹ L. no. 2014-856 of the 31st of July 2014, art. 3.

³⁹² L. no. 47-1775 of the 10th of September 1947, art. 25-1 al. 2.

³⁹³ D. no. 2015-706 of the 22nd of June 2015.

4.6.2. *The Independence of Auditors*

The independence of auditors is probably the core concern of the legislature, since it is the only point about auditors mentioned in the law; no doubt it has been inspired by the regulation on the statutory auditor. The new legislative provisions do not specify the scope of the independence, but it refers to the decree to ensure that independence. To be noted is that, before the new law, that point was not mentioned. However, some provisions aimed at its achievement, such as the involvement, for the nomination of an auditor, of an independent commission to advise the ministry; removed with many other commissions, it no longer exists. Today, independence is mainly considered by reference to the audited cooperatives. First, it means incompatibilities for the position of auditor:³⁹⁴ prohibition of the auditor and the natural persons performing the audit on behalf of an auditor legal person, as well as the managers of such a legal person, being manager, member, employee or remunerated service provider for the cooperative during five years after the audit; prohibition on any manager, member, employee or remunerated service provider for a cooperative being designated as auditor or natural person auditing on behalf of a legal person auditor for the cooperative during five years after the end of its relationship. When designated, the auditor must check this incompatibility.

During the audit, the decree provides for other guarantees of independence concerning termination of the audit. The most important is the prohibition of the cooperative terminating the contract when it appears that the auditor is likely to conclude non-compliance and warn the competent organs and bodies.³⁹⁵ To ensure application of that provision, the decree defines the circumstances in which the auditor may him/herself terminate the contract: definitive termination of his/her professional activity, impelling personal motives such as health or conditions related to his/her independence or objectivity. In such cases, the auditor must submit a special report to the Ministry for Social and Solidarity Economy. Moreover, the audit is then performed by the supply auditor.³⁹⁶

The regulation of the independence of auditors is rather broad, and does not provide any guidance on the relationship between auditors and cooperative federations. It seems that auditors may be either fully autonomous from the cooperative organisations or connected with them. The regulation is different for agricultural cooperatives, since the Rural Code explicitly provides for an institutional relationship with cooperative organisations.

³⁹⁴ D. no. 2015-706 of the 22nd of June 2015, art. 6.

³⁹⁵ D. no. 2015-706 of the 22nd of June 2015, art. 8.

³⁹⁶ The supply auditor is designated by the members' meeting at the same time and with the same conditions as the auditor him/herself.

The audit is performed by special cooperative federations, and all agricultural cooperatives must be members of one such federation.³⁹⁷ This means that the financing of auditing federations comes primarily from the cooperatives themselves. However, attention is paid to the independence of the federation. First, to run a cooperative audit, a federation must be certified, through the National Cooperative Auditing Association, by the Minister of Agriculture.³⁹⁸ This National Association is important because it prepares the rules on auditing and studies all applications to the federation to be auditors. Moreover, it initiates any inquiry that may lead to removal of the assent. The statutes of this association are validated by the Minister of Agriculture.

The structure and organisation of the federation certified to run audits are specially regulated. Firstly, the federation must have a two-tier management system.³⁹⁹ The management board is only composed of auditors: that is to say, agricultural cooperatives (members) cannot be members. The supervisory board, which nominates the members of the management board, may only be composed of cooperatives that do not use the federation for the legal control of their accounts.⁴⁰⁰ Indeed, these federations are competent to perform cooperative audits, but also legal control of accounts,⁴⁰¹ usually performed by the statutory auditor. By derogation to their general regulation, statutory auditors may be employees of an agricultural federation; in this case, they are not allowed to perform any legal control of accounts outside the federation.

The general regulation provides no guidance, although disputes have arisen because of the lack of transparency on the assent of auditors and the free choice of cooperatives. Indeed, a strong financial interest is at stake, notably for the cooperative federations. The agricultural cooperative organisations found equilibrium through recognition of the link between federations and auditors, and regulated it. Certainly, in other cooperatives, publication of the list of auditors on a website of the Ministry for Social and Solidarity Economy will be an improvement.

5. COOPERATION AMONG COOPERATIVES

5.1. INTRODUCTION

In the past, French cooperative law did not enumerate cooperative principles, so that there was no general provision for cooperation among cooperatives.

³⁹⁷ C.rur., art. L.527-1.

³⁹⁸ C.rur., art. R.527-4.

³⁹⁹ C.rur., art. L.527-1.

⁴⁰⁰ C.rur., art. L.527-1.

⁴⁰¹ C.rur., art. L.527-1-1.

This has evolved with the law no.2014-856 of the 31st July 2014 on social and solidarity economy. It has included some principles in the general cooperative law, and one of them is cooperation with other cooperatives.⁴⁰² Nevertheless, regulations concerning organisations aimed at this cooperation have existed for a long time.⁴⁰³ These groupings are primarily aimed at cooperation among cooperatives, but they also enable wider cooperation among social and solidarity economy enterprises.

Two more points are important and will be developed. The first concerns mergers. Like capitalist enterprises, cooperatives take part in the general restructuration process, notably through mergers. The possibility for cooperatives to merge was briefly discussed in the 1980s because there were no general provisions regulating that mechanism. The solution was to refer to company law,⁴⁰⁴ since it is the applicable general law. Some special laws have specifically regulated the mechanism for special cooperatives, notably for agricultural cooperatives.⁴⁰⁵

The second point concerns the creation of subsidiaries. This is not related to the cooperation principle. However, it is a means which is used by cooperatives to create networks of enterprises and which raises specific difficulties. The regulation of these subsidiaries is related to most of the questions discussed in the previous sections, but it requires a synthetic approach.

5.2. COOPERATIVE UNION

Union among cooperatives is the technical tool with which to achieve inter-cooperation. It has been provided for in many special cooperative laws since the beginning of the twentieth century, and it was introduced into the general cooperative law in 1947.⁴⁰⁶ Nevertheless, this general rule is duplicated by many special provisions dealing with specific cooperative unions. This complexity does not preclude the creation of unions whose members come from different cooperative families.⁴⁰⁷ In practice, however, most unions are special unions, that is to say, with members from the same family.

Article 5 of the 1947 Law has been recently modified by the law on social and solidarity economy, but its general purpose and organisation remain similar. Despite the various questions involved, the provision is very brief and there is no case law to complete it. I will refer to provisions included in special cooperative

⁴⁰² L. no. 47-1775 of the 10th of September 1947, art. 1.

⁴⁰³ See section 5.2.

⁴⁰⁴ C.com., arts. L.236-1 ff.

⁴⁰⁵ C.rur., arts. L.526-3 ff., introduced by ordinance 2006-1225 of the 5th of October 2006.

⁴⁰⁶ L. no. 47-1775 of the 10th of September 1947, art. 5.

⁴⁰⁷ See section 5.2.2.

laws to clarify the general features. Attention will be paid to a special grouping, dedicated to the political representation of cooperatives: the cooperation high council.

5.2.1. *The Objective of the Union*

The objective of the union is defined very briefly: it aims at the management of their common interests and the development of their activities.⁴⁰⁸ Because of the speciality principle applicable to all groupings, which restrains the capacity of legal persons, discussion about the objective of the union deals mainly with the limits of that capacity. The new version of article 5, after the 2014 law on social and solidarity economy, has extended the objective of the union; previously, the management of common interests was the only possible objective. Also to be specified is that the development of members' activities was mentioned in several special laws, so that the addition to article 5 of the law of 1947 is rather a generalisation.

The first remark is that the union is fully targeted on its members, exactly like the primary cooperative itself. This appears in the letter of article 5, as well as through the cooperative nature of the union. Nevertheless, the situation differs, since the members of the union are themselves cooperatives, which means that their purpose is to provide services to their members. Therefore, in the end, the union must be fruitful for the primary cooperators.

To clarify the specific objective of the union, it may be compared to that of the economic interest grouping. The objective of this grouping is to facilitate or develop its members' activities.⁴⁰⁹ This is not so different from the union's objective. The most important difference is in the next paragraph, which states that the economic interest grouping's activity must be related to its members' economic activities and be accessory to them. Such restrictions do not apply to cooperative unions, and this allows for a wider objective, also taking into account the reference to management of the common interests of the union's members.

Many special cooperative laws deal with unions, however they are named, and provide some specifications. This is particularly the case of cooperative banks, on which primary banks have lost part of their power attributed to the secondary one, i.e. the regional or national union. In regard to agricultural credit, for instance, the law distinguishes between local and regional agricultural banks, and attributes the conclusion of loans to the local ones.⁴¹⁰ Nevertheless, in practice, the decision to grant a loan is no longer taken at the local level.

⁴⁰⁸ L. no. 47-1775 of the 10th of September 1947, art. 5.

⁴⁰⁹ C.com., art. L.251-1.

⁴¹⁰ C.mon.fin., arts. L.512-32 and L.512-33.

Moreover, because of general regulations on banks, the powers of the central managing body have become increasingly intrusive.

5.2.2. *The Membership of the Union*

5.2.2.1. Quality of Members

Prima facie, the members of unions are cooperatives, given that article 5 of the 1947 Law states that two cooperatives may create a union. Consequently, it is not possible for natural persons to join the cooperative. Even if the letter of article 5 mentions only the creation of a union, the objective of the latter does not favour any extension, so that no primary cooperator may join the union after its creation.

Nevertheless, the question is more complex in regard to investors. Article 5 of the 1947 Law does not deal with investors, but this also applies to many provisions of the 1947 Law, so that this silence is not very significant. Moreover, because unions are explicitly qualified as cooperatives, the cooperative law is applicable to them, provided that no special provision derogates. Therefore, article 3*bis* of the 1947 Law is applicable, and unions may welcome investors as members, within the limits defined by the general provision. These investors may be cooperatives, but also institutional investors, and even natural persons.

5.2.2.2. Multi-Purpose Unions

No other restriction is provided for in article 5 of the 1947 Law. Therefore, cooperatives may create a union regardless of their social object. In other words, the union may be multi-purpose, since cooperatives may have different objectives. Nevertheless, difficulties arise because of the provisions contained in the cooperative special laws. The Rural Code, for example, specifically regulates agricultural cooperative unions and defines their members as agricultural cooperatives.⁴¹¹ Because agricultural cooperative unions are subject to a special regulation, such as accounting and more generally financial aspects, it could be argued that the creation of a generic union may evade these rules. Apart from that such a generic union cannot be qualified as an agricultural cooperative union, and provided that there is no fraud, I do not consider the mechanism invalid. However, this choice may have negative consequences: for example, for agricultural cooperative unions, the impossibility to profit from tax exemptions.

Another interesting example is provided by merchants' cooperatives, for which the law distinguishes different unions, notably the union of merchants'

⁴¹¹ C.rur., art. L.521-1 al. 3.

cooperatives,⁴¹² whose members may only be merchants' cooperatives. However, this confirms the possibility to include different types of cooperatives when the union does not use the title reserved to special unions. The same remarks can be extended to all the specially regulated cooperative unions.

5.2.2.3. Cooperative Exclusivism

Exclusivism requires that cooperatives conduct cooperative transactions only with their members. French cooperative law provides for such a principle, but with some flexibility,⁴¹³ and cooperatives are allowed to obtain 20% of their revenues with non-members.

Cooperative unions are subject to the same rule. This means that the union may conduct cooperative transactions with its members, but not with primary cooperators, who are not members of the union.

Some special cooperative laws dealt with this point, especially when exclusivism was absolute;⁴¹⁴ in that case, it was explicitly stated that the cooperators of the union's members could benefit from the services provided by the union.⁴¹⁵ Full exclusivism has been removed, but, in the meantime, extension of the status of possible beneficiaries of cooperative transactions to the primary cooperators of the union's members has been generalised.⁴¹⁶ The solution is interesting, since it transforms the union from a technical, formal grouping of cooperatives into a wide community of cooperators. Moreover, it is more coherent with other provisions applicable to unions that deal with voting rights or cooperative refund.

5.2.2.4. Minimum Membership

Unions are cooperatives and, therefore, subject to the same regulation. The minimum membership is similar in consequence of the application of company law. Therefore, depending on the type of company chosen, the minimum number of members is two or seven.⁴¹⁷ Another special solution is stated by the Rural Code for agricultural cooperatives, since they are not subject to company law. Contrary to agricultural cooperatives, which require at least seven members, agricultural cooperative unions may be created with two cooperatives.⁴¹⁸

⁴¹² C.com., art. L.124-5.

⁴¹³ See above 1.2.2.

⁴¹⁴ C.com., art. L.124-2.

⁴¹⁵ C.com., art. L.124-5 al. 3.

⁴¹⁶ L. no. 47-1775 of the 10th of September of 1947, art. 5.

⁴¹⁷ See above 2.2.2.

⁴¹⁸ C.rur., art. R.522-1 2.

5.2.3. *Organs*

5.2.3.1. Representative of Members

The question of the representation of members is not really specific to unions, but only unions necessarily face it. By definition, a union is composed of legal persons which designate a representative to take part in the different organs of the union. There is no general provision on this matter. For agricultural cooperatives, the Rural Code states that, when an agricultural cooperative is a member of a union, its board designates the cooperative's representative in the union's organs from among its members.⁴¹⁹ Therefore, it ensures the cooperators' control of the union. If no representative is designated, the president of the cooperative is considered as such. Even if this solution is limited to agricultural cooperative unions, it may be generalised.

5.2.3.2. Members' Meeting

There is no specific statement on the organisation and composition of the members' meeting; it is simply similar to that of any cooperative, but the members are cooperatives. The only specification provided by the law concerns the date of the meeting, for the agricultural cooperative unions.⁴²⁰ Whereas the meeting must take place within six months from the end of the financial year for cooperatives, unions have three months more. The solution is coherent, since approval of accounts by the unions' meeting may depend on approval by the members of their own accounts. Nevertheless, this is a favour which cannot be extended to other cooperative unions, which remain subject to company law.

The closest attention is paid, regarding the members' meeting in unions, to voting rights. As cooperatives, the unions apply the one person/one vote principle.⁴²¹ Nevertheless, a special rule allows the cooperative statutes to adapt the principle to unions.⁴²² The statutes may derogate the principle, but they are only allowed to adopt two other mechanisms: voting rights may be proportionate, either to the number of the cooperatives' members, or to the cooperative transactions conducted by each cooperative with the union. These two mechanisms raise further questions. As regards the proportion to the cooperative's members, what constitutes a member may be discussed, the doubt being about the assimilation between members and cooperators. The question has

⁴¹⁹ C.rur., art. R.524-23.

⁴²⁰ C.rur., art. R.524-12.

⁴²¹ L. no. 47-1775 of the 10th of September 1947, art. 1.

⁴²² L. no. 47-1775 of the 10th of September 1947, art. 9.

been answered in some special laws, notably in the case of workers' cooperative unions, for which the law allows the statutes to proportion voting rights to the number of shareholders employed in each cooperative, i.e. cooperators. The solution must be approved. Nevertheless, another interpretation is required in general law since the law on social and solidarity economy. The new draft of the law of 1947 has retained in article 9 the word 'membre' for the calculation of voting rights in the unions, whilst the expression 'membre coopérateur' has been introduced into the third paragraph of article 1. Consequently, 'membre' seems to be distinct from 'membre coopérateur'. Literal interpretation therefore requires consideration be taken of all shareholders, including investor members.

Given that the statutes attribute voting rights in proportion to business, the question arises as to the meaning of 'business': is it any business run by the cooperative, or is it only cooperative transactions? Apart from practical considerations,⁴²³ the lack of debate is the consequence of the weakness of the notion of cooperative transaction in French law.

Several special laws add a limit on the proportionate attribution of voting rights. In workers' cooperative unions, for example, no member may have more than one-fourth or one-third of the voting rights in the members' meeting, depending on the type of company used by the union.⁴²⁴ For agricultural cooperative unions, the maximum of voting rights depends on the number of the union's members: if there are more than two members, no member may have more than two-fifths of the voting rights; if there are two members, none may have more than three-fifths.⁴²⁵

When the special laws explicitly allow participation in the union by non-cooperators, they often limit their voting rights in the members' meeting. For example, in agricultural cooperative unions, of which any non-cooperative legal person interested in the union's activity may be a member, they may not have more than 20% of voting rights in the members' meeting.⁴²⁶ Moreover, cooperators must hold more than half of the cooperative's capital.⁴²⁷

A similar solution applies to workers' cooperative unions, for which two-thirds of members must be either workers' cooperatives or workers' cooperatives' unions and federations, or credit unions for consumer cooperatives.⁴²⁸ Moreover, in these unions, workers' cooperatives must hold two-thirds of voting rights in the members' meeting.⁴²⁹

⁴²³ Usually, the union and its cooperators conduct only cooperative transactions together.

⁴²⁴ L. no. 78-763 of the 19th of July 1978, art. 47.

⁴²⁵ C.rur., art. L.524-4 al. 2.

⁴²⁶ C.rur., art. L.522-2.

⁴²⁷ C.rur., art. L.522-2-1.

⁴²⁸ L. no. 78-763 of the 19th of July 1978, art. 46.

⁴²⁹ L. no. 78-763 of the 19th of July 1978, art. 47.

5.2.3.3. Board

Voting rights in the members' meeting cannot be the only focus of union governance, since it does not fully ensure the control of cooperators. The other point concerns the board. The general cooperative law contains no provision on this matter, but some special laws do, and this should be generalised. As in the case of agricultural cooperatives, non-cooperators in an agricultural cooperatives' union, if any, must be present on the board; but they cannot designate more than one-third of the board members.⁴³⁰

5.2.4. *Financial Regulation*

Again, like cooperatives, unions are subject to financial cooperative regulation. I will only mention a few special rules. First, in agricultural cooperative law, the cooperatives, provided that they have half of the voting rights in a subsidiary,⁴³¹ must publish an account which takes these legal persons into consideration. This obligation is not applicable if the legal person is an agricultural cooperative union.⁴³² Secondly, a special rule is adopted for distribution of the cooperative refund in workers' cooperative unions.⁴³³ Indeed, the mechanism applicable to workers' cooperatives is inapplicable to the union. In workers' cooperatives, the cooperative refund is proportionate to the work performed by the employee in the cooperative.⁴³⁴ This is meaningless in the union, since the cooperatives, which are the members, may not work for the union. Therefore, by principle, cooperative refund is excluded. The statutes of the union may, nevertheless, replace it with an allocation of a part of surpluses to the members, in proportion to the amount of transactions with the union.

5.2.5. *Cooperation High Council*

The definition of the objective of the union does not exclude political representation of cooperatives, since this indubitably concerns common interests of cooperatives. Nevertheless, unions are considered like enterprises that pursue economic purposes. It is significant, for example, that the federations of cooperatives (or similar groupings) aimed at this political representation are generally associations.⁴³⁵

⁴³⁰ C.rur., art. L.524-1 al. 3.

⁴³¹ C.com., art. L.233-16.

⁴³² C.rur., art. L.524-6-2 al. 3.

⁴³³ L. no. 78-763 of the 19th of July 1978, art. 47.

⁴³⁴ Time or salary: L. no. 78-763 of the 19th of July 1978, art. 33 3°.

⁴³⁵ For example, for agricultural cooperatives: C.rur., art. R.527-1.

An official representative institution for cooperatives was established in 1919, but it became dormant. It was resurrected in 1976.⁴³⁶ Its advice was sometimes compulsory, notably in the procedure for conversion into a company.⁴³⁷ The law on social and solidarity economy has created a new provision concerning this cooperation high council in the general cooperative law.⁴³⁸ This innovation must be related to the creation of different institutions in social and solidarity economy, notably the social and solidarity economy high council.⁴³⁹ The organisation and functioning of the cooperation high council is specified by a decree.⁴⁴⁰ The cooperation high council should become more active because its competences have been extended. Its most important new power is, probably, the definition of principles for cooperative audit, and the drafting of its regulation.⁴⁴¹

5.3. SPECIAL GROUPINGS FOR WORKERS' COOPERATIVES

The question of the cooperative group has been debated for more than twenty years among cooperators. The question arose with the restructuring process, and, in parallel, the creation of capitalist subsidiaries. Some people contested this evolution and called for an authentic cooperative group. Despite the findings of various studies, no precise proposal has emerged. The difficulty stems, at least partly, from the desire of the cooperators to remain within the cooperative area, as well as to benefit from capitalist techniques, such as control. Some innovations have been introduced into cooperative law, but they remain very narrow. For example, in agricultural cooperative law, some aspects of groupings have been regulated, but they concerned mainly accounting.⁴⁴²

The social and solidarity economy law created a new grouping inspired by cooperative debates dedicated to workers' cooperatives. It created a new title 4 in the 1978 law: the workers' cooperative grouping.⁴⁴³ I will describe only its main features.

The purpose behind creation of such a grouping is to enable a cooperative in the grouping to control another cooperative in the same grouping.⁴⁴⁴ Indeed, the hope of the legislature is that the capitalist subsidiaries created by some big workers' cooperatives will be converted into workers' cooperatives integrated into such a grouping. But, this possibility is subject to several conditions.

⁴³⁶ Decree no. 76-356 of the 20th of April 1976.

⁴³⁷ L. no. 47-1775 of the 10th of September 1947, art. 25.

⁴³⁸ L. no. 47-1775 of the 10th of September 1947, art. 5-1.

⁴³⁹ L. no. 2014-856 of the 31st of July 2014, art. 4.

⁴⁴⁰ D. no. 2015-562 of the 20th of May 2015.

⁴⁴¹ L. no. 47-1775 of the 10th of September 1947, art. 5 al. 4.

⁴⁴² C.rur., art. L.524-6-2. D. HIEZ, n. 7 above, no. 151.32.

⁴⁴³ L. no. 78-763 of the 19th of July 1978, arts. 47bis to 47septies.

⁴⁴⁴ L. no. 78-763 of the 19th of July 1978, art. 47quinquies.

Of course, a grouping must be created, since a cooperative can control another cooperative only if they are members of the same grouping. The creation of such a grouping requires several conditions. At this stage, an observation is necessary. Despite the word 'grouping', which may be compared to other legally defined groupings, this new legal entity is not a legal person. Title 4 of the 1978 law does not define it, nor considers it as a cooperative. Moreover, the law does not provide for any object, nor create any organ. Hence the grouping is something like an abstraction created by a contract, with consequences on the relationships among its members, but with no substantial existence as such.

Two workers' cooperatives are necessary to create a grouping.⁴⁴⁵ These cooperatives must modify their statutes in order to adopt similar provisions on participation in the grouping, membership, distribution of surpluses, forms of control within the grouping.⁴⁴⁶ Any future modification of these provisions of the statutes are only possible if accepted by all the members of the grouping.⁴⁴⁷ The decision to be part of the grouping is taken by an extraordinary members' meeting. After the creation of the grouping, any new application can only be approved if all the present members agree.⁴⁴⁸

The grouping as such has no specific power, nor any general strategy. It sets only the boundaries of a category of cooperatives, which may have special relationships among themselves. One of them can control the others. But this requires some reciprocity. Indeed, the employees of the controlled cooperatives must hold, as a whole, a proportion of voting rights in the controlling cooperative higher than a percentage defined in cooperatives' statutes.⁴⁴⁹ Because this proportion is freely defined in the statutes, nothing forbids a low one. Surprisingly, the minimum voting rights are considered with regard not to the cooperators, but to the employees of the cooperatives.

It is difficult to anticipate the success of this new grouping. Nevertheless, it seems to be a mechanism closely connected to the needs of workers' cooperatives. Consequently, it is not likely to be a basis for definition of a cooperative group.

5.4. COOPERATION BEYOND COOPERATIVES

The political edification of social economy in France in the 1980s has meant the creation of diverse institutions, notably the social economy union. Grounded on cooperation principles, it may be completed by a new grouping which would tackle the question of control.

⁴⁴⁵ L. no. 78-763 of the 19th of July 1978, art. 47*bis*.

⁴⁴⁶ L. no. 78-763 of the 19th of July 1978, art. 47*bis*.

⁴⁴⁷ L. no. 78-763 of the 19th of July 1978, art. 47*ter*.

⁴⁴⁸ L. no. 78-763 of the 19th of July 1978, art. 4 *ter*.

⁴⁴⁹ L. no. 78-763 of the 19th of July 1978, art. 47*quinquies*.

5.4.1. *Social Economy Union*

The social economy union is a grouping introduced into the law of 1947 in 1985.⁴⁵⁰ Its purpose is to facilitate cooperation among diverse enterprises, mainly from the social and solidarity economy. This union is inspired by the cooperative union. It is even stated that these unions are subject to the 1947 Law,⁴⁵¹ whereas they are not cooperatives as such. They have the same objective as cooperative unions; their organisation and functioning are similar. Their particular feature is their membership. Members may be any enterprise, cooperative or not, from the social and solidarity economy, and even companies. No limitation is set on the capital. But voting rights are regulated: 65% of voting rights in the members' meeting must be held by cooperatives, mutuals, associations or foundations, and, if so provided by the statutes, other not-for-profit enterprises.⁴⁵² Apart from this frame for the members' meeting, the functioning of the board is also regulated:⁴⁵³ half of boards and supervisory committees' members must be representatives of the former enterprises.

Despite their attractiveness in books, there are, in fact, few social economy unions. Nevertheless, the legislature has used that legal model to regulate certain activities in housing. First, it has created a social economy union for housing.⁴⁵⁴ Its objective is general interest⁴⁵⁵ and closely involves the state. Secondly, and more recently, the legislature has created⁴⁵⁶ the social economy union for access to ownership.⁴⁵⁷ Its purpose is to promote and organise the policy on access to ownership. Again, its connection with general interest implies the strong involvement of the state. I will not detail its organisation and functioning, but only show that this legal person, even if not widely used in practice, may be indirectly useful.

5.4.2. *Social and Solidarity Economy Enterprise Groups*

This section deals only with prospective provisions. It has been proposed, by amendment to the social and solidarity economy law, to create a new group of social and solidarity economy enterprises, but the proposal has not been adopted. However, I mention it because it gives an idea of the expectations concerning creation of a group dedicated to social and solidarity economy enterprises. This group would be regulated in the 1947 Law on cooperation by

⁴⁵⁰ L. no. 47-1775 of the 10th of September 1947, arts. 19*bis* ff.

⁴⁵¹ L. no. 47-1775 of the 10th of September 1947, art. 19*bis*.

⁴⁵² L. no. 47-1775 of the 10th of September 1947, art. 19*bis* al. 3.

⁴⁵³ L. no. 47-1775 of the 10th of September 1947, art. 19*bis* al. 4.

⁴⁵⁴ C.const.hab., art. L.313-16 ff.

⁴⁵⁵ Notably the use of a compulsory tax paid by employers for housing.

⁴⁵⁶ Ord. no. 2006-1048 of the 25th of August 2006.

⁴⁵⁷ C.const.hab., art. L.215-5 ff.

adding two articles: 19*quarter* and 19*quarter b*. This group would be a special addition to the social economy union, more than being a distinct grouping. Its main objective is to allow coherent coordination of the different members of the union through contractual arrangements. This coherence may derive from exclusive control as defined by the Code of Commerce: common structures able to impose a common commercial or financial policy, the common composition of the organs of the member's union and the union itself. The mechanism of cooperative refund would not be applicable in such unions. The group would have common accounting and reporting obligations.

5.5. SUBSIDIARIES

Generally, subsidiaries are not linked with inter-cooperation. However, there is certainly a relationship between the increasing number of subsidiaries created by cooperatives and the low number of unions or other groupings aimed at inter-cooperation. The recourse to subsidiaries by cooperatives started in the 1980s, and generated a debate in the 1990s. Some prominent authors, specialists in cooperative law, claimed the illegality of such mechanisms in the cooperative world, notably because of the reference, in the legal definition of cooperatives, to the involvement of cooperators in achievement of the cooperative's objective.⁴⁵⁸ Some other prominent authors, more specialised in company law, solicited by cooperative institutions for their opinion, defended the validity of the mechanism, notably because of the liberalism principle, which allows everything that is not forbidden.

During the same period, the number of subsidiaries grew very rapidly, mainly in the most economically dynamic sectors, such as merchants' cooperatives and agricultural cooperatives. The Rural Code already regulated that mechanism by requiring authorisation from the public body or its information, depending on the subsidiary's activity.⁴⁵⁹ Its regulation also meant the validity of the mechanism. But the question was more debatable when cooperative law was silent, as in the case of merchants' cooperatives. Because of the uncertainty of the point and its economic importance, the legislature modified the definition of the cooperative object:⁴⁶⁰ it simply added that the activities may be undertaken by the cooperative 'directly or indirectly', i.e. through subsidiaries.⁴⁶¹ Because

⁴⁵⁸ F. ESPAGNE, 'Restructuration des coopératives, filialisations, fusions, prises de participation', lettre du 8 août 2001; S. DE VENDEUIL, 'Les entreprises coopératives se modernisent', JCP E, 1993, act. 100213.

⁴⁵⁹ C.rur., art. L.523-5, now abrogated.

⁴⁶⁰ C.com., art. L.124-1.

⁴⁶¹ S. GRANDVUILLEMIN, 'Le statut de coopérative de commerçants détaillants: déclin ou renouveau?', JCP E, 2003, comm. 759 p. 844.

no other modification has been made to the law, there is, for merchants' cooperatives, no regulation of the mechanism, which is, therefore, totally free.

In the absence of any specific provision, the only possible limit on the creation of subsidiaries is the existence of a fraud. Cooperative practitioners generally agree that fraud certainly exists when all the assets, and notably the brand, have been transferred from the cooperative to the subsidiary. The judgement is far too vague, technically insufficient, and requires deeper research. This matter is, to my mind, extremely important, since it questions the practical pertinence of inter-cooperation itself.

