



# LEGAL FRAMEWORK ANALYSIS

## NATIONAL REPORT: BELGIUM

ICA-EU PARTNERSHIP



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## I. Introduction

Cooperatives benefit from regulations that acknowledge their specificities and ensure a level playing field with other types of business organisations. The research falls within the scope of the knowledge-building activities undertaken within the partnership for international development signed in 2016 between the European Commission and the International Cooperative Alliance (ICA), which aims to strengthen the cooperative movement and its capacity to promote international development worldwide. It demonstrates that the absence of a supportive legal framework for cooperatives, or the presence of a weak or inadequate legal framework, can negatively impact cooperatives and their evolution. In contrast, the existence of supportive regulations can foster cooperatives' creation and strengthening, acting as a driver of sustainable development. For this reason, further knowledge and evaluation of cooperative legislation will become a tool for ICA members, cooperators worldwide, and other key stakeholders such as policymakers and cooperative legal scholars. With greater knowledge and access to a global, country-based legal framework analysis, ICA members can advance their advocacy and recommendations on the creation or improvement of legal frameworks, document the implementation of cooperative legislation and policies, and monitor their evolution.

The main objectives of the legal framework analysis are:

- to gather general knowledge of the national cooperative legislation and of its main characteristics and contents, with particular regard to those aspects of regulation regarding the identity of cooperatives and its distinction from other types of business organizations, notably the for-profit shareholder corporation (the *sociedad anónima lucrativa* in Spanish; the *société anonyme à but lucratif* in French);
- to evaluate whether the national legislation in place supports or hampers the development of cooperatives, and is therefore “cooperative friendly” or not, and the degree to which it may be considered so, also in comparison to the legislation in force in other countries of the ICA region (or at the supranational level);
- to provide recommendations for eventual renewal of the legal frameworks in place in order to understand what changes in the current legislation would be necessary to improve its degree of “cooperative friendliness”, which is to say, to make the legislation more favourable to cooperatives, also in consideration of their specific identity.

This report presents the main results of research to examine and analyse cooperative law in Belgium, its general context and main elements, including how adequate it may be for cooperatives. Finally, conclusions and recommendations for the improvement of the legal framework are considered.

Section II of this report is based upon work authored by Thierry Tilquin and Maïka Bernaerts, lawyers (LIME Law), supported and coordinated by staff from Cooperatives Europe and the ICA. They also authored Sections III, IV and V, with some input from two ICA members of Belgium:

Cera SC, one of the largest cooperatives in Belgium (with some 400,000 members) which is active in the banking and insurance sectors as one of the main shareholders of KBC Group

SA (directly and indirectly through KBC Ancora SA) and which promotes and supports cooperative entrepreneurs<sup>1</sup>; and

Febecoop ASBL, an intersectoral platform whose fundamental objective is the defence, promotion and development of the cooperative business model and whose mission is embodied in three essential strategic axes: (i) defence and promotion of cooperative entrepreneurship; (ii) development of expertise on the cooperative model; and (iii) operational support for the development of cooperative projects<sup>2</sup>.

Note that for some footnotes, the text has been condensed. The full information of the footnote provided by the authors, including official French and Flemish titles and text from legislation, and additional points are available in an Annex at the end of this report. This is highlighted to readers by the note “[See Annex]” in the relevant footnotes.

## II. National cooperative law: Belgium

### i. General Context

**General legal framework** – The Belgian legislator has recently implemented a radical reform of the legislation applicable to all companies and associations, under the Act of 23 March 2019 introducing the Belgian Code of Companies and Associations and miscellaneous provisions<sup>3</sup>, as recently amended by an Act of 28 April 2020<sup>4</sup> (hereafter the “CCA”).

The legal framework is completed by the Royal Decree of 29 April 2019 executing the Belgian Code of companies and associations<sup>5</sup> and the Act of 17 March 2019 adapting some tax measures to the new Belgian Code of Companies and Associations<sup>6</sup>.

The new Code contains, among others, the main legal rules applicable to all cooperatives (Book 6 of the CCA), certain rules relating to the European Cooperative Societies (SCE), as provided for by Regulation (EC) 1435/2003<sup>7</sup> – Book 16 of the CCA) and the rules applicable to ‘accredited cooperative societies’ (Book 8 of the CCA).

**Accredited cooperative societies** – A cooperative society can be “accredited” pursuant to article 6:1, §3, CCA which refers to Book 8 of the Code, which itself then refers to the following specific legislations: the Act of 20 July 1955 establishing a National Council for Cooperation,

<sup>1</sup> For more information, see Cera website: <https://www.cera.coop/nl/cooperaties> (consulted on 2 June 2020).

<sup>2</sup> For more information, see Febecoop website: <https://febecoop.be/> (consulted on 2 June 2020).

<sup>3</sup> ‘Law of 23 March 2019 introducing the Code of societies and associations’ Belgian Monitor (here after: M.B.), 4 April 2019, pp. 33239 et seq. [See Annex]

<sup>4</sup> ‘Law transposing Directive (EU) 2017/828 of the Parliament and of the Council of 17 May 2017’ and introducing various provisions relating to companies and associations, M.B., 6 May 2020, pp. 30488 et seq. [See Annex]

<sup>5</sup> ‘Royal Decree of 29 April 2019 implementing the Code of societies and associations’, M.B., 30 April 2019, pp. 42246 et seq. [See Annex]

<sup>6</sup> ‘Law of 17 March 2019 adapting certain federal fiscal dispositions to the new Code of societies and associations’, M.B., 10 May 2019, pp. 45450 et seq. [See Annex]

<sup>7</sup> Regulation (EC) nr. 1435/2003 of the Council of 22 July 2003 on the statute for a European cooperative society, O.J.E.U., L 207, 18 August 2003, pp. 1-24 (hereafter the “Regulation 1435/2003”).

Social Entrepreneurship and Agricultural Enterprise<sup>8</sup> (hereafter the NCC), whose purpose is to spread the cooperative principles and preserve the cooperative ideal<sup>9</sup>, the Royal Decree of 8 January 1962 fixing the accreditation conditions for groups of cooperative societies and cooperative societies<sup>10</sup> and the Royal Decree of 28 June 2019 fixing the accreditation conditions as agricultural enterprise and social enterprise<sup>11</sup>.

These special laws apply in addition to the general legislation, meaning that every cooperative must comply with the rules of the Code and can furthermore choose to follow complementary special legal rules to become an “accredited” cooperative.

Three accreditations specific to cooperatives exist: the simple accreditation (‘accredited cooperative society’ – CCA, art. 8:4)<sup>12</sup>, the accreditation as a social enterprise (‘cooperative society accredited as a social enterprise’ – CCA, art. 8:5, § 1) or the double accreditation (CCA, art. 8:5, §2). Only cooperatives can request these accreditations<sup>13</sup>.

The legislator has created a specific accreditation as ‘social enterprise’ to respond to the expectations of the social economy sector. The requirements which a cooperative society must meet when requesting an accreditation as social enterprise are very similar to those for the accredited cooperative society (conditions related to voting rights, directors’ remuneration, limited dividend, distribution of profits and liquidation surplus, drawing up of an annual special report and accreditation request), except as for its principal purpose: the principal purpose of an accredited cooperative society must concern its shareholders whereas the main purpose followed by a cooperative society accredited as a social enterprise must be ‘to generate a positive societal impact for the people, the environment or the society in the general interest.’<sup>14</sup>

**ICA Principles in Belgian law** – The Belgian legislator, by implementing the new Code of Companies and Associations, adopted a new approach towards the cooperative society: the intention was to reserve the form of cooperative society to entities based on the ‘cooperative model’<sup>15</sup> and to introduce, in this context, a definition inspired by Regulation 1435/2003. This

<sup>8</sup> Law of 20 July 1955 establishing a National Council of Cooperation, Social Entrepreneurship and Agricultural Enterprise, *M.B.*, 10 August 1955, pp. 4865 et seq. [See Annex]

<sup>9</sup> The Cooperative National Council’s mission is to “study and promote all measures specific to principles and cooperative ideal as defined by the International Cooperative Alliance (ICA)”. It also “submits all opinions and proposals regarding questions related to the cooperative activity to a minister, within its field of competence, to the Central Economic Council, upon request or on its own initiative by way of reports expressing the different points of view expressed among its members” (art. 1, 9° and 2° of the Act of 20 July 1955). [See Annex]

<sup>10</sup> ‘Royal Decree of 8 January 1962 fixing conditions of accreditation for groups of cooperative societies and for cooperative societies’, *M.B.*, 19 January 1962, pp. 398 et seq. [See Annex]

<sup>11</sup> ‘Royal decree of 28 June 2019 fixing conditions of accreditation as agricultural enterprise and as social enterprise’, *M.B.*, 11 July 2019, pp. 70056 et seq. [See Annex]

<sup>12</sup> The National Cooperation Council accredits cooperative societies, affiliated to a national group or not, whose articles of association and actual functioning comply with the provisions of Article 5 of the Act of 20 July 1955 and with the rules specified in Article 1, §1, of the Royal Decree of 8 January 1962 [See Annex]. The accredited cooperative group or the accredited cooperative society that no longer abides by those principles is dissolved or is struck off the list of accredited cooperative groups and accredited cooperative societies (art. 7 of the Royal Decree of 8 January 1962).

<sup>13</sup> Two other accreditations are provided by Book 8 of the CCA (the accreditation as a ‘forestry group’ and the accreditation as an ‘agricultural enterprise’) but these two last accreditations can be requested by any company and not only cooperative societies.

<sup>14</sup> Art. 6, § 1, 1° and 2° of the Royal Decree of 28 June 2019 fixing conditions of accreditation as agricultural enterprise and as social enterprise and art. 8:5, § 1, 1°, of the CCA.

<sup>15</sup> Act introducing the Code of Companies and Associations, Explanatory Memorandum, *Doc. Parl.*, Ch. Repr., sess. Ord. 2017-2018, nr. 54-3119/001, 4 June 2018, p. 11 (“the cooperative society recovers its initial particularity, namely running an enterprise on the grounds of the International Cooperative Alliance (ICA) cooperative model, which can also be found in Regulation nr. 1435/2003”), p. 14 (“dedicated to companies leading an enterprise on

is a major novelty: indeed, before this reform, any company could be created in Belgium under the legal form of a cooperative society, without needing to follow any cooperative principles or model (see *infra*, II, ii).

However, despite that change of paradigm, no article of the CCA expressly requires compliance with the ICA Principles. The ICA Principles are in reality only expressly mentioned in the parliamentary preparatory works of the Code of Companies and Associations<sup>16</sup> and the concrete effect of this reference to the ICA Principles is quite limited: it could be used to verify if a company created under the form of the cooperative society is based on the 'cooperative model' but it could well be defended by said cooperative society that it does follow some kind of 'cooperative model' even without applying all the ICA Principles.

This can however encourage companies willing to adopt the cooperative society form to respect them or at least a part of them to confirm their 'cooperative purpose'. Indeed, according to a technique of transparency and information, rather usual in Belgian company law, the legislator ensures that the new definition is respected by providing the obligation to express in writing, in their articles of association<sup>17</sup>, the cooperative purpose and the values of each entity, which reinforces the idea that the cooperative society adheres to the cooperative ideal.

The conditions to become an accredited cooperative society may be compared to the ICA Principles but are not completely similar (open door principle, conditions related to voting rights, directors' remuneration, distribution of profits and liquidation surplus, drawing up of an annual special report and accreditation request).

## ii. Specific elements of the cooperative law

### a) Definition and objectives of cooperatives

**Definition** – The modification of the definition of the cooperative society is the main change brought by the Code of Companies and Associations in comparison with the existing system in Belgian law: the new definition aims at limiting the use of the cooperative form to companies inspired by the traditional cooperative model, "driven by a cooperative ideal", while, at the same time, introducing elements in terms of purpose, organisation and the relationship with its shareholders (CCA, art. 6:1).

The definition of the cooperative society under the terms of Article 6:1 of the CCA includes the following components, that can helpfully be compared to the definition specified in Article 1 of Regulation 1435/2003:

*the grounds of the cooperative ideal as specified in ICA's principles*" ), pp. 25, 190 and 91 and Report drawn up on behalf of the economic and commercial law Commission, *Doc. Parl.*, Ch. Repr., sess. Ord. 2018-2019, nr. 54-3119/011, 14 November 2018, pp. 11, 135 and 138.

<sup>16</sup> Act introducing the Code of Companies and Associations, Explanatory Memorandum, *Doc. parl.*, Ch. repr., sess. ord. 2017-1018, nr. 54-3119/001, 4 June 2018, p. 11.

<sup>17</sup> or "statutes".

CCA (art. 6:1, § 1)	Regulation 1435/2003 (art. 1, § 3)
Principal purpose – “shall have as its principal purpose the satisfaction of its shareholders or third interested parties’ needs and/or the development of their economic and social activities”	Principal object – “shall have as its principal object the satisfaction of its members’ needs and/or the development of their economic and social activities”
Double quality – “in particular through the conclusion of agreements with them to supply goods or services or to execute work of the kind that the cooperative society carries out or commissions”	Double quality – “in particular through the conclusion of agreements with them to supply goods or services or to execute work of the kind that the SCE carries out or commissions” <sup>18</sup>
	Interactions between cooperative societies – “may also have as its object the satisfaction of its members’ needs by promoting, in the manner set forth above, their participation in economic activities, in one or more SCEs and/or national cooperatives”
Interactions with mother companies and third parties – “may also have as purpose the satisfaction of its shareholders or mother companies and their shareholders or third interest parties’ needs”	
Subsidiaries – “whether or not through the intervention of subsidiaries”	Subsidiaries – “an SCE may conduct its activities through a subsidiary”
Stakeholding – “to have as its object to promote their economic and/or social activities by a participation in one or more other companies”	

The Belgian legislator has been influenced by the European legislator which has underlined that “a European cooperative society [...] should have as its principal object the satisfaction of its members’ needs and/or the development of their economic and/or social activities, in compliance with the following principles : its activities should be conducted for the mutual benefit of the members so that each member benefits from the activities of the SCE in accordance with his/her participation [...]” (recital nr. 10 of Regulation 1435/2003).

**Objectives** – The adopted definition of the ‘cooperative society’ under the CCA is essentially oriented towards the double quality of shareholders and towards the contractual relationship between the society and its shareholders. The definition of the cooperative and of its purpose is however broader than just focused on members. The purpose of a Belgian cooperative

<sup>18</sup> Art. 1, § 4 of Regulation 1435/2003: “an SCE may not extend the benefits of its activities to non-members or allow them to participate in its business, except where its statutes provide otherwise”.

society can therefore be broader than the mere promotion of its members and the members can be clients (users, recipients of the services or products) of the cooperative society but also workers, providers, investors, etc.

A cooperative can thus pursue objectives other than member-promotion and act in the interest of non-members or the community at large. The definition allows for this interpretation ('(...) shall have as its principal purpose the satisfaction of its shareholders or third interested parties' needs' – CCA, art. 6:1) and it is even an obligation for cooperative societies accredited as social enterprises: the principal purpose of a cooperative society accredited as a social enterprise must be 'to generate a positive societal impact for the people, the environment or the society in the general interest.' (CCA, art. 8:5, § 1, 1° and art. 6, § 1, 1° and 2° of the Royal Decree of 28 June 2019 fixing the accreditation conditions for agricultural enterprise and social enterprise). A cooperative society pursuing such a purpose has in theory no obligation to be accredited as a social enterprise and could therefore be an unaccredited cooperative society (in reality, it will probably request said accreditation as it can offer some advantages, for example in terms of public subventions).

Furthermore, a cooperative society can also be an investment vehicle. The Belgian legislator even expressly requires some investment vehicles to be incorporated as cooperative societies: the regulated real estate investment company with social purpose ('*société immobilière réglementée à but social*') created by the Act of 22 October 2017<sup>19</sup> must take the form of a cooperative society. It must exclusively carry out an activity consisting in detaining and providing end users with real property for housing and caring for the elderly and disabled people, as well as hosting and teaching children and pupils<sup>20</sup>, while obtaining financing only from investors<sup>21</sup>. In this model, the primary beneficiaries of the society's activities are therefore not its shareholders but rather the community at large.

As a rule, a Belgian cooperative society can carry out any economic activity (there are several Belgian cooperative societies active in banking and insurance activities).

**Differences to other organisations** – The main legal characteristics that distinguish cooperative societies from other types of limited liability companies are, as detailed, the definition of the cooperative society and the rather simple rules concerning the entry and exit of shareholders.

The cooperative society must also be distinguished from non-profit organisations: as it is qualified in Belgian law as a 'company' (rather than a non-profit organisation), '[o]ne of its purposes is to distribute or procure for its associates a direct or indirect patrimonial benefit.' (CCA, art. 1:1), in other words pursuing profit.

<sup>19</sup> Act of 22 October 2017 modifying the Act of 12 May 2014 related to regulated real estate investment companies M.B., 9 November 2017, p. 98035 et seq.

<sup>20</sup> Articles 76/5, 76/6 and 76/7, § 2, of the Act of 12 May 2014 related to regulated real estate investment companies.

<sup>21</sup> Article 76/3 of the Act of 12 May 2014 states that the regulated real estate investment company with social purpose 'collects its financial resources exclusively by an offer made to persons belonging to the following categories: 1° retail investors, (a) provided that the maximum amount that can be subscribed within the offer is limited so that at the end of the offer, any cooperator who has subscribed to the offer does not own shares in the regulated real estate investment company with social purpose for a nominal value not within the limits determined by the King, by a decree taken on the advice of the FSMA, and (b) provided that the King has exercised this authorisation. When doing so, the King shall take into account the investors' interests, namely considering that the shares of the regulated real estate investment company with social purpose are not admitted to trading on a regulated market; 2° eligible investors'.

## b) Establishment, cooperative membership and governance

**Establishment** – Belgian cooperatives are not registered in a specific way, they are subject to the same legal obligations as any other company in Belgium (*i.e.* being registered in the register of legal entities, being registered with the Crossroads Bank for Enterprises, publishing its incorporating act and articles of associations in the Official Belgian Gazette, etc.).

Every cooperative society must be incorporated through the adoption of a notarised deed (incorporating act) by a minimum of three members (natural or legal persons) (CCA, art. 6:3). Article 6:126 CCA provides that *'[i]f, during its existence, a cooperative society has fewer than three shareholders, any interested party may apply for its dissolution before the business court of the company's registered office. The court may grant the company a period of time to regularize the situation by taking another legal form or by bringing the number of shareholders back to three.'*

**Cooperative membership: admissions** – The principle of new admissions in a cooperative society, under Belgian law, is one of admitting only existing shareholders (should they want to acquire new shares) and third parties meeting the criteria specifically defined in the articles of association of the cooperative (CCA, art. 6:105 and 6:106). The articles of association may furthermore provide for admission procedures<sup>22</sup>.

The admission rules and the 'open door' principle therefore vary for each cooperative depending on its articles of association. However, should an applicant fulfilling the statutory requirements of any cooperative request their admission, it must be automatically accepted except if the articles of association provide for a possibility to refuse an applicant. If the articles of association provide for such a possibility, the refusal must be motivated (CCA, art. 6:106).

**Cooperative membership: shares transfer** – In principle, shares are freely transferable between shareholders (CCA, art. 6:52) whereas transfers to third parties are subject to the following conditions: the proposed acquirer must belong to one of the categories referred to in the articles of association and must meet the statutory requirements to become shareholder (CCA, art. 6:54).

**Cooperative membership: exit of members** – Any member is in principle free to resign, with the exception of founders who cannot do so before the third financial year of the society (CCA, art. 6:120) and, on the contrary, the cooperative is also in principle free to exclude a member (CCA, art. 6:123).

The implementation of these principles is subject to modalities that must be detailed in the articles of association of the cooperative. Indeed, the Code of Companies and Associations offers great freedom to the authors of articles of association: the main rules provided for are only applicable by default and allow (i) to plan for any resignation 'window' (or limitation of the resignation possibilities), (ii) to freely define the effective date of this resignation, (iii) to freely define the time for paying the withdrawal amount or (iv) to determine the withdrawal amount (CCA, art. 6:120, § 1).

<sup>22</sup> However, it can not be provided that such an admission would lead to amending the articles of incorporation: CCA art. 6:106.

Concerning the removal of a member by the cooperative itself, such a decision must be based on 'serious grounds' ("*justes motifs*") or on other grounds detailed in the articles of association and shall follow a strict procedure defined by the CCA (CCA, art. 6:123).

Other cases of exit are mentioned by the Code: death, bankruptcy, liquidation, collective debt settlement and judicial protection of a shareholder entail in principle the application of the rules provided for the resignation of a shareholder, it being understood that the articles of association can provide for specific rules. The same is applicable should a member lose their 'quality', *i.e.* if a person needs to be a client to be admitted as a member, the loss of the quality of client automatically induces the loss of their quality as a member. This must however be provided by the articles of associations, along with the modalities of its application.

**Governance: voting rights** – The default rule in Belgian law is that each share results in one vote (CCA, art. 6:41). The articles of association may however provide for certain voting arrangements, it being understood that each share must have at least one voting right (issuing shares without voting right is forbidden - CCA, art. 6:19 and 6:40).

The articles of association could also provide for a vote per member ('one member, one vote' principle) but it is not the per default rule and it is considered as a 'restriction', a 'maximum' set by the cooperative society (as a person detaining several shares can only vote once) and as such it must in principle apply to all members (CCA, art. 6:44).

The principle of multiple voting is admitted<sup>23</sup> and several categories of shares could be created, meaning that some members of the cooperative society could be treated differently (some having three votes while others have only one for example or voting ceilings based on the qualities of shareholders could be provided). The Code does not provide any particular criterion for multiple voting rights (*e.g.* based on capital or based on the transactions of the member with the cooperative society) nor does it provide for a limit on the number of votes per member.

One must therefore review the applicable rules in the articles of association of a cooperative.

**Governance: administration regime** – The administration regime of a Belgian cooperative society is very flexible. The default rule states that a cooperative society is administered by one or more directors, appointed by the general shareholders' meeting, whether or not acting as a college (collegial decisions). These directors may be natural or legal persons, shareholders/members or not (CCA, art. 6:58, §1, indent 1). There is therefore no obligation to have a board of directors. Instead, one person could manage a cooperative society on their own. The articles of association can provide for many different systems.

The administrative body may furthermore entrust one or more persons, each acting individually, jointly or collegially, with the company's day-to-day management as well as with the representation of the company regarding its management (CCA, art. 6:67, indent 1).

The administrative body may also (i) create, on the basis of mandates and delegation under ordinary law, an executive committee which will, in principle, have larger powers than those of the day-to-day management, or (ii) create various advisory committees, as the case may be, emanating from the board of directors or other interested parties, such as users, investors

<sup>23</sup> Act introducing the Code of Companies and Associations, justification of the amendment nr. 542 of O. Henry et al., *Doc. parl.*, Ch. repr., sess. ord. 2018-2019, nr. 54-3119/021, 26 February 2019, p. 71.

or scientists whose role and organisation will be defined in its articles of association or in its internal rules<sup>24</sup>.

**Governance: control** – The administrative body is controlled by the general shareholders meeting. For example, once a year, the general meeting must decide on the discharge of responsibility the administrative body of the company. The general meeting may also, at any time, remove any director/member of the administrative body from its position (some articles of association might provide for some specific procedures or indemnities in some cases) or summon them before the court in the event of misconduct, violation of the articles of association or of the Code of Companies and Associations.

Indeed, “*Each member of the administrative body or delegate to the day to day management shall be held accountable to the legal entity for the proper execution of the mandate conferred in them*” (CCA, art. 2:51) and they are “*liable to the legal person for misconduct in the performance of their duties*” and “*to third parties in so far as the misconduct is of an extra-contractual nature*” (CCA, art. 2:56). They are however only liable “*for decisions, acts or conduct which manifestly exceed the margin within which normally prudent and diligent directors in the same circumstances could reasonably be expected to hold a different opinion.*” (CCA, art. 2:56). Complementary ‘standards’ could also be provided for in the articles of association of a cooperative.

### c) Cooperative financial structure and taxation

**Terminology and absence of a minimum share capital** – The Belgian legislator has abolished the legal concept of ‘capital’ for cooperative societies under the Code of Companies and Associations (as well as for the limited liability companies). The cooperative society has hence ‘equity capital’ (“*capitaux propres*”), constituted by contributions in cash or in kind by its members (including in the form of works or services).

This terminology modification was accompanied by the deletion of a minimum share capital, meaning that a cooperative society could theoretically be created with an ‘equity capital’ of one euro. The minimum capital requirement is now replaced with an obligation for the founders to ensure that the company disposes of ‘*equity capital which, having regards to other sources of financing, is sufficient in the light of the planned activity*’ (CCA, art. 6:4). The amount of equity capital is not determined by law: founders are totally free to decide but they must be able to justify ‘*the amount of initial equity capital in the light of the company’s planned activity for a period of at least two years*’ in a financial plan (CCA, art. 6:5). Other financing sources than merely the contributions of members can also be considered (bank credit, bond issues, crowdfunding, etc.).

**Members’ contributions** – The rules governing the members’ contributions are to be adopted in each cooperative society articles of association, meaning that members could contribute equally to the equity capital but it could also be provided that some members contribute more than others (for example based on their quality or on the volume of transactions with the cooperative society). Examples in Belgian cooperatives often show that investors (whose

<sup>24</sup> Act introducing the Code of Companies and Associations, justification of the amendment nr. 542 of O. Henry et al., *Doc. parl.*, Ch. repr., sess. ord. 2018-2019, nr. 54-3119/021, 26 February 2019, p. 72.

existence is expressly mentioned in the parliamentary papers of the Code of Companies and Associations<sup>25</sup>) or legal persons must contribute for a greater amount than the natural persons buying the products or using the services of the cooperative (its 'clients').

**Form and types of securities** – A Belgian cooperative society may only issue registered shares with voting rights and bonds (CCA, art. 6:19).

An extension exists for some specific cooperatives: cooperative societies which are regulated companies in terms of Article 3, 42°, of the Law of 25 April 2014 on the status and control of credit institutions and stock exchange companies<sup>26</sup>, 'may issue any other security that their legal status allows them to issue, whether dematerialised or not' (for example 'debt securities allowed by their status'<sup>27</sup>). A second extension has been provided by the Law of 28 April 2020 for cooperative societies subject to a 'special regulatory status'<sup>28</sup> that can issue other securities if:

- (i) their issuance is authorised by their regulatory status (*i.e.* by another legislation than the CCA<sup>29</sup>) and
- (ii) it is compatible with their cooperative finality<sup>30</sup>. It is uncertain which cooperative societies, except for cooperative societies active in the insurance sector<sup>31</sup>, may meet these criteria as of today but it might open possibilities in the future.

**Shareholders' rights and obligations** – Each shareholder's rights and obligations are in principle determined based on the shareholder's contributions and on the statutory and conventional provisions. The founders and shareholders' freedom of choice is almost unlimited and is encouraged by a legal regime almost entirely only applicable by default, meaning that many different regimes of profits allocations might be created (distributions based on the contributions subscribed, on the volume of transactions, on the profits, etc.), including some recognising "patronage refunds" ('*ristournes*'/'*restorno*'s'). This concept is however neither recognised nor defined by law.

The articles of association must stipulate whether each share gives the right to an equal part of the profits and balance of liquidation proceeds or whether different systems are applicable (it is often the case in the articles of association of existing cooperative societies), meaning that members and third parties can easily know which regime is applicable.

**Reimbursement** – Should a member wish to exit the cooperative or should the cooperative be dissolved, said member may have their contribution returned. Again, this shall depend on

<sup>25</sup> Act introducing the Code of Companies and Associations, justification of the amendment nr. 542 of O. Henry et al., *Doc. parl.*, Ch. repr., sess. ord. 2018-2019, nr. 54-3119/021, 26 February 2019, p. 71.

<sup>26</sup> *M.B.*, 7 May 2014, pp. 36794 et seq.

<sup>27</sup> Free translation of "*titres de dette permis par leur statut*": Act introducing the Code of Companies and Associations, justification of the amendment nr. 542 of O. Henry et al., *Doc. parl.*, Ch. repr., sess. ord. 2018-2019, nr. 54-3119/021, 26 February 2019, p. 69.

<sup>28</sup> Free translation of "*statut réglementaire spécial*": article 120 of the Law of 28 April 2020 amending art. 6:19 CCA.

<sup>29</sup> Act transposing Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and including miscellaneous provisions relating to Companies and Associations, justification of the amendment nr. 129 of P. Prévot et al., *Doc. Parl.*, Ch. repr., sess. ord. 2019-2020, nr. 55-0553/004, 28 January 2020, p. 143.

<sup>30</sup> Article 120 of the Law of 28 April 2020 amending article 6:19 CCA.

<sup>31</sup> These societies are directly mentioned in the parliamentary proceedings: Act transposing Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and including miscellaneous provisions relating to companies and associations, justification of the amendment nr. 129 of P. Prévot et al., *Doc. Parl.*, Ch. repr., sess. ord. 2019-2020, nr. 55-0553/004, 28 January 2020, p. 143.

the regime provided by the articles of association of the company which can provide for any system (no reimbursement, reimbursement of a specific smaller amount, reimbursement based on the value of the company, etc.). The default rule provides for a reimbursement of the amount actually paid up and not yet reimbursed for the concerned shares without, however, being superior to the amount of the net asset value of these shares as it results from the last approved annual accounts (CCA, art. 6:120, §1, 5°).

It must also be noted that the articles of association may stipulate that part of the equity capital is not available for distribution, including reimbursement (there are indeed no legal obligations to create reserve funds). Prescribing for unavailable equity capital allows for limits to financial outflows in the interest of the cooperative society.

**Dissolution or conversion** – There is no specific regime for cooperative societies' dissolution or conversion into another type of business organisation: they are subject to the same rules as any other company governed by Belgian law. These rules provide for a reimbursement of the contributions and for a distribution of the residual assets to the members of the company. A cooperative society could however provide in its articles of association that the equity capital and residual assets shall be distributed to another organisation disinterested or not or to other activities that it wants to promote.

The only exception concerns the cooperative societies accredited as social enterprises: 'the remaining assets after discharge of liabilities and repayment of the amount actually paid by the shareholders and not yet repaid on the shares, is reserved for an allocation that corresponds as closely as possible to its purpose' (CCA, art. 8:5, §1, 3° and art. 6, § 1, 8°, of the Royal Decree of 28 June 2019).

The conversion of a cooperative society into another type of business organisation does not entail any change in the legal personality of the company: it is merely substituted by a new form. Besides, it does not entail any change in existing equity capital and assets (CCA, art. 14:1 and 14:2).

**Tax regime** – Except for accredited cooperatives that are subject to some specificities, the tax regime applicable to cooperative societies is identical to the regime applicable to other limited liability companies. It is therefore neither supportive nor non-supportive of cooperatives as such and it does not target their particular legal nature.

The 'patronage refunds' are treated, on a tax level, differently than dividends. The refunds are deducted from turnover and are thus not taken into account for the final determination of profits. The 'dividends' of the cooperative society are treated the same way as in any other company.

As an exception, accredited cooperatives benefit, amongst others, from a withholding tax exemption on some distributed dividends.

### iii. Other specific features

#### d) Cooperative internal and external control and cooperation among cooperatives

**Cooperative external control** – Cooperatives are not subject to external control by the State or any other public authority in a different way than any other company except when it is an ‘accredited cooperative society’. In that case, it is controlled by the Federal Public Service for Economic Affairs when requesting the accreditation and regularly thereafter to verify that they still meet the criteria to be accredited. Should they not, they may be deregistered by the Federal Public Service for Economic Affairs.

**Cooperative internal control** – For all cooperatives in general, should they not qualify as a small company under Belgian law (*i.e.* fulfilling more than one of the following criteria: having an annual average of 50 employees, an annual turnover of EUR 9 million and a total balance sheet of EUR 4.5 million), they must appoint an external auditor to audit/monitor their financial situation, annual accounts and the regularity of several other procedures relating to accounts (CCA, art. 3:72 and 3:73).

The articles of association of a cooperative society could in addition provide for the creation of a committee or for other specific rules designed to organise a self-control system.

**Cooperation among cooperatives** – The Belgian legislator has tried to take into account, at least partly, the reality of existing Belgian cooperative societies and in particular groups of cooperative societies or the so-called “second degree” cooperative societies (defined by Regulation 1435/2003 as cooperative societies constituted by members which are themselves cooperative societies<sup>32</sup>). The idea that a cooperative society can pursue the satisfaction of mother companies rather than only the satisfaction of its own direct shareholders is therefore provided by article 6:1 of the CCA. A cooperative society can also conduct its activities through the intervention of subsidiaries.

In Belgium, some credit institutions are constituted under the form of public limited company (in principle to allow them to meet the regulatory requirements specific to their sector more easily) and provide services to users who do not become directly its shareholders but become shareholders of a cooperative society which is itself shareholder of the public limited company. Services are then offered by a subsidiary of the cooperative society and not directly by the cooperative society itself.

Belgian cooperative societies can also support the action of another cooperative society by becoming a shareholder: the shareholding society could hence become an “investor” cooperator or a supplier cooperator for example.

These various possibilities are similar to the ICA’s principle of ‘cooperation between cooperative societies’ without the Belgian legislator expressly imposing them to do so (it is merely a possibility mentioned by the law).

<sup>32</sup> Recital nr. 9 of Regulation 1435/2003.

### III. Degree of “cooperative friendliness” of the national legislation

This section, which draws upon the input of contributing member organisations, examines a number of issues and attempts to provide a basic assessment on the degree of cooperative friendliness of the national legislation. In general, both contributing member organisations (Cera and Febecoop) and the national legal experts suggest that the new Code of Companies and Associations is a positive step forward for cooperative societies that aim to abide to the cooperative principles. In the view of the national experts, this is due to the greater inclusion of links to international cooperative principles than the previous legislation and hence the Code aims at limiting the use of the cooperative form to those societies that are inspired by the cooperative model.

However, one perspective to highlight from contributing members is that the definition of cooperative societies under the CCA could be clarified further. In other words, under the current circumstances the new restrictions on the use of the cooperative society form is considered to be inadequate. For instance, based on the interpretation given by the parliamentary preparatory works, liberal professions such as lawyers, doctors and architects would be unable to operate as cooperative societies. It is however argued in this respect that liberal professions should not be prohibited from using the cooperative society form.

It is recognised that liberal professions have used the cooperative model in other contexts. For instance, CECOP, the European Confederation of Industrial and Service Cooperatives represents over 1000 cooperatives of self-employed producers, including doctors and lawyers. Other legal commentators at the international level refer to cooperatives of all kinds of professions including cooperatives of the liberal professions<sup>33</sup>.

Regarding the ICA principles, it is important to acknowledge the diversity of views from the membership organisations on the role of the principles and their employment within the code. On the one hand, there is some support for the explicit reference to the ICA principles in the code. Explicit reference would provide additional clarity to the existing reference in the parliamentary papers which may be considered confusing in light of the potential for dissolution of a cooperative society that does not conform to Article 6:1 of the CCA. On the other hand, it is also recognised that flexibility can be left to cooperative societies on this matter, by allowing them to implement the ICA principles according to their specific context. From this perspective, the ICA principles on the cooperative identity act as a guide for cooperatives but are not translated into legally binding regulations.

It should be noted that as a consequence of the entry into force of the new Code of Companies and Associations, there will be a reduction in the number of cooperative societies in Belgium. The change of the definition of the cooperative society implies that many ‘false’ or ‘pseudo’ cooperative societies (i.e. societies organised under the legal form of a cooperative society, but which do not respect any cooperative principle) will have to transform into another legal form. Contributing member organisations note that the likely reduction of the number of

<sup>33</sup> H. Henry, *International Labour Organisation, Guidelines for cooperative legislation / by Hagen Henry; International Labour Office. – 3rd ed. Rev.*, Geneva: ILO, 2012.

cooperative societies may have a detrimental impact on the future visibility and presence of the cooperative model in the long term.

Taking this into account, this reduction will also inevitably be accompanied by a rise in 'quality': all remaining cooperative societies will be following a cooperative purpose and their specific nature as cooperatives will be taken into account. The national experts note that the exact number of cooperatives remaining in Belgium following these changes is difficult to predict at this stage.

With regard to the degree of cooperative friendliness, much is still to be determined. The new Code of Companies and Associations was recently adopted (1 May 2019) and entered into force on 1 January 2020 for existing companies. It is therefore difficult to draw concrete conclusions and identify best practices or examples that can assess the code since its entry into force. In view of the contributing member organisations, both consider the new Belgian cooperative legislation to be '*partially cooperative friendly*'. This stands in contrast to the old law which was very limited in its cooperative friendliness. Importantly, as mentioned above, both membership organisations consider the new law to be an improvement on the old law.

With regard to specific obstacles, the national experts do not identify any precise legal obstacles or barriers to their knowledge for the development of cooperatives or legal provisions that would damage cooperatives or hamper their development. For Cera, the existence of a level playing field with other types of business organisations is particularly important.

Regarding the promotion of cooperatives, Belgian legislation is not structured to promote cooperative societies or projects, and their promotion is, to the knowledge of the national experts, not part of any specific public function. There are, for the time being, no specific incentives to cooperative societies in the legislation on public procurement or any other legislation that the authors are aware of with the exception of some specific subventions reserved to the 'social economy' and thus to the cooperative societies accredited as social enterprises. Cooperative societies are however promoted by the NCC, a public organisation whose mission is to promote the cooperative principles and to preserve the cooperative ideal, or by specific advocacy from other cooperative representative organisations. Both organisations wish to highlight the role of the NCC, and further argue that more work is needed to promote cooperative societies in Belgium.

In regard to national legal frameworks for cooperatives that can serve as a source of inspiration a contributing member organisation, Febecoop, highlights that French law could be a potential source of inspiration, especially its common framework for all cooperative societies which, from Febecoop's perspective, is considered to contain adequate reference to cooperative principles, combined with special cooperative laws for different types of cooperatives.

## IV. Recommendations for the improvement of the national legal framework

According to the legal experts, one main problem remaining in the new Code is the '*numerus clausus*' on the types of securities that can be issued by cooperative societies (*i.e.* shares with voting rights and bonds). It is suggested, in this context, to offer cooperatives societies the same possibilities that exist for the two other limited liability companies organised under Belgian law (the public limited company and the private limited liability company) for which no '*numerus clausus*' or limit exists, meaning they can issue any kind of securities. Though not all instruments might be either needed or even appropriate (such as warrants), this would indeed enable cooperative societies to issue specific securities, for example in order to attract investors, while offering their usual shares along with voting rights to their members-users, for example.

Another recommendation concerns the accreditations available to cooperative societies which should be clarified: three different accreditations (the regular accreditation or CS, the accreditation as a social enterprise SE, and the double accreditation CSSE) are organised but the conditions attached to the regular accreditation and to the accreditation as a social enterprise are too similar to really distinguish between them, except for the "main objective" they are pursuing.

Indeed, the main difference (and, actually, the only real one) between the accredited CS and the CS accredited as SE, is the main purpose followed by the concerned company, which is either directed towards its own shareholders or towards a broader positive societal impact.

It is possible to request a double accreditation, however for accredited CS, the main purpose is '*to provide its shareholders with an economic or social benefit to satisfy their professional and private needs*'<sup>34</sup> while for the CS accredited as SE, the main purpose is '*to generate a positive societal impact for man, the environment or society*'<sup>35</sup> and cannot be '*to provide its shareholders with an economic or social benefit to satisfy their professional and private needs*'<sup>36</sup>. This obviously might be a source of difficulties of interpretation as it seems that a company having a double accreditation cannot, as a main purpose, follow the purpose relating to its shareholders, meaning then that there seems to be no difference between the 'CS accredited as an SE' and the 'accredited CSSE' (*i.e.* the cooperative society having a double accreditation). A modification of the requirements for each accreditation, or of the advantages each accreditation could however take place in the future and might clear this difficulty.

<sup>34</sup> Art. 8:4 of the CCA; free translation of "(...) [*dont le but principal consiste*] à procurer à ses actionnaires un avantage économique ou social, pour la satisfaction de leurs besoins professionnels ou privés ».

<sup>35</sup> Art. 8:5, §1, first indent, 1°, of the CCA; free translation of "(...) *de générer un impact sociétal positif pour l'homme, l'environnement ou la société* ».

<sup>36</sup> Art. 8:5, §1, last indent, of the CCA; free translation of "(...) [*dont le but principal ne consiste pas*] à procurer à ses actionnaires un avantage économique ou social, pour la satisfaction de leurs besoins professionnels ou privés ».

Furthermore, specific consequences and incentives should be attached to these accreditations, for example to offer these specific societies better means and more visibility (e.g. specific public funding, a logo that could be widely recognised, wider tax incentives, etc.).

In view of the contributing member organisations, a number of recommendations are noted.

Febecoop state that Book 6 of the CCA covering cooperatives should be amended, so that the ICA principles are enforced by the law. With regard to the role of the NCC, Febecoop state that the body should retain its existing authority, but with less emphasis on the cooperative principles and a greater focus on ensuring that cooperatives submit to a cooperative audit. They also wish to see the new '*entreprise sociale*' status abolished, due to potential confusion following the introduction of the new law, and the above noted similarities between each status.

From the perspective of Cera, the importance stems from a correct understanding of the law, and of the ICA principles rather than an emphasis on specific legal changes. For Cera it is important to apply the principles in a way that aligns with the specific context of the cooperative. Cera is opposed to a strict enforcement of the ICA principles in the law, yet recognises that an improved understanding of the law will therefore be crucial for the law to be effective<sup>37</sup>.

It can also be noted that the contributing member organisations support the existence and further facilitation of workers' cooperatives. As noted above, Cera also specifically recommends the inclusion of worker cooperatives for liberal professions.

## V. Conclusion

The recently amended Belgian Code of Companies and Associations includes the legal rules that are applied to cooperatives. In general, the Code is considered as a flexible legal text, leaving considerable space to the founders and shareholders to formulate the articles of association according to their specific context in key aspects of the cooperative society's function, such as in the profit allocation or regarding their governance scheme.

The main change introduced by this new Code was the modification of the definition of the cooperative society. The new definition aims at limiting the use of the cooperative form to companies inspired by the traditional cooperative model, "driven by a cooperative ideal", while, at the same time, introducing elements in terms of purpose, organisation and the relationship with its shareholders. The latter is expected to reduce the number of "pseudo" or "false" cooperatives and strengthen the commitment of the existing and new ones to the cooperative ideal.

Overall, both contributing member organisations and the national legal experts consider the amended Code as a positive step forward for cooperative societies that aim to abide to the

<sup>37</sup> As the ICA Guidance Notes on the Cooperative Principles state: "our values are immutable, but the application of our Cooperative Principles require constant re-appraisal in light of economic, social, cultural, environmental, and political change and challenge". See ICA, Guidance Notes on the Cooperative Principles, 2015, pg.2.

cooperative principles. Nevertheless, there is a considerable room for the Code's further improvement, such as: a) by clarifying the cooperative societies' definition where noted above b) by reforming the existing accreditations, the conditions and consequences of which seem rather similar, c) by expanding the thus far limited access of cooperative societies to financing instruments providing for the same possibilities offered to other limited liability companies. More specifically, Febecoop emphasised on the need to enforce the ICA principles by law, as well as to introduce cooperative audit and abolish the social enterprise statute. In addition, from Cera's perspective, a better understanding of the recent legal changes as well as the facilitation of worker cooperatives, including for liberal professions, were also recommended. They also aim for improved understanding of the ICA principles and of their concrete translation and application within the specific context of the cooperative.

## August 2020

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## VI. Annex

Footnote	Applicable note :
3	<p>Official French: <i>Loi du 23 mars 2019 introduisant le Code des sociétés et des associations et portant des dispositions diverses</i></p> <p>Official Dutch: <i>‘Wet van 23 maart 2019 tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen’</i></p>
4	<p>Official French: <i>‘Loi transposant la directive (UE) 2017/828 du Parlement européen et du Conseil du 17 mai 2017 modifiant la directive 2007/36/CE en vue de promouvoir l’engagement à long terme des actionnaires, et portant des dispositions diverses en matière de sociétés et d’associations’</i></p> <p>Official Dutch: <i>‘Wet tot omzetting van richtlijn (EU) 2017/828 van het Europees Parlement en de Raad van 17 mei 2017 tot wijziging van richtlijn 2007/36/EG wat het bevorderen van de langetermijnbetrokkenheid van aandeelhouders betreft, en houdende diverse bepalingen inzake vennootschappen en verenigingen’</i></p>
5	<p>Official French: <i>‘Arrêté royal du 29 avril 2019 portant exécution du Code des sociétés et des associations’</i></p> <p>Official Dutch: <i>‘Wet van 23 maart 2019 tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen’</i></p>
6	<p>Official French: <i>‘Loi du 17 mars 2019 adaptant certaines dispositions fiscales fédérales au nouveau Code des sociétés et des associations’</i></p> <p>Official Dutch: <i>‘Wet van 17 maart 2019 tot aanpassing van bepaalde federale fiscale bepalingen aan het nieuwe Wetboek van vennootschappen en verenigingen’</i></p>
8	<p>Official French: <i>‘Loi du 20 juillet 1955 portant institution d’un Conseil national de la Coopération, de l’Entrepreneuriat social et de l’entreprise Agricole’</i></p> <p>Official Dutch: <i>‘Wet van 20 juli 1955 houdende instelling van een Nationale Raad voor Coöperatie, het Sociaal Ondernemerschap en de Landbouwonderneming’</i></p>
9	<p>The following text in footnote 9 is a free translation provided by the authors of this report, the official French follows:</p> <p>English translation: “study and promote all measures specific to principles and cooperative ideal as defined by the International Cooperative Alliance (ICA)”; Official French: <i>“étudier et promouvoir toutes mesures propres à</i></p>

	<p><i>les principes et l'idéal coopératif tels que définis notamment par l'Alliance coopérative internationale</i></p> <p>English translation: “submits all opinions and proposals regarding questions related to the cooperative activity to a minister, within its field of competence, to the Central Economic Council, upon request or on its own initiative by way of reports expressing the different points of view expressed among its members”; Official French: <i>“adresser à un ministre et, dans les matières de son ressort, au Conseil central de l'Économie, soit à leur demande, soit d'initiative et sous forme de rapports exprimant les différents points de vue exposés en son sein, tous avis ou propositions concernant des question relatives à l'activité coopérative”</i></p>
10	<p>Official French: <i>‘Arrêté royal du 8 janvier 1962 fixant les conditions d'agrément des groupements de sociétés coopératives et des sociétés coopératives’</i></p> <p>Official Dutch: <i>‘Koninklijk besluit van 8 januari 1962 tot vaststelling van de voorwaarden tot erkenning van de groeperingen van coöperatieve vennootschappen en van de coöperatieve vennootschappen’</i></p>
11	<p>Official French: <i>‘Arrêté royal du 28 juin 2019 fixant les conditions d'agrément comme entreprise agricole et comme entreprise sociale’</i></p> <p>Official Dutch: <i>‘Koninklijk besluit van 28 juni 2019 tot vaststelling van de voorwaarden van de erkenning als landbouwonderneming en als sociale onderneming’</i></p>
12	<p>The report authors expand on the conditions for the NCC accrediting cooperative societies, namely that they have voluntary and open membership; their main purpose of providing shareholders with an economic and social benefit; their equality or limitation of voting rights in the general shareholders meeting; the setting of economic advantages; and the use of a part of the resources for informing and training its members.</p>
20	<p>Official French: <i>‘Loi du 22 octobre 2017 modifiant la loi du 12 mai 2014 relative aux sociétés immobilières réglementées’</i></p> <p>Official Dutch: <i>‘Wet tot wijziging van de wet van 12 mei 2014 betreffende de gereglementeerde vastgoedvennootschappen’</i>, M.B., 9 November 2017, p. 98035 et seq.</p>