

## LEGAL FRAMEWORK ANALYSIS AND THE ICA-EU PARTNERSHIP: AN UPDATE ON ENSURING A LEVEL PLAYING FIELD FOR PEOPLE-CENTRED ORGANISATIONS'

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### Abstract

*This paper builds on existing research conducted within the ICA-EU Partnership's Legal Framework Analysis Research, which analyses the national cooperative legal frameworks of a variety of countries worldwide. The research aims to provide harmonised information on cooperative law and its provisions, both at the national and supranational level, including a critical analysis of laws that impede or promote cooperatives, and the degree to which the legislation can be considered adequate for cooperative development.<sup>2</sup> With greater knowledge and access to a country-based legal framework analysis partly established through an open access online platform, ICA members can advance their advocacy and recommendations on the creation or improvement of legal frameworks and monitor their evolution.<sup>3</sup> This paper outlines the exploratory findings and insights gained through this current implementation with a view to analysing, based on the current work completed, the emergent trends in a discussion on the necessary elements of a strong cooperative law.*

*The paper discusses four main recurrent elements that can impact cooperative development. First, it discusses the necessity for cooperative law to be well drafted, implemented and enforced. Secondly, the extent to which cooperatives can compete on a level playing field with other business models is also highlighted, not only from the perspective of supporting the development of a thriving cooperative movement but also of cooperative autonomy, the fourth principle of the cooperative movement. The current results also suggest that cooperatives generally benefit from legal frameworks that respect their common cooperative identity. Third, based on the insights at present, the fragmentation of cooperatives by governing them under special sectoral laws instead of a general law can generally be seen as negative*

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<sup>2</sup> The paper serves as an update to a previous paper, in which the initial purpose and methodology behind the research are documented. See Arielle Romenteau & Jeffrey Moxom, *Legal Framework Analysis And the ICA-EU Partnership: Acknowledging the Specificity of The Cooperative Model and Ensuring A Level Playing Field for People-Centred Organisations*, International Journal of Cooperative Law (IJCL), Issue 2. 2019.

<sup>3</sup> For more information and to view the database of national reports, please visit [www.coops4dev.coop](http://www.coops4dev.coop)

*for cooperative development*<sup>4</sup>. Finally, the importance of a legal framework that reflects the modern and evolving context of cooperatives by being sufficiently up-to-date is also discussed, being commonly cited by national experts as important to ensure an adequate legal framework for cooperatives.

*The paper concludes by arguing that there are certain commonalities applicable across national legal frameworks and argues that observing the presence or absence of these commonalities within legal frameworks can be a step towards establishing an enabling environment for cooperatives, and for international cooperative development in general. Despite the harmonised collection of information on cooperative legal frameworks, specific national contexts must be carefully considered when making recommendations for changes at different levels of governance. Finally, the paper also aims to lay the ground for more in-depth analysis to be conducted following the completion of the Legal Frameworks Analysis under the ICA-EU Partnership.*

## **Introduction**

This current research falls within the scope of the knowledge building activities undertaken within the partnership for international development signed between the International Cooperative Alliance and the European Commission in 2016, to strengthen the cooperative movement and its capacity to promote international development worldwide, with a number of work streams based on advocacy, visibility, capacity building, and research. Under this partnership, the ICA is carrying out a number of global research activities in collaboration with its four regional offices, which includes the national and regional analysis of cooperative legal frameworks featured within this paper.

## **Current status of the research**

The ongoing Legal Framework Analysis research (LFA) has three primary objectives i) acquiring general knowledge of the national legislation on cooperatives; ii) evaluating the national jurisdictions covered by the LFA according to their enabling environment for cooperatives (their degree of ‘cooperative-friendliness’); and iii) providing concrete recommendations for eventual renewal of the legal frameworks.

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<sup>4</sup> Although there are also examples of cooperative-friendly legislation in the study with fragmented legal frameworks, in general these national experts still see a unified framework as an objective to aspire to.

The LFA aims to cover a wide range of national jurisdictions throughout the study, focusing upon the 109 jurisdictions where ICA member organisations are located<sup>5</sup>. When analysing national legal frameworks, it examines general cooperative legislation but also examines special cooperative laws covering different types of cooperatives, where this is crucial to gaining an understanding of the country's legal framework.

## Methodology

A methodological structure was jointly developed with the support of an external partner EURICSE (European Research Institute on Cooperative and Social Enterprises) and with input from the ICA regional offices. The methodology has two main stages, supported by regional and national experts. First, the collection of data is undertaken with the completion of a harmonised questionnaire, submitted by national legal experts for each of the jurisdictions covered by the LFA. This questionnaire is also provided via ICA regional offices to member organisations, which provides an opportunity for member centred input to the study. As a second step, the respective national experts then analyse and evaluate the information collected from the questionnaire responses and produce national reports for each country in a harmonised format, with the support of Partnership staff. The completed national reports are currently available on an open access online database, launched on 4 March 2020.

In order to provide a picture of the cooperative landscape at the regional level in each ICA region, this analysis will later be compiled into four harmonised regional reports, one for each ICA region, compiling the main highlights of the national jurisdictions covered, as well as relevant regional analysis of cooperative law. Finally, the regional reports will be gathered in one complete global report, combining all inputs into a single document. At the time of writing (May 2020), the LFA has been completed for 46 countries worldwide, with 10 legal frameworks in Africa, 18 in the Americas, 13 for Asia-Pacific, and 5 in Europe.

The LFA is a contribution towards improving our general understanding of cooperative legislation and to create an assessment tool that can aid future policy recommendations in the pursuit of an enabling environment for cooperative development. As noted by national legal experts, comparative analysis between countries is particularly challenging task without detailed operational knowledge of a local context. Without space for such detailed comparisons here, the aim of this paper is limited to providing an analytical overview of the research to date and exploring four common elements that are prominent across a variety of countries covered. The exploration of these recurring elements is therefore intended to build upon the existing analysis of cooperative law in the national reports. It is also important to note that the

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<sup>5</sup> As of May 2020.

elements chosen are by no means exhaustive, but a selection of measures for the cooperative friendliness of a country, both in the eyes of the national expert and membership organisation input that, where obtained, has been a crucial in offering a complementary perspective within each country report. These four elements are further developed in the theoretical section below.

### Theoretical Framework:

This section seeks to provide theoretical context behind the recurring elements referred to throughout the paper. The main elements discussed here are enforcement of cooperative legislation, the existence of a level playing field, fragmentation of cooperative law, and up-to-date legislation. The paper provides background on each of these elements, before assessing their presence within the completed national reports with the use of illustrative examples.

Firstly, the **enforcement of cooperative legislation** is necessary for it to be effective. According to Hagen Henry, *"in order for an effective and efficient cooperative movement to emerge and/or to thrive, the law must be applied."*<sup>6</sup> This point is expanded by noting that the law needs to be understood by those affected by it in order for it to be applied effectively, including through ensuring that the law is available in the languages of the territory (vernacular languages are included in the analysis). Beyond this point, implementation of a cooperative law be accompanied by efficient registration and auditing systems for cooperative organisations, as well as sufficiently resourced monitoring and promotional mechanisms<sup>7</sup>. On this basis, well implemented cooperative legal frameworks will facilitate a cooperative movement that is both efficient and effective. By contrast, poorly implemented cooperative law can harm the cooperative movement in a territory. For example, poor registration and monitoring of cooperatives can lead to a phenomenon of "pseudo cooperatives" created solely to take advantage of legal advantages afforded to cooperatives by the law. ILO Recommendation 193 both calls for national policies to ensure cooperatives are not set up for the purpose of avoiding compliance with labour laws, and also for the combatting of pseudo-cooperatives which it states violate workers' rights<sup>8</sup>. This is also relevant given that pseudo-cooperatives are an issue identified by national experts in the study.

For a strong cooperative movement to exist, cooperatives must be able to compete with other business models on a **level playing field**. ILO Recommendation 193 supports this through both its provisions on oversight and national law and practice, which should treat cooperatives no less favourably than that

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<sup>6</sup> H. Henry, 'International Labour Organisation, Guidelines for cooperative legislation / by Hagen Henry; International Labour Office. – 3rd ed. Rev', Geneva: ILO, 2012, p. 104.

<sup>7</sup> Ibid.

<sup>8</sup> ILO, R193 - Promotion of Cooperatives Recommendation, 2002 (No. 193), para 8(1)(b)

applicable to other forms of enterprise<sup>9</sup>. Countries can therefore make use of the recommendation to enact sufficient forms of protection and regulation for cooperative enterprises. Some legal frameworks in our analysis were seen to treat cooperatives unfairly compared to for-profit businesses or even prevent them from participating in certain sectors. Additionally, cooperatives cannot compete on a level playing field with for-profit businesses if they are not treated as a distinct type of business model<sup>10</sup>. In the ongoing LFA, examples of this have included allocating responsibility for cooperative matters to the government department in charge of for-profit businesses. Alternatively, a lack of distinct treatment may result in the absence of a specific tax regime for cooperatives. At both the national and global level, there is a wider trend of ‘companisation’. Henry describes a legislative trend called “stock companisation”, referring to those processes in legislation through which the features of cooperatives are approximated with stock companies<sup>11</sup>. This is due to using for-profit companies as a measure for evaluating the performance and efficiency of all types of enterprise<sup>12</sup>. At an international level, there are examples from the LFA demonstrating how an increasingly globalised economy focused on for-profit enterprises renders cooperatives less capable of operating to their full potential. This paper will therefore look in greater detail at features of national legal frameworks that either facilitate or hinder the ability for cooperatives to compete on a level playing field.

This paper will also address the issue of **fragmentation** within legal frameworks, another element identified as a hindrance to the cooperative movement by experts throughout the research. To understand the concept of fragmentation, it is necessary to understand that many legal frameworks govern cooperatives through special laws applicable to different categories of cooperative in different sectors. The issue of fragmentation in legal frameworks is seen as negative for cooperatives by national experts working in the field of cooperative law who took part in the Legal Framework Analysis and note that such law-making effectively disregards the shared identity of cooperative organisations. Such fragmentation also leads to an uneven playing field between different cooperative types, as in some jurisdictions certain cooperatives are treated more favourably by the law than other types, which may face more restrictions. By contrast, Hagen Henry states that unification and harmonisation of special laws can lead to more coherent policymaking, a reduction in bureaucracy and actually leads to greater cooperative autonomy<sup>13</sup>. At the same time, it is noted that special laws are not always to be seen as a negative and, indeed, might be necessary to protect smaller cooperatives and justified from the activities and objectives of the wider

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<sup>9</sup> Ibid, paras 6(c) and 7(2)

<sup>10</sup> C. Mills and W. Davies, ‘Blueprint for a Cooperative Decade’, International Cooperative Alliance, 2013, p. 26

<sup>11</sup> H. Henry, ‘Basics and New Features of Cooperative Law – The Case of Public International Cooperative Law and the Harmonisation of Cooperative Laws’, The Bulletin of Belgorod University of Cooperation, Economics and Law, 2012 no. 2, pp. 414-415, footnote 7.

<sup>12</sup> Ibid, p. 407.

<sup>13</sup> Op cit, Henry, at supra 5, see footnote 41 of p. 15

social and solidarity economy<sup>14</sup>. From the study, there are examples of frameworks which either do not foresee certain types of cooperatives, or which are focused mainly on agricultural cooperatives to the exclusion of other sectors. For these specific national contexts, the experts believe the cooperative sector would benefit from further specialisation of cooperative laws.

A further point raised in the current national reports is the importance of **up-to-date** cooperative law. Cooperative legislation in some countries in the study has not been updated in several decades, during which time the economic, administrative and labour contexts have changed dramatically. At the same time, frequently updated legislation will not necessarily benefit the cooperative movement in a country unless it is well drafted. As part of this process, the genuine inclusion of the cooperative movement in the consultation and drafting of the legislation, with timely notice, can be considered a route to better outcomes, such as efficient transposition or implementation of the updated law in practice.<sup>15</sup> The study finds at least once example where frequently changing cooperative legislation leads to instability and an environment that is not conducive to growth of cooperative organisations.

This paper takes each of the four elements, the enforcement of cooperative legislation, the existence of a level playing field, fragmentation of cooperative law, and up to date legislation in turn. Combined with support of the analysis from national legal experts gathered from the completed legal framework analysis reports, the paper argues that the consideration of these elements is important for the pursuit of an enabling environment for cooperative development.

### **(i) Implementation and enforcement**

When assessing countries for which national reports are currently available, it is clear that how well a law is implemented, for example through effective auditing and oversight mechanisms, can impact on the effectiveness of cooperative legislation at achieving better cooperative development. For example, in Mexico the national expert notes that, despite some significant deficiencies in the country's general cooperative law, there are no legal barriers to cooperative development from a regulatory perspective.<sup>16</sup> At the same time, cooperative development in the country suffers as the law is not effectively enforced. The national expert highlights in particular that the law establishes duties and obligations but without any consequences for non-compliance.

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<sup>14</sup> Ibid, p. 60

<sup>15</sup> One example of inclusion of the cooperative movement in drafting legislation is noted in Nepal. In more general efforts, the ICA has been involved in contributing to enabling environments for cooperatives during parliamentary processes involving legislative change in Argentina in 2018, and more recently in Greece, among other instances.

<sup>16</sup> Cooperatives of the Americas, Legal Framework Analysis, 'National Report for Mexico', ICA-EU Partnership

Additionally, while legislation might facilitate grants and tax benefits for cooperatives in order to support their growth and development, if this leads to positive discrimination towards cooperatives over other types of enterprises, this can at times result in a negative side-effect, pseudo cooperatives<sup>17</sup>. For South Africa, the legal system offers some advantages for cooperative enterprises such as grants that such organisations can access at both national and local levels. However, the national expert describes a “light hand” state to the effect that there are currently insufficient checks to identify which enterprises are operating in line with cooperative values and principles and those which are not<sup>18</sup>.

There are more unscrupulous reasons for why an organisation would wish to register as a cooperative under false pretences, namely as a type of ‘law-shopping’ in order to avoid compliance with labour or social security rules<sup>19</sup>. Given cooperatives serve member and community needs, this is undoubtedly a particularly negative use of the enterprise model. As an example, in South Africa, members of cooperatives do not benefit from legal protections for employees under labour law, on the pretext that cooperative members are not employees. The national expert notes that pseudo cooperative organisations have proliferated in the clothing industry, an industry known for low wages and poor labour standards<sup>20</sup>. In simple terms, these organisations, which do not operate in line with cooperative values and principles, hire workers who are formally ‘members’ of the pseudo cooperative in order to avoid obligations under labour law they would be liable under if these workers were hired as employees, which they may truly be.

Other territories also experience this phenomenon<sup>21</sup>, including Italy, which has been identified as a legal framework that is, overall, conducive to the growth of cooperatives<sup>22</sup>. In this territory, the national expert also identifies false cooperatives setting up on a short-term basis with the sole aim of circumventing tax and labour laws<sup>23</sup>. The consequence of this is that genuine cooperatives which abide by the laws are put at a disadvantage and also reputational damage to the image of cooperatives which may harm their future development.

One means of overcoming, or indeed, preventing this trend from occurring without excessive government interference is integration, either horizontally or vertically, of cooperatives. The principle of freedom of association means that cooperatives ought to have the right to form unions, federations or

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<sup>17</sup> Op. cit, Henry, at supra 5, p. 53

<sup>18</sup> The Alliance Africa, ‘*South Africa National Report*’, ICA-EU Partnership, p. 13

<sup>19</sup> Op cit, Henry, at supra 5, pp. 36-37

<sup>20</sup> Op cit, ‘*South Africa National Report*’, at supra 17, pp. 13-14

<sup>21</sup> Other examples, highlighted previously by the ILO and other organisations including the FAO, include Belgium, Brazil, Georgia and India.

<sup>22</sup> Op cit, Henry, at supra 5, p. 36

<sup>23</sup> E. Emmolo, ‘*Legal Framework Analysis National Report: Italy*’, Cooperatives Europe, ICA-EU Partnership, p. 11

confederations<sup>24</sup>. Under a system of vertical integration, cooperatives at the highest level in countries such as Italy may be tasked with monitoring cooperatives lower down in order to ensure compliance with the law, for example through auditing<sup>25</sup>. In simple terms, cooperatives that are able to network with other cooperatives through cooperative representative organisations can enjoy the benefits of cooperation with each other and gain from economies of scale<sup>26</sup>, as well as collective knowledge and information sharing.

The South African expert notes that the pseudo cooperatives present in the country are allowed to proliferate, at least in part, due to the lack of a cohesive or unified cooperative movement in the country<sup>27</sup>. By contrast, in Italy, the cooperative movement has strong networks supported by umbrella cooperative organisations<sup>28</sup>. In response to the problem of pseudo cooperatives in Italy, in 2016 this network mobilised with the leadership of the Italian Cooperative Alliance. It presented the Italian Parliament with a legislative proposal which would remove from the National Cooperative Register entities escaping controls or failing to demonstrate the necessary mutualistic requisites.<sup>29</sup> While there has not been a change in law at this time, this is nonetheless an example of the importance of a strong coherent cooperative movement to advocate for change. Another possible means of tackling pseudo-cooperatives is through legislation. Though not discussed in the national report of this study, one example of a legislative framework that has been inspired by ILO Recommendation 193's stance on pseudo-cooperatives is Colombia's Law 812 of 2003, which the ILO cites as an example of a national development plan aimed at tackling this phenomenon<sup>30</sup>.

It is important to note that it is not enough for cooperative integration to be provided for by the legislator if cooperatives are prevented from forming unions by restrictions and conditions.<sup>31</sup> In Greece, for example, the national expert as well as the ICA member organisation note that a main legislative barrier is that different types of cooperatives are unable to form unions. For example, agricultural cooperatives can only form unions with other agricultural cooperatives with the same or similar agricultural products<sup>32</sup>. The result is that, in Greece, the setup of a national confederation representing the whole cooperative movement has proved impossible.

<sup>24</sup> Op cit, Henry, at supra 5, p. 100

<sup>25</sup> Op cit, 'Legal Framework Analysis National Report: Italy', p. 9

<sup>26</sup> Ibid

<sup>27</sup> Op. cit, 'South Africa National Report', at supra 17, p. 14

<sup>28</sup> See also Henry's discussion of Italian social cooperatives and their success in preventing law-shopping by actors wishing to avoid labour and social security laws, at supra 5, p. 36

<sup>29</sup> Op. cit, Emmolo, at supra 22, p. 11

<sup>30</sup> ILO, 'The Story of the ILO's Promotion of Cooperatives Recommendation, 2002 (No.193), a review of the process of making ILO Recommendation No.193, its implementation and its impact', 2015, p. 67

<sup>31</sup> Münkner H-H. (2013) 'Worldwide regulation of co-operative societies – an Overview', Euricse Working Paper n. 53 | 13, p.20.

<sup>32</sup> I. Douvitsa, 'Legal Framework Analysis National Report: Greece', Cooperatives Europe, ICA-EU Partnership, p. 22

Overall, the legal frameworks discussed here highlight several elements that can impact adequate implementation and enforcement of the law. While a legal framework might be cooperative friendly in the sense that it does not impede cooperative development, attention must also be paid to the enforcement of any law for it to be effective. Furthermore, incentives for cooperatives provided for by law should be accompanied by a strong system of monitoring, preferably through a system of cooperative integration. This integration should provide support, develop networks, strengthen the cooperative identity, as well as ensure the collection of harmonised information on the cooperative sector, all of which can help to alleviate the proliferation of pseudo cooperatives. The freedom for collective organising between first and second degree cooperatives through the principle of cooperation among cooperatives, can also be important to ensure effective cooperative integration.

### **(ii) A level playing field for cooperatives**

As previously stated, for a strong cooperative sector to exist, it must be able to compete alongside other enterprise forms, as cooperatives operate within a wider market orientated economic system. From a negative perspective, this means a lack of legal obstacles that discourage the emergence of new cooperative enterprises. Cooperative-specific tax and audit policies are also beneficial from the perspective of membership promotion<sup>33</sup>, but also as a recognition of cooperatives as a distinct enterprise model<sup>34</sup>. In this section, it is evident that currently cooperatives are in some cases subject to greater oversight and control than other types of enterprise models. In other cases, cooperatives may be excluded from benefits offered stock companies or may have limited access to capital, or other grants to facilitate business growth. In addition, the lack of a level playing field for cooperatives can also be seen as a driver of ‘*companisation*’ where cooperatives increasingly adopt or have features of stock companies imposed on them<sup>35</sup>. It is also recognised that the trend of *companisation* and an increasingly globalised economy can have impacts that go beyond the reach of the legislator, which are also discussed in this section.

From the national reports of the LFA, there are examples of cooperatives being subject to greater oversight when compared to for-profit enterprises. In Jordan, the national expert notes that cooperatives are subject to regulatory and financial control by the Jordanian Cooperative Corporation, (An independent organisation formed by the government for overseeing, promoting and registering cooperatives)<sup>36</sup>, contrary to the principle of cooperative autonomy<sup>37</sup>. Companies, by contrast, are characterised by their

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<sup>33</sup> Ibid, p. 24

<sup>34</sup> Ibid, p. 25

<sup>35</sup> Ibid, pp. 8-16

<sup>36</sup> ICA - Asia and Pacific, ‘*Legal Framework Analysis National Report for Jordan*’, ICA-EU Partnership, p. 16

<sup>37</sup> Ibid, p. 20

financial independence<sup>38</sup>. In practice, the country's taxation rules also treat cooperatives like private enterprises in terms of taxation, and the lack of incentives encourages entrepreneurs and those wishing to work on projects to be registered as for-profit enterprises<sup>39</sup>.

Conversely, cooperatives in Bolivia are promoted by the state in order to encourage participative democracy and contribute to social justice<sup>40</sup>, and the national expert describes the Bolivian cooperative legal framework as cooperative-friendly<sup>41</sup>. At the same time, cooperatives in the country are also subject to increased oversight and taxation compared to private enterprises. For taxation, cooperatives pay double the sectoral tax rate compared to private companies, which is negative from the perspective of competitiveness. For oversight, they are also subject to oversight not only by the sectoral regulator but also from AFCOOP, the cooperative regulatory authority<sup>42</sup>. By contrast, companies are only subject to regulation by the former.

Beyond oversight and controls, the study also highlights that in some countries, cooperatives are excluded from operating in certain sectors, and thus unable to compete with other business models. One example is Colombia, where the national expert notes that only companies regulated by the Colombian Code of Commerce can participate in certain sectors, including health or private security. It is noted that since cooperatives fall under a separate legal regime, they are excluded from operating in these sectors<sup>43</sup>. Another example is Paraguay, where the national expert notes that only entities registered as companies can carry out activities under the country's banking and insurance laws, thus preventing cooperatives from participating in such activities<sup>44</sup>. Cross-sectoral recognition of the cooperative model can serve as one route towards tackling this problem and is a priority at the regional level, for example in Europe.<sup>45</sup>

In certain countries, the legal framework allows for-profit enterprises to access certain benefits, while cooperatives are excluded from accessing these benefits due to their status. For example, in Côte d'Ivoire, the national expert notes that there is an investment code that provides advantages for entities recognised as enterprises. Since cooperatives in the country struggle to be recognised as such, they have difficulty accessing the benefits of this instrument that are enjoyed by commercial enterprises, and therefore the

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<sup>38</sup> Ibid

<sup>39</sup> Ibid, p. 16

<sup>40</sup> M. A. Weise, 'Legal Framework Analysis National Report for Bolivia', ICA - Asia and Pacific, ICA-EU Partnership, p. 3

<sup>41</sup> Ibid, p. 11

<sup>42</sup> Ibid, pp. 11-12

<sup>43</sup> Cooperatives of the Americas, Legal Framework Analysis, 'National Report for Bolivia', ICA-EU Partnership, p. 17

<sup>44</sup> Ibid, p. 12

<sup>45</sup> Karakas, C. (2019), 'Cooperatives: Characteristics, activities, status, challenges', Briefing, European Parliamentary Research Service, February 2019.

national expert argues for more explicit reference to cooperatives in this text<sup>46</sup>. From the literature and the examples from this study, the explicit recognition of the cooperative enterprise form in legislative instruments is therefore a priority for policy makers and legislators to help ensure a level playing field for cooperatives.

In a number of legal framework reports, there are also factors that impact on the ability of cooperatives to compete on a level playing field that go beyond the scope of the national legislator<sup>47</sup>. For instance, in Panama, the national expert highlights the impact of a globalised economy on cooperatives in the country. While the legal framework of the Panama is notable for its absence of barriers to cooperative development, international anti-money laundering rules mean that savings and loans cooperatives in the country are placed under significant pressure by the obligation to submit periodic reports, with sanctions for non-compliance<sup>48</sup>. In the view of the expert, the sanctions placed on these cooperatives are disproportionate, especially given they apply regardless of whether the lack of compliance was merely due to lack of understanding of the obligation.

Furthermore, harmonisation of cooperative law, when this takes place, also limits the scope national legislators have for reforming cooperative law. The Côte d'Ivoire is a party of the *Organisation pour l'harmonisation en Afrique du droit des affaires* (in English, the Organisation for the Harmonisation of Corporate Law in Africa, hereinafter 'OHADA') Treaty, a system of corporate law and implementing institutions adopted by 17 west and central African countries. Under this treaty, there has been harmonisation of cooperative law under a uniform act for cooperative societies. The national expert for Côte d'Ivoire thus highlights that the national legislator can only legislate for cooperatives for matters that are not harmonised, namely fiscal law<sup>49</sup>. The national expert for the Côte d'Ivoire believes that, since the OHADA Uniform Act applying to Cooperatives system has been in place for nearly a decade, a study into the overall implementation of it in each country could identify weaknesses and bring about suitable solutions<sup>50</sup>.

Overall, this study demonstrates that there are numerous obstacles to achieving a level playing field for cooperatives. This section notes that from the examples discussed, cooperatives in a number of countries

<sup>46</sup> J. Gbede, , 'Rapport National Analyse Du Cadre Juridique des Cooperatives en Côte D'ivoire', The Alliance Africa, ICA-EU Partnership, p. 22

<sup>47</sup> As an additional example of the impact of global economic trends on national cooperative movements, the expert for New Zealand cites an interesting example of global economic factors driving companisation, where a large national dairy demutualised its century old cooperative model after being sold to a Chinese industrial group: see A. Apps, 'National report of New Zealand', ICA-AP, ICA-EU Partnership, p. 19.

<sup>48</sup> Cooperatives of the Americas, Legal Framework Analysis, 'NATIONAL REPORT FOR PANAMA', ICA-EU Partnership, pp. 11-12

<sup>49</sup> Op cit, Gbede, at supra 45, p. 22

<sup>50</sup> Ibid

are subject to the burden of increased oversight compared to regular companies, with cooperatives in some cases regulated by a body specific to cooperatives along with oversight by the bodies other enterprise types are subject to. Legislators should aim to address this imbalance. Additionally, some national experts note that regulatory conditions exclude cooperatives from operating in certain sectors or accessing grants available to for-profit companies, hindering their ability to compete on a level playing field with other business models. Where possible, national legislators should remove such obstacles to cooperative participation in certain sectors. Furthermore, the study highlights the impact of extra-judicial factors on cooperatives, which policy makers should take into account. Factors that go beyond the scope of the national legislator are highlighted by the national experts, such as international treaties and a global trend towards the companisation of cooperatives.

### (iii) Fragmentation

In the guidance notes to the cooperative principles, the ICA defines a cooperative as “*an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise.*”<sup>51</sup> Therefore, although cooperatives operate in virtually every sector, they share a common cooperative identity. As stated previously, a unified legal framework is beneficial from the perspective of a building a coherent public policy for cooperative development, for a reduction of bureaucracy and also from the perspective of cooperative autonomy.

Several of the national experts in our study have highlighted the cooperatives in their respective countries are governed not by one cooperative law but by a series of sectoral laws. In Greece, the national expert notes that the cooperative movement is served by a legal system burdened by a problematic architecture that divides cooperatives into numerous special cooperative laws<sup>52</sup>, justified by a provision of the Constitution that explicitly divides cooperatives into rural and urban categories<sup>53</sup>. The expert argues that this results in the shared identity of cooperative enterprises being disregarded by the legislator, noting that there is no general definition for a cooperative in Greece. Beyond this, the fragmentation of Greek cooperative legislation results in registration of cooperatives under different registers and different authorities, thus rendering statistical collection for the whole cooperative movement very difficult and preventing a cohesive public policy for cooperatives. To address these issues, the Greek expert

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<sup>51</sup> International Cooperative Alliance, ‘Guidance Notes to the Co-operative Principles’, 2015

<sup>52</sup> Op cit, Douvitsa, at supra 31, pp. 20-21

<sup>53</sup> Ibid, p. 3

recommends the harmonisation of existing cooperative laws, the introduction of a general cooperative law, as well as a unified register for cooperatives<sup>54</sup>.

Similarly, in Tunisia the national expert also notes the fragmented and complex legal system as a major obstacle to achieving a cooperative-friendly legal framework<sup>55</sup>. In Tunisia, there is a general cooperative law, existing alongside other special laws, dividing agricultural cooperatives into two sectors<sup>56</sup>. To complicate matters, the general law explicitly allows the special laws to deviate from it<sup>57</sup>. The national expert for Tunisia thus suggests that abolishing the special laws and bringing all cooperatives in the country under one law or amending each individual law would be beneficial to the cooperative movement in Tunisia<sup>58</sup>.

It is important to remember that socio-economic contexts can influence the development of cooperative laws in different countries. The national expert for Japan notes that cooperative law in this country evolved differently from other countries for due to its particular history. As such cooperatives in Japan have since their inception been regulated through different ministries and under special laws for different types of cooperatives<sup>59</sup>. It is therefore in the view of the national expert that it would be unfeasible to unify cooperatives in Japan under a general law. The Republic of Korea is another country in which cooperatives are regulated under special laws. It is important to note that the Republic of Korea's legal framework relies on special laws for cooperatives and its expert notes the country has a thriving cooperative movement, with the 2012 Framework Act seeing over 15,000 new cooperatives (discussed in greater detail in section (iv), below). Nonetheless the expert still considers a coherent legal framework to be something that the country's legislators should aspire to<sup>60</sup>.

A further point is that, as noted by Henry above and depending on the context, certain types of cooperative might need to be specifically regulated by separate legislation. An example of this is Bolivia, where in addition to a general cooperative law, there are special laws applying to open and corporate savings and credit unions, and mining cooperatives. The view of the national expert for Bolivia is that for this country, a further special law to facilitate the creation of associated work cooperatives is needed since the general law does not foresee such cooperatives<sup>61</sup>. In another example, for Côte d'Ivoire, the national expert notes that, since the vast majority of cooperatives in the country are agricultural, legislation and

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<sup>54</sup> Ibid, p. 25

<sup>55</sup> A. B. Rhouma, '*Rapport national Analyse du cadre juridique des coopératives en Tunisie*', ICA-EU Partnership, p. 22

<sup>56</sup> Ibid, pp. 6-7

<sup>57</sup> Ibid, p. 12

<sup>58</sup> Ibid, p. 24

<sup>59</sup> A. Kurimoto, '*National Report of Japan*', ICA - Asia and Pacific, ICA-EU Partnership, p. 16

<sup>60</sup> ICA - Asia and Pacific, Legal Framework Analysis, '*National Report of Republic of Korea*', ICA-EU Partnership, p. 29

<sup>61</sup> Op cit, Weise, at supra 39, p. 11

policy is focused on cooperatives in this sector. At the same time, the country's informal sector could be particularly well suited to the cooperative enterprise model and the national expert therefore supports studies that look into specific cooperative legislation for this sector<sup>62</sup>.

Overall, most national experts consider the division of cooperatives into special laws to be undesirable from the perspective of cooperative development. Fragmentation of cooperative law can not only disregard the shared identity of cooperatives; it can also prevent a coherent public policy for cooperatives by governing cooperatives in different sectors under different authorities. An overly complex legal framework can also make the formation of new cooperatives and the implementation of cooperative law more difficult. Notwithstanding the fact that replacing special cooperative laws is not always feasible or desirable in the national cooperative context, as well as the fact that legislative frameworks affecting cooperatives can interact with several areas of law (e.g. labour law, competition law or taxation), lawmakers are encouraged to ensure cooperative laws are not more complex than necessary and strive for a coherence in cooperative law in the interests of cooperative development and policy.

#### **(iv) Up-to-date law**

In addition to implementation, a level playing field and addressing fragmentation, an up-to-date legal framework is the final category discussed within this paper. The regular review and, where necessary, update and revision of legislation impacting cooperatives are important indicators that cooperatives continue to be taken into account by policy makers.<sup>63</sup> This is important from the perspective of ensuring legislation takes into account the distinctness of cooperatives from other types of business model, and also so that government ministers, advisors and citizens are educated on cooperative law and policy. In addition, the inclusion of cooperatives and cooperative representative organisations in consultation, drafting and development of the law is also important.

For several other countries, the national experts also call for updates to cooperative laws which have not been updated for decades. The national expert for the Dominican Republic notes that cooperatives have experienced growth in the country, but that legislation is antiquated. It is the opinion of the expert that the main legislative instruments that have been in force since 1963 and 1964 are not fit for purpose, especially given developments that have taken place in the previous decade<sup>64</sup>. In Ghana, the national expert notes that the current law was introduced during in 1968 during an era of military dictatorship and

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<sup>62</sup> Op cit, Gbede, at supra 45, p. 22

<sup>63</sup> A. Apps, '*National report of Fiji*', ICA - Asia and Pacific, ICA-EU Partnership, p. 15

<sup>64</sup> J. Méndez, '*National Report for the Dominican Republic*', Cooperatives of the Americas, ICA-EU Partnership, p. 12

for the purpose of maximising government control over cooperatives<sup>65</sup>. As such, although the expert notes that cooperatives offer a means of improving livelihoods, the current legislation does not provide for an enabling environment for cooperatives and prevents them reaching their potential to contribute to poverty alleviation<sup>66</sup>.

By contrast, experts in other countries have welcomed updates to their cooperative legal frameworks. For Nepal, the first cooperative law of 1959 was amended in 1961 on account of the authoritarian *Panchyat* regime which began in 1960. Following the end of the regime, the autocratic constitution was replaced by a democratic constitution and a new cooperative law came into place in 1991<sup>67</sup>. The expert notes that only 830 cooperative enterprises existed in the country before 1992, compared to over 34,000 within the past year when the report was written<sup>68</sup>. The expert credits the 1991 legal framework for supporting the cooperative movement in the country, as it is noted that the cooperative movement emerged after this law came into effect<sup>69</sup>. In general, the expert also highlights the importance of introducing new legislation to reflect constitutional changes<sup>70</sup>.

The national expert also notes that the 2015 constitution of Nepal recognised the cooperative model as one of the three pillars of the economy. This was accompanied in 2017 by a new Cooperative Act which was formulated with the involvement of the country's cooperative movement, namely through the cooperative federation and confederation<sup>71</sup>. Although the expert notes that not all recommendations from the movement appeared in the final Act, Chapter 13 of the Act contains significant adjustments for cooperatives<sup>72</sup>.

Some countries have updated their cooperative laws on a very frequent basis. In the Republic of Korea, the national expert highlights that all of the cooperative laws in the country have been updated to take into account socio-economic and industrial changes in periods of increased economic growth<sup>73</sup>. The Agricultural Cooperative Act has been amended over eighty times, for example. The Framework Act on Cooperatives designed to recognise self-help organisations, excluded from the scope of the eight sectoral laws, has also been amended four times since its creation in 2012. The Framework Act has been notable

<sup>65</sup> A. Boakye, Legal Framework Analysis, 'Ghana National Report', The African Alliance, ICA-EU Partnership, p. 8

<sup>66</sup> Ibid, p. 6

<sup>67</sup> ICA - Asia and Pacific, Legal Framework Analysis, 'National Report of Nepal', ICA-EU Partnership, pp. 1-2

<sup>68</sup> Ibid, p. 16

<sup>69</sup> Ibid, p. 2

<sup>70</sup> Ibid, p. 3

<sup>71</sup> Nepal Law Commission, Cooperatives Act, 2017 An Act Made for Amendment and Consolidation of Laws concerning Cooperatives, Act No. 41 of the Year 2074, Date of Authentication 2074-7-4 (October 18, 2017)

<sup>72</sup> Ibid. pp. 15-16

<sup>73</sup> Op cit, National Report of Republic of Korea, at supra 59, p. 3

for facilitating a simplified process for creating a cooperative and cooperatives in a wide variety of sectors have emerged as a result, and more than 15,000 cooperatives have been set up as of March 2019.

At the same time, one must be careful to recommend frequent updates to legislation for their own sake. The Greek national expert notes that cooperatives in that country are subject to greater legislative changes compared to the Anonymous Societies (SA) business model, to the detriment of cooperatives. The SA model has experienced mainly minor changes or those resulting from European Union law. By contrast, cooperatives have been subject to not only a considerably greater number of changes, but these changes are of a more severe nature. Revisions to cooperative legal frameworks entail the constant amendment and abolishment of special laws, replaced by new legislation.<sup>74</sup> It is in the view of the Greek national expert that the nature of these changes does not benefit the cooperative movement but rather leads to uncertainty around the cooperative legal form, thus dissuading parties choosing it as their form of business<sup>75</sup>.

Overall, there is a broad consensus among national experts in the study that cooperatives benefit from legal frameworks that are up to date. For some countries in the study, the cooperative legal frameworks have not been updated in over half a century, during which time the socio-economic context has dramatically changed. Arguably, outdated legislation does not create an adequate enabling environment for modern cooperatives to thrive. Due to evidence from national experts that well drafted and modern cooperative legal frameworks can result in strong growth in cooperative numbers, lawmakers should encourage growth in the national cooperative movement across different sectors by updating outdated laws. One potential good practice identified is giving the cooperative movement of the country a voice through consulting with cooperative stakeholders when drafting new legislation, as noted in Nepal.

## Conclusions

Considering the need for cooperatives to benefit from enabling legislation and policies, the legal framework analysis strives to make knowledge on legal frameworks more accessible to cooperative organisations and provide them hands-on tools to support their advocacy and recommendations. Based on the current research completed, this paper discusses four main trends from the legal framework analysis that could be used to form recommendations for national legal frameworks.

In part (i) of this contribution, national experts cite the importance of not only a strong legal framework but good enforcement and implementation, in order to ensure compliance with the law and to protect

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<sup>74</sup> Most recently, changes were enacted for agricultural cooperatives. See <https://www.ica.coop/en/newsroom/news/ica-advocates-regulatory-improvements-greece-help-agricultural-cooperatives>

<sup>75</sup> Op cit, Douvitsa, at supra 31, p. 20

cooperative identity as a distinct form of enterprise. This should entail strong and proportionate auditing and registration of cooperatives, preferably through a legal system that facilitates integration of cooperative networks and maintains cooperative autonomy. Part (ii) of this contribution concludes that for cooperatives to be able to compete on a level playing field, they should not be subject to greater oversight or taxation than other business models. The reports of some national experts demonstrate that cooperatives still face legislative barriers. Attention should also be paid to legislation that excludes cooperatives from competing in certain sectors. In part (iii) of the contribution, it is noted that most national experts are in favour of replacing legal frameworks that divide cooperative laws by special laws with a unified text covering all cooperatives, in recognition of their common cooperative identity, though it is recognised that in some national contexts this is not possible or even desirable.

Finally, in part (iv) this paper notes that in the opinion of national experts, cooperatives benefit from regular review, update and revision of the legal frameworks governing them. Lawmakers should therefore identify where cooperative legislation is no longer fit for purpose and make updates to cooperative law, with consultation and genuine inclusion of the cooperative movement and other relevant international stakeholders. This paper also recognises national contexts differ widely from country to country and also that factors going beyond the national legislator, such as financialisation and companisation, can also impact the cooperative sector.

In short this paper asserts that the absence of an adequate legal framework for cooperatives, or the presence of a weak or fragmented legal framework, can negatively impact cooperatives and their evolution; while in contrast, the existence of supportive regulations can foster cooperative identity, cooperative development and is also instrumental in supporting a fairer, more inclusive and sustainable economy.

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