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"PRINCIPLES" PROJECT**

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NEW STUDY GROUP ON EUROPEAN COOPERATIVE LAW: "PRINCIPLES" PROJECT

Gemma Fajardo, Antonio Fici, Hagen Henry, David Hiez, Hans-H. Münkner, Ian Snaith*

Abstract

This paper presents both a new scientific network named "Study Group on European Cooperative Law" (SGECOL), and the "Principles of European Cooperative Law" (PECOL) project, which SGECOL has identified as its first research activity.

SGECOL is a European group of cooperative law scholars, established in Trento (Italy), at the European Research Institute on Cooperative and Social Enterprises (Euricse), in November 2011. SGECOL's general objective is to conduct comparative research on cooperative law in Europe, thus promoting increased awareness and understanding of cooperative law within the legal, academic and governmental communities at national, European and international level. SGECOL intends to achieve this objective through various research initiatives on cooperative law, beginning with the drafting of PECOL. PECOL will take the form of legal provisions accompanied by explanatory comments. They will be developed on the basis of the existing cooperative law in Europe, focusing in particular on six European jurisdictions (Finland, France, Germany, Italy, Spain, UK). PECOL, however, will not simply summarize and describe the common core of European national cooperative laws. Going beyond that, the project aims to present the main general provisions through which – in the authors' view – cooperative law should be formulated to provide cooperatives with a definite and distinct legal identity *vis-a-vis* other business organizations.

The PECOL project does not serve a single specific purpose, still less is its goal to impose harmonization on national cooperative laws. PECOL will be a scientific and scholarly work, capable of serving many potential functions, depending on the users' particular needs.

Keywords

Study Group on European cooperative law; Principles of European cooperative law; European cooperative law; Comparative cooperative law; European Union; Business Law; Cooperatives

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1. Introduction

This paper is divided into two parts. The first part (sec. 1) presents the background, aims, methodology and composition of the “Study Group on European Cooperative Law” (SGECOL). SGECOL is a new scientific network in the field of cooperative law, established by the authors of this paper in November 2011, under the auspices of the European Research Institute on Cooperative and Social Enterprises (Euricse). The second part of this paper (sec. 2) describes the “Principles of European Cooperative Law” (PECOL) project, which SGECOL has identified as its first research activity¹.

2. The Study Group on European Cooperative Law (SGECOL): background, objectives and methodology

SGECOL is a group of cooperative law scholars from different European countries, whose first meeting was held in Trento, at the European Research Institute on Cooperative and Social Enterprises (Euricse), on 29-30 November 2011.

SGECOL aims to conduct comparative research on cooperative law in Europe, thus promoting increased awareness and understanding of cooperative law within the legal, academic and governmental communities at national, European and international level².

It intends to achieve this objective through different research projects in the area of cooperative law, beginning with the drafting of PECOL, which is a project that will be described in the next section of this paper³.

By so doing, SGECOL will fill a gap in European legal scholarship. Several private and commercial law subjects have been extensively explored by European groups of experts, particularly with a view to developing a common European private and commercial law. However, this process has not so far dealt with cooperatives and cooperative law⁴. Nor has Council Regulation (EC) No. 1435/2003 of 22 July 2003 on

¹ SGECOL web-page (<http://euricse.eu/en/node/1960>), hosted by the Euricse website, will provide constantly updated information on SGECOL and its projects.

² In general SGECOL’s attention will not be confined to European Union countries but extended to all European countries, although single projects might focus on European Union jurisdictions and some of these in particular.

³ It must be immediately underlined that from SGECOL’s perspective – in line with its methodology of comparative law analysis, which will be referred to later in this text – “cooperative law” consists of those provisions normally contained in formally independent national cooperative acts (or in specific sections of more general national acts or codes) which deal with the institutional purposes and organizational structure of cooperatives. In addition, it concerns, among others, those provisions of labour-, tax-, competition-, public procurement-, or insolvency law that are specifically dedicated to cooperatives. Accordingly, “cooperative law” comprises organizational law aspects as well as other legal aspects relating, for example, to labour in worker cooperatives, cooperative taxation, etc. SGECOL will not ignore the complexity of cooperative law; on the contrary, as pointed out later in this text, it acknowledges and emphasizes the strong connection between cooperative identity, as defined by organizational law, and cooperative regulation under labour-, tax-, competition-, public procurement-, insolvency-, and other fields of law.

⁴ The first initiatives in this regard concerned contract law. The very first was the “Commission on European Contract Law”, set up in 1982 and chaired by Ole Lando, which drafted the “Principles of European Contract Law” (PECL) in three parts. The last result of which was published in 2003 (see http://frontpage.cbs.dk/law/commission_on_european_contract_law/). Ten years later, in 1992, the “Academy of European Private Lawyers” was established in Pavia with the aim to “to contribute, through scientific research, to the unification and the future interpretation and enforcement of private law in Europe” and “to promote the development of a legal culture leading to European unification” (from art. 1 of the statute); thus far the Academy has published two books of a “European Contract Code” (see

the Statute for a European Cooperative Society (SCE Regulation) contributed to generating a wave of European and comparative cooperative legal studies. That is probably a result of the modest use made of it in practice and of its regulatory structure where references back to national law abound. That considerably reduces the autonomy of EU cooperative law from national cooperative law and consequently the level of scholarly or scientific interest in the former as compared to the latter⁵.

www.accademiagiurprivatistieuropei.it). Subsequently, in 1998, the “Study Group on a European Civil Code”, chaired by Christian von Bar, was established with a focus on contract law as well (see www.sgecc.net). The “European Research Group on Existing EC Private Law” (Acquis Group) was founded in 2002; it drafted in 2009 the “Principles of the existing EC contract law” (Acquis Principles) (see <http://www.acquis-group.org/>). The “Joint Network on European Private Law” was founded in 2005 within the EU sixth framework programme “Network of Excellence”; it comprises, among the others, the Study Group on a European Civil Code and the Acquis Group (see www.copecl.org). The Study Group on a European Civil Code and the Acquis Group prepared a work entitled “Principles, Definitions, and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)”, whose full edition in six volumes was published by Sellier in 2009. In parallel to this, the Association Henri Capitant des Amis de la Culture Juridique Française and the Société de Legislation Comparée drafted the “Principes Contractuels Communs”, whose English edition was published in 2008. Other European initiatives in this field include: *Social Justice in Contract Law: A Manifesto*, by the “Study Group on Social Justice in European Private Law” (in http://papers.ssrn.com/sol3/papers.cfm?abstract_id=605141); and the “Society of European Contract Law” (SECOLA) (see www.secola.org). See, more recently, COM(2011) 635 final and COM(2011) 636 final, both of 11 October 2011, on a common European sales law.

In other fields of private law, see, among others, the “European Centre of Tort and Insurance Law”, established in Vienna in 1999 (www.ectil.org), and, within it, the “European Group on Tort Law”, at Tilburg University (www.egtl.org) (1992), which drafted the “Principles of European Tort Law” (2005); the “Pan European Organisation of Personal Injury Lawyers” (see www.peopil.com); the “Forum Group on Mortgage Credit” and the “Mortgage Funding Expert Group” set up by initiative of the EC (see http://ec.europa.eu/internal_market/finances-retail/home-loans/integration_en.htm); “The Eurohypothec: a common mortgage for Europe” (www.eurohypothec.com); the “Commission on European Family Law”, which prepared the “Principles of European family Law” (see <http://www.ceflonline.net/>).

More general, and partially different, initiatives on private law are: “The Common Core of European Private Law” (see www.common-core.org) and the “Ius commune Casebooks for the Common Law of Europe” (see www.casebooks.eu), both started in 1994. In the specific area of company law, see the “High Level Group of Company Law Experts” (2002) (http://ec.europa.eu/internal_market/company/modern/index_en.htm), whose final report constituted the basis of 2003 EC Action Plan (http://ec.europa.eu/internal_market/company/modern/index_en.htm); the “EU Corporate Governance Forum”, established and supported by the EC (2004) (see http://ec.europa.eu/internal_market/company/ecgforum/index_en.html); the “Advisory group on Corporate Governance and Company Law”, set up and supported by the EC in 2005 (see http://ec.europa.eu/internal_market/company/advisory/index_en.htm); and the project named “European Model Company Act” (EMCA) (2007), to be prepared by a commission chaired by prof. Andersen and prof. Baums at Aarhus University (see <http://www.asb.dk/en/aboutus/departments/departmentsofbusinesslaw/europeanmodelcompanyactemca/>), a complete chapter of which was presented at the conference “European Company Law: The way forward”, organised by the EC, DG internal market, on 16/17 May 2011 (see http://ec.europa.eu/internal_market/company/modern/index_en.htm). See also the “European Corporate Governance Institute” (www.ecgi.org).

⁵ On the implementation of the SCE regulation, see the study prepared, after a year-long project, by a Consortium set up by Cooperatives Europe, EKAI and Euricse (the latter as the Consortium leader) in execution of a service contract with the European Commission. The scientific direction of the study was entrusted to a committee comprising some of the authors of this paper (namely, Antonio Fici, as the committee coordinator, Hagen Henry, Hans-H Münkner and Ian Snaith) and two other cooperative legal professionals (Chantal Chômel and Agnes Mathis). The study was submitted in October 2010 and contains an analysis both of the implementation of the SCE Regulation and of the existing national cooperative laws in the 30 European countries covered by the research (27 EU MSs plus 3 EEA countries), as well as a synthesis and comparative study which, among other things, highlights on the one hand the weaknesses of the SCE Regulation and the need for its amendment, and on the other hand the great variety of cooperative laws in Europe. The Study may be found at http://ec.europa.eu/enterprise/policies/sme/files/sce_final_study_part_i.pdf, http://ec.europa.eu/enterprise/policies/sme/files/sce_final_study_part_ii_national_reports.pdf, and

Accordingly, SGECOL projects are also designed to favour networking between European scholars of cooperative law, who, in general, seem at present to operate independently⁶.

SGECOL will use comparative research on cooperative law to explore differences and commonalities across jurisdictions, with a view to considering the feasibility of a *ius commune cooperativum*.

In general, SGECOL will take an approach to comparative cooperative law that implies⁷:

- a) identification of (old and new) common problems in the regulation of cooperatives, which may require to take account of the existing different types of cooperatives;
- b) discussion around the ways in which national cooperative laws respond to these problems, which also depends on the general features of the legal system of which the cooperative law is part;
- c) justification of commonalities and differences found across jurisdictions in solving these problems;
- d) evaluation of the most adequate way or ways – including the dichotomies between private autonomy and law on the one hand, and mandatory and non-mandatory rules of law, on the other – through which the identified problems may be solved by cooperative law;
- e) connection with other business organizations and, in particular, company law problems, solutions and theories.

To clarify the last point, it must be noted that, from SGECOL members' point of view, cooperative law cannot be properly studied and understood without having regard to other business organizations law, and in particular company law. In fact, the

<http://www.euricse.eu/it/node/256>. The specific *acquis communautaire* on cooperatives also includes art. 54 (2) TFEU, stating that “Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making”.

⁶ But see the Study mentioned in footnote 5, which was conducted by legal experts from 30 European countries, directed by a scientific committee comprising six members from different European countries (of which, as said, four are the same as the authors of this paper), and HIEZ (ed.), “Droit Comparé des Coopératives Européennes”, Larcier, Brussels, 2009, which collects contributions by authors from nine different countries (four of which were written by the authors of this paper, namely, Gemma Fajardo, Hagen Henry, David Hiez, and Ian Snaith). An additional initiative, involving two authors of this paper as co-editors, is CRACOGNA, FICI, HENRY (eds.), “International Handbook of Cooperative Law”, Springer, Heidelberg, scheduled for 2013.

⁷ In this regard, see recently KRAAKMAN, ARMOUR *et al.*, “The Anatomy of Corporate Law. A Comparative and Functional Approach”, 2nd ed., Oxford, 2009, p. 4. Our method of comparative analysis may be considered “functional” insofar as the problem-based approach is emphasized. See, on this point, HENRY, “Kulturfremdes Recht Erkennen. Ein Beitrag zur Methodenlehre der Rechtsvergleichung. Forum iuris”, Helsinki, 2004, especially p. 151, and more recently in English, also for the essential references to the relevant literature, DE CONINCK, *The Functional Method of Comparative Law: Quo Vadis?*, in 74 (2010) *Rabels Zeitschrift*, p. 318 ff. It is worth underlining that the critical aspects of the functional analysis, which this lastly cited article points out, in particular the impossibility for the comparative lawyer to be effectively neutral in identifying the problems through which to compare the legal systems (or, more radically, the absence of problems common to all legal systems), may partly be solved by a comparative analysis conducted by a team of lawyers from different countries, as in the SGECOL case. Of course, that assumes that (common) problems to serve as *tertia comparationis* are jointly formulated. SGECOL approach is also “normative” in the sense that – as pointed out immediately below in the text – we do not intend to limit ourselves to describing or explaining differences and commonalities among legal systems, but also wish to evaluate such differences and commonalities in order, for example, to identify and suggest “ideal rules”, as the PECOL project clearly demonstrates. In this regard, it must however be observed that, at least according to DE CONINCK (*ibidem*, p. 342 ff.), the functional method may be less subject to criticism when the comparative legal research where it is applied has normative purposes.

regulation of cooperatives may reflect problems that are, at times, identical to those which other business organizations face. Moreover and primarily – since one of SGECOL’s principal objectives is to discuss the legally distinct identity of cooperatives, and by definition differentiation establishes identity – the very comparison with the law governing other business organizations and companies seems to be necessary for correctly defining the essential elements of cooperative identity.

Of equal importance – especially considering the great variety that connotes cooperative law in Europe⁸ – SGECOL wishes to offer a common language and an analytic and conceptual framework with which to understand cooperatives and the purposes that can potentially be served by cooperative law, and with which to compare and evaluate the efficacy of different legal regimes in serving those purposes⁹.

SGECOL does not take a strong stand in the debate on the convergence of national cooperative laws in Europe, which, however is still very limited, especially compared with that taking place among scholars of company law¹⁰. However, it is worth noting that, outside Europe, several initiatives have been undertaken for the harmonization or even unification of national or state cooperative laws¹¹.

Therefore, SGECOL hopes that its research projects might at least stimulate a discussion among cooperative scholars and relevant cooperative stakeholders on the

⁸ See, on this point, the Study cited in the preceding footnote 5, as well as FICI, *Cooperative Identity and the Law*, Euricse Working Paper, n. 23/12 in www.ssrn.com.

⁹ In this respect we share the same goal as KRAAKMAN, ARMOUR *et al.*, “The Anatomy of Corporate Law. A Comparative and Functional Approach”, p. 4 f. It is worth underlining that the SCE Regulation may not substantially contribute to the development of a common language and of an analytic and conceptual framework. In part this is due to the fact that this Regulation is not sufficiently known in individual European countries, in part to the fact that many concepts are not appropriately mentioned and developed therein (*e.g.*, that of surplus distribution in proportion to the member activity with the cooperative, *i.e.*, “patronage refunds”), also as a result of the numerous references back to national cooperative law, which make many rules of the SCE Regulation not mandatory or applicable only as far as they do not contradict the national cooperative law of the country where the SCE has its registered office.

¹⁰ References would be endless and inevitably incomplete. It may suffice here to redirect readers to the numerous papers published on the European Corporate Governance Institute website (see www.ecgi.org).

¹¹ For an example of unification see the OHADA (Organization for the Harmonization of Business Law in Africa) *Uniform cooperative law* of 15.12.2010, concerning 16 Central-Western African countries (in <http://www.ohada.org/droit-des-societes-cooperatives/telechargement-droit-des-societes-cooperatives.html>).

In this regard, ILO Recommendation no. 193/2002 concerning the promotion of cooperatives adopted on 3 June 2002 (in <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R193>), must also be mentioned, especially considering the legally binding force that some attach to it: see HENRY, *International Guidelines for Cooperative Policy and Legislation: UN Guidelines and ILO Recommendation 193*, paper presented at the United Nations Expert Group Meeting “Cooperatives in Social Development: Beyond 2012”, Ulaanbaatar (3-6 May 2011). Attempts at voluntary harmonization include: in the USA the *Uniform Limited Cooperative Association Act* (2007), drafted, approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws, also known as Uniform Law Commission (in http://www.law.upenn.edu/bll/archives/ulc/uarc/2007_final.pdf); in Russia the 2007 *Model act on cooperatives and their unions* (in http://www.lawrussia.ru/texts/legal_339/doc339a672x913.htm); the *Framework Law for the Cooperatives in Latin America* (2008) (in <http://issuu.com/jcse.info/docs/frameworklaw>) (the laws of the concerned countries are published in <http://www.aciamericas.coop/-Legislacion-Cooperativa-en-las.45->).

See also HENRY, “Guidelines for cooperative legislation”, 2nd ed., Geneva, 2005, and in http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_094045.pdf; WOCCU (World Councils of Credit Unions), “Model law for Credit unions”, 2005, in <http://www.woccu.org/publications/modellaw>, and *ibidem* by the same organization the “Guide to International Credit Union Legislation”.

possibilities for cooperative law convergence in Europe. SGECOL may at least foster a *de facto* approximation of European national cooperative laws on the basis of good practice in cooperative regulation, whose emergence and circulation SGECOL research projects will facilitate.

There is a connection between the SGECOL project and EU policies on cooperatives. In particular, the activity of SCEGOL appears to be in line with the view expressed by the European Commission in its Communication no. 18/2004 of 23/2/2004 on the promotion of cooperative societies in Europe¹². Indeed, in this document, the EC emphasizes the need to improve cooperative legislation in Europe by contacts between the national regulators and common analysis of good or innovative practice¹³. Furthermore, in the same document, the EC on the one hand declares that, notwithstanding the differences in laws, it does not intend to make proposals for the harmonization of national cooperative legislation; but on the other hand – following the opinion of the High Level Group of European Company Law Experts, expressed in the report of November 2002¹⁴ – welcomes initiatives from national and European organizations to draft “model laws” as a means of encouraging gradual approximation of national laws governing cooperatives¹⁵.

Apart from a recent study on the implementation of the SCE Regulation, carried out under the scientific direction of most of SGECOL founding members¹⁶, the EC has not supported research and study initiatives on European cooperative law. By way of contrast, some support has been given to similar initiatives on European company law¹⁷. Therefore, SGECOL would greatly welcome EC support to its future activity, such as public meetings, conferences, and publications. This would demonstrate that the EC is concerned about the equal treatment of cooperatives relative to companies, a point that the EC has often emphasised in its official documents¹⁸.

It is also worth recalling that the United Nations and the International Labour Organization have also expressed the view that the improvement of cooperative law is an essential element of the overall strategy of cooperative promotion¹⁹.

Finally, SGECOL’s work is likely to support the cooperative movement, particularly in Europe, in its efforts to gain recognition of the cooperative difference on the part of institutional actors, and to promote the role of cooperatives. From this point of view, SGECOL members believe that the legal dimension of cooperatives is essential to their defence against potential detractors and their promotion with the general public. This appears to be particularly true in those European countries where cooperatives still face a problem of visibility that a clear legal identity (as is the case for companies) and a revival of cooperative legal studies might ease. However, it is equally important in those EU countries where cooperatives benefit from particular measures, for

¹² See COM(2004) 18, of 23.02.2004, on the promotion of co-operative societies in Europe, in http://ec.europa.eu/enterprise/policies/sme/files/craft/social_economy/doc/coop-communication-en_en.pdf.

¹³ See COM(2004) 18, pp. 11-12.

¹⁴ See footnote 4 for the reference.

¹⁵ See COM(2004) 18, p. 11.

¹⁶ See footnote 5.

¹⁷ See footnote 4 for references.

¹⁸ See COM(2004) 18, p. 13.

¹⁹ See UN resolution no. 56/114 adopted on 19 December 2001, and containing “Guidelines aimed at creating a supportive environment for the development of cooperatives”, in <http://www.caledonia.org.uk/papers/Cooperatives%20in%20Social%20Development.pdf>, and ILO Recommendation no. 193/2002, in <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R193>.

example under tax law, and the need regularly emerges to justify this treatment on the grounds of the cooperative difference. The European Court of Justice judgment of 8 September 2011 clearly confirms this contention, as, in the Court's reasoning, a legal text, namely, SCE Regulation, was essential to the Court's recognition of cooperative diversity and consequently of the legitimacy of a particular treatment of cooperatives by comparison with companies²⁰.

2.1. Structure and organization of SGECOL

The authors of this paper have founded SGECOL and are its present full members²¹. SGECOL full members set the research agenda, direct the projects of the group, deliberate on the admission and exclusion of members and other organizational issues. They will meet regularly to discuss fundamental issues, trends and developments of cooperative law in Europe. They are in charge of the drafting of PECOL.

SGECOL will also have another category of members, associate members. Associate members will contribute to the activities of the group by participating in its projects and providing information on their national legal systems and cooperative laws.

Measures will be adopted so that, after a certain period of involvement in the operations of the group, associate members can achieve the status of full members.

As already highlighted above, one of the intended outcomes of the SGECOL project is the establishment of a large European network of cooperative legal scholars. That will, of itself, foster common research and fruitful exchanges of experience and legal knowledge. Therefore, SGECOL will be a team open to all legal scholars from every European country, particularly academics, who wish to contribute to its projects and take part in its initiatives. Accordingly, the maintenance of the status of member, whether full or associate, depends on the member's participation in SGECOL activity.

SGECOL is currently financed by Euricse, which encouraged and supported its foundation, is hosting its secretariat and webpage, and will fund the PECOL project. However, SGECOL would greatly appreciate support from other organizations and institutions, notably research centres dealing with cooperatives, social enterprises or the social economy, whether as sponsors of single events, like meetings, conferences or publications, or as longer term funders of the Group.

3. The Principles of European Cooperative Law (PECOL) project: contents and objectives

During its first meeting in Trento, SGECOL deliberated on the first major project to be undertaken in the next few years – the drafting of "Principles of European Cooperative Law" (PECOL). This section of the paper outlines its contents and objectives.

²⁰ See European Union Court of Justice, 8 September 2011 (C-78/08 to C-80-08), particularly points 55 ff., in <http://curia.europa.eu/juris/document/document.jsf?text=&docid=109241&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=392888>.

²¹ Antonio Fici will assume the responsibility for coordinating the activity of the group and its members.

PECOL will take the form of legal provisions accompanied by explanatory comments. They will be developed on the basis of the existing cooperative law in Europe, focusing in particular on six European jurisdictions (Finland, France, Germany, Italy, Spain, UK). PECOL, however, will not simply summarize and describe the common core of European national cooperative laws. Going beyond that, the project will provide the main general provisions through which – in the authors’ view – cooperative law should be formulated to provide cooperatives with a definite and distinct legal identity *vis-a-vis* other business organizations.

This strategy involves a number of features and assumptions.

Firstly, PECOL provisions, in their authors’ view, must not be regarded as “legal principles” in the sense of legal philosophy, but as “ideal” provisions of cooperative law. Therefore, they will not necessarily reproduce rules (or the “better” rules) found in the existing cooperative law, although the latter constitutes the main source of inspiration for the drafters. In this sense, the approach taken in the drafting of PECOL is “normative” rather than descriptive, in line with the methodology that, in general, SGECOL intends to use in its comparative analysis of cooperative law²².

Moreover, being “ideal”, PECOL provisions do not necessarily need to be detailed, which mainly justifies the use of the term “principles”²³. Therefore, PECOL might also be eventually formulated in a way that allows for their integration and/or adaptation by those (*e.g.*, legislators) who wish to make use of them. In some cases, multiple optional principles may be provided.

Secondly, PECOL will not cover all the possible aspects of a cooperative regulation, but will only concentrate on those aspects that relate to the identity of cooperatives.

SGECOL, indeed, maintains that focusing on cooperative identity, at least in this initial stage of its activity, is paramount, since the main problem in the regulation of cooperatives is providing cooperatives with a definite and distinct legal identity *vis-a-vis* other business organizations. There are many reasons for that, ranging from the protection of the legal brand *per se* to the shaping of specific policies in favour of cooperatives. The latter is perhaps the most delicate issue. The principle of equal treatment would require that the nature of the organization be relevant under tax, labour, competition, state aid, public procurement, insolvency law, *etc.*, in order to treat the organization fairly. Therefore, if the organization has features distinguishing it from all the others, although within the same genus (*e.g.*, business organizations), it may deserve specific treatment, which thus cannot be considered “preferential” but rather “fair” or “adequate” in the context of the particular subject matter.

In the case of cooperatives – but the problem exists also with regard to social enterprises – legislators and policy makers, especially in some European countries and, to a lesser extent, at the EU level²⁴, are still unaware of the cooperative

²² See above § 2 and footnote 7.

²³ There are, in fact, additional justifications for the use of this term instead of that of “rules” or similar. First, “principles”, more than “rules”, conveys the idea of provisions that are “fundamental”, which is in line with PECOL drafters’ intention to concentrate on the identity of cooperatives as the fundamental aspect of a cooperative regulation (see immediately below in the text). Second, “principles”, more than “rules”, conveys the idea of provisions that have been formulated by scholars also (or primarily) for pure scientific purposes and that, therefore, are not legally binding.

²⁴ See COM(2004) 18, of 23.02.2004 (quoted in footnote 12); and more recently EU Court of Justice, 8 September 2011 (C-78/08 to C-80-08) (quoted in footnote 20), as well as COM(2011) 206 of 13 April 2011 on Single Market

difference and cannot even imagine themselves shaping legislation and policies accordingly. One problem is that the cooperative law in force in some European countries either does not provide cooperatives with a distinct legal identity or attributes a legal identity to them which does not completely correspond to the generally understood characteristics of cooperatives²⁵. The fact that cooperative law varies from country to country in Europe²⁶, and that the SCE Regulation has only had a limited success in practice²⁷, certainly does not help build an image of cooperatives different from that of for-profit investor-owned business organizations.

PECOL drafters are conscious that, in any inquiry into "ideal" principles of law, and in this case on the "ideal" legal identity of cooperatives, elements of subjectivity may always appear and influence the results. This risk cannot be completely avoided but only limited by recourse to external, possibly objective, factors as *tertia comparationis*.

To this end, PECOL drafters have identified a set of elements whose synthesis will serve as *tertium comparationis* for the elaboration of the "ideal" legal identity of cooperatives. Namely, these elements are:

- the common European culture as stemming from national cooperative laws and EU cooperative law (*i.e.*, the SCE Regulation);
- the Statement on the Cooperative Identity in the last version adopted by the International Cooperative Alliance in 1995²⁸, and ILO Recommendation no. 193/2002 concerning the promotion of cooperatives, which incorporates ICA Principles and goes beyond that²⁹;
- best practice in cooperative articles of association and by-laws;
- and finally business organization law, particularly company law, as cooperative legal identity might also need to be delineated by contrast with the legal identity of other business organizations.

It is also worth noting that work conducted by a team, where the team comprises persons from different countries and legal cultures, may itself reduce the influence of subjectivity, especially when the methodology applied, as in the case of PECOL, forces researchers to go beyond their national law and to adapt their concepts to a trans-national analysis.

According to the number of relevant areas of interest for the cooperative identity as identified by the drafters, PECOL will be divided into five chapters, which are:

- 1) cooperative social object;
- 2) cooperative governance;
- 3) cooperative financial structure;
- 4) cooperative control;
- 5) cooperation among cooperatives.

Act, pp. 14 f. (in http://ec.europa.eu/internal_market/smact/docs/20110413-communication_en.pdf), and COM(2011) 682 of 25 October 2011 on Social Business Initiative (in http://ec.europa.eu/internal_market/social_business/docs/COM2011_682_en.pdf).

²⁵ See, on this point, FICI, *Cooperative Identity and the Law* (quoted in footnote 8).

²⁶ See, on this point, the Study cited in footnote 5, as well as FICI, *Cooperative Identity and the Law* (quoted in footnote 8).

²⁷ See the Study cited in footnote 5.

²⁸ In <http://www.ica.coop/coop/principles.html>.

²⁹ See quotation in footnote 19.

Each chapter will be divided into a number of sections depending on the number of points that comprise the area of interest.

Interim reports and the draft PECOL will circulate outside SGECOL and particularly among cooperative professionals and representative organizations, as well as non-legal experts, notably economists.

PECOL will be eventually published in its full and final version and presented at a final conference of the project.

Some final considerations as regards the objectives pursued through the PECOL project are worth mentioning.

The idea of establishing European groups of experts with a specific mission of drafting common European principles of law is not new³⁰. Although a variety of approaches may be found, the common objective of these initiatives is to lay the foundations for a common European regulation of contracts, torts, companies, *etc.* This process has not involved cooperatives so far, which is one of the reasons for SGECOL's initiative in this field. PECOL is a scholarly and scientific project. As such it is not specifically intended to promote the harmonization of national cooperative laws. When cooperatives and cooperative law are the matters at hand, a project like PECOL finds sufficient justification in the promotion of a better understanding of cooperatives and cooperative law.

Notwithstanding their strong presence in the marketplace and their capacity to contribute to sustainable development³¹, cooperatives, as a business structure, are still relatively unknown in some European countries. That is also true of cooperative law.

Therefore, PECOL has been conceived both as a basis for discussion if the issue of unification, harmonization or approximation of cooperative laws in Europe arises, and as a purely scientific and scholarly work aiming to advance knowledge and understanding of the subject matter under examination. The comments accompanying PECOL may help in this direction.

Being a scholarly and scientific project, PECOL may serve several purposes depending on the users' needs. For researchers it may provide a basis for understanding foreign cooperative laws or undertaking deeper comparative analysis of cooperative law; for legislators, a collection of model rules for improving national or EU cooperative laws; for policy-makers, a device for better understanding cooperatives and cooperative law; for cooperative advocates and representative organizations, a further instrument for defending and promoting the distinct identity of cooperatives relative to other business organizations.

³⁰ See footnote 4 for references.

³¹ 2012 has been recognized as the International Year of Cooperatives by the United Nations, in consideration of their capacity to build a better world (cf. United Nations General Assembly Resolution A/Res/64/136; see <http://www.2012.coop/>).