

THE EAST AFRICAN COMMUNITY'S COOPERATIVE REGULATION

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Abstract

Since 2014, a new legal framework governing cooperative societies has been in force within the East African Community. The Act was adopted through a concerted procedure involving all interested parties. The Act replaces national provisions of Partner States, except for complementary and non-contrary provisions. The aim of this analysis is to present the main articulations of this regulation.

I. Introduction

The East African Community (EAC) is a regional intergovernmental organisation of 6 Partner States¹. The EAC was established by a Treaty which guides the work and the activities of the Community. The Treaty was signed on 30th November 1999 and entered into force on 7th July 2000 following its ratification by the original three Partner States². The main Organs of the EAC are the Summit³, the

¹ The Republic of Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania, and the Republic of Uganda. The headquarters are in Arusha, Tanzania.

² Kenya, Tanzania and Uganda. The Republic of Rwanda and the Republic of Burundi acceded to the EAC Treaty on 18th June 2007 and became full Members of the Community with effect from the 1st of July 2007. The Republic of South Sudan acceded to the Treaty on 15th April 2016 and became a full Member on 15th August 2016.

³ The Summit includes Heads of Government of Partner States. The Summit gives strategic direction towards the realisation of the goal and objectives of the Community.

Council of Ministers⁴, the Co-ordinating Committee⁵, the Sectoral Committees⁶, the East African Court of Justice⁷, the East African Legislative Assembly and the Secretariat⁸.

The East African Legislative Assembly (EALA) is the Legislative Organ of the Community and has a cardinal function to further EAC objectives, through its legislative, representative and oversight mandate. It was established under article 9 of the Treaty. The Assembly has a membership comprising of 45 elected members (nine from each Partner State), and 7 *ex-officio* members consisting of the Minister or Cabinet Secretary responsible for EAC affairs from each Partner State, the Secretary-General and the Counsel to the Community totaling 52 members⁹. The Assembly draws the authority to establish its Standing Committees from its rules of procedure. It currently has 6 Standing Committees to execute its mandate¹⁰.

The objective of the Community is to develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defense, security and legal and judicial affairs, for their mutual benefit (article 5 of the Treaty). One way of achieving these objectives is the production of appropriate and applicable legal standards.

According to article 62 of the Treaty (Acts of the Community), “1. The enactment of legislation of the Community shall be effected by means of Bills passed by the Assembly and assented to by the Heads of State, and every Bill that has been duly passed and assented to shall be styled an Act of the Community. 2. When a Bill has been duly passed by the Assembly, the Speaker of the Assembly shall submit the Bill to the Heads of State for assent. 3. Every Bill that is submitted to the Heads of State under paragraph 2 of this Article shall contain the following words of enactment: Enacted by the East African Community and assented to by the Heads of State”¹¹.

⁴ The Council of Ministers is the central decision-making and governing organ of the EAC. Its membership constitutes of Ministers or Cabinet Secretaries from the Partner States whose dockets are responsible for regional co-operation.

⁵ Under the Council, the Co-ordinating Committee has the primary responsibility for regional co-operation and co-ordinates the activities of the Sectoral Committees. It also makes recommendation to the Council about the establishment, composition and functions of such Sectoral Committees. It draws its membership from Secretaries responsible for regional co-operation from the Partner States.

⁶ Sectoral Committees conceptualise programmes and monitor their implementation. The Council establishes such Sectoral Committees on recommendation of the Coordinating Committee.

⁷ The East African Court of Justice is the principal judicial Organ of the Community and ensures adherence to the law in the interpretation and application of compliance with the EAC Treaty. It was established under article 9 of the Treaty.

⁸ The Secretariat is the executive organ of the Community. As the guardian of the Treaty, it ensures that regulations and directives adopted by the Council are properly implemented.

⁹ More details on the website of EALA: <http://www.eala.org/>

¹⁰ Accounts Committee ; Committee on Legal, Rules, and Privileges; Committee on Agriculture, Tourism and Natural Resources; Committee on Regional Affairs and Conflict Resolution; Committee on Communication, Trade and Investment, and Committee on General Purpose.

¹¹ For more details about EAC, see Mathieson, C. (2016) : The political economy of regional integration in Africa, the East African Community, ECPDM : <http://ecdpm.org/wp-content/uploads/ECDPM-2016-Political-Economy-Regional-Integration-Africa-EAC-Report.pdf>

Following this procedure under article 62 of the Treaty, many Acts have become effective within the Community since its creation. One of these Acts is related to cooperative societies and will be the main subject of this article.

The purpose of this article is to present this legislation applicable to cooperatives in East Africa. We will not carry out an in-depth analysis involving a comparison with the national cooperative legislation of Partner States. The aim will be simply to highlight the main articulations of the text, while commenting on them in the light of internationally recognized cooperative ethics. The approach will be essentially analytical, with no ambition to account for the effectiveness of the law; which requires close proximity with the actors in the field.

After an analysis of historical aspects, we will discuss the modalities of constitution, functioning and dissolution of cooperatives.

II. History and objectives

According to Valeria Galletti, Independent Consultant, we can identify four steps in the history of the EAC Cooperative Societies Bill, 2014¹².

First phase: mobilizing broad-based expertise to define a model legislation

In 2009: a comparative study on cooperatives. EAFF¹³ commissions a comparative study of cooperative laws in Ethiopia, Uganda and Kenya. Best practices were identified and model legislation drafted serving as a very first draft of the Bill¹⁴.

March 2010: validation of the study. The study report was validated during a workshop of EAFF members.

June 2010: sharing the draft with EALA members. EAFF convened a workshop in Nairobi to look at policy issues and process at the EAC.

June 2011: 1st think tank on cooperatives. EAFF convenes a think tank at the Cooperative College of Karen (Kenya) to further work on the draft.

Second phase: from a farmer proposal to a regional law

¹² Galletti, V. "Successful engagement of Farmers' Organisations in the policy arena: EAFF experience with the EAC Co-operative Societies Bill, 2014", http://www.sfoap.net/fileadmin/user_upload/sfoap/KB/docs/EAFF_EAC%20Coop%20Bill_Case%20study.pdf

¹³ Eastern Africa Farmers' Federation.

¹⁴ Nkandu, J. (2010) : "Analytical Study of the Co-operative Acts of Eastern Africa (Ethiopia, Kenya and Uganda)" Commissioned by the Eastern Africa Farmers' Federation (EAFF), Draft Report: http://www.sfoap.net/fileadmin/user_upload/sfoap/KB/docs/EAFF%20Cooperatives%20Study%20Report.pdf

March 2012: meeting at EAC and EALA. EAFF sends a delegation to meet the Speaker of EALA and the EAC Secretary General.

May 2012: 1st presentation to the Parliament. EAFF appears before the EALA Committee to present the Bill for the first time (Arusha, Tanzania).

April 2013: 2nd presentation to the Parliament. EAFF appears before the Committee for a second time during their session in Kigali, Rwanda.

August 2013: Side meeting during EAFF Congress. EAFF convenes a side meeting to discuss the Bill with their members during the 3rd EAFF Farmers' Congress in Burundi.

October 2013: 2nd Co-operatives Think Tank. A 2nd think-tank with EAFF members and legal experts from the Kenyan Ministry in charge of Cooperatives and the Cooperative University College is organised to further critique the Bill.

October 2013: submission to EALA and Parliamentary sponsorship. EAFF submits the revised Bill to EALA.

January 2014: the Bill is published. The Bill is published by the order of the EAC and is placed as a notice in the EAC Gazette No. 1 of 3rd January, 2014.

22 January 2014: 1st Reading of the Bill. The Bill is read for the first time during the EALA session in Kampala, Uganda. EAFF sends 22 representatives to witness the Reading. The motion is seconded and the Bill is forwarded to the Committee for further consultations, before the Bill is brought back to the Assembly for the 2nd Reading.

Third phase: back to the countries

January– July 2014: national and district consultations. EAFF organizes national and district consultations with members and stakeholders to ensure that the Bill is comprehensively critiqued, while preparing for EALA to convene Public Hearings in the Partner States. A report is further prepared and validated.

August – September 2014: Public hearings.

September – October 2014: preparation of the amended document. All stakeholders comments and submissions are compiled by the Principal Legal Draftsman of the EAC, the Clerk and Secretary of the EALA Committee and the EAFF Policy Officer. A report is subsequently drafted together with a proposed schedule of more than 60 amendments.

Fourth phase: the Bill becomes an Act of EALA

October 2014: back to EALA. The mover of the Bill and the Chair of the Committee table the report of the public hearings and the schedule of amendments before EALA for further reading.

22 January 2015: the 2nd reading. The Chairman of the Committee presents the Report to the Assembly gathered in Arusha (Tanzania). The Bill successfully goes through the 2nd reading.

27 January 2015: the 3rd reading. The Bill is scrutinised clause by clause during a 3rd reading in Arusha, Tanzania.

28 January 2015: the Bill becomes an act of EALA.

Once ratified, the Bill will become law and take precedence over existing national laws.

Source: Galletti, V. "Successful engagement of Farmers' Organisations in the policy arena: EAFF experience with the EAC Co-operative Societies Bill, 2014", http://www.sfoap.net/fileadmin/user_upload/sfoap/KB/docs/EAFF_EAC%20Coop%20Bill_Case%20study.pdf

In accordance with the provisions of article 62 of the Treaty, the Bill went through the stages of the procedure described above, and the version currently available is an Act. Even if the main title is "The East African Community Cooperative Societies Bill"¹⁵, such title is followed by this statement, "An Act to provide a legal framework for cooperative societies in the Community and to provide for other related matters - Enacted by the East African Community and assented to by the Heads of State". Also, article 1 of the Bill provides that "This Act may be cited as the East African Community Cooperative Societies Act, 2014".

The objective of the EAC cooperative societies Act is to provide a legal framework for cooperative societies in line with article 128 of the Treaty (strengthening the role of private sector as an effective force for developing economies)¹⁶. The Act intends to harmonise national cooperative laws in the EAC partner states. That is why article 54 of the Act provides that it shall prevail over the laws of the partner States in respect of any matter to which its provision relates. However, this presupposes that the national provisions which are not contrary to or complementary to the Act remain valid.

¹⁵ The official version is available on the website of EALA : <http://www.eala.org/uploads/EAC%20Cooperative%20Societies%20Bill.pdf>

¹⁶ Cooperatives play a significant role in the economies of East African countries. In 2013, Kenya, Tanzania and Uganda each reported at least 9,000 registered cooperative societies in their respective countries. Most of these are agriculture-related cooperatives. In Uganda Burundi and Rwanda, agriculture co-operatives account for over 50% of co-operatives in the country. Savings and credit co-operatives (SACCOs) are also becoming increasingly popular in the region. In Tanzania, SACCOS account for 56% of the registered co-operatives in the country. In 2013, the SACCOS had a total savings of USD 220 Million. Further, the African Business magazine (October 2011 edition) ranked the Cooperative Bank of Kenya the third biggest bank in the East African Community and 71st largest bank in Africa, in 2011. Source : Daily Nation, 31 mai 2014 : <http://www.nation.co.ke/business/Bill-seeks-to-harmonise-rules-on-cooperatives/-/996/2333364/-/86juqoz/-/index.html>

III. Constitution of cooperatives

Definition

Under the provisions of article 4 (2) of the Act, cooperative societies are voluntary organisations open to all persons able to utilise their services and willing to accept the responsibilities of membership without gender, social, racial, political or religious discrimination. Paragraphs 3 to 10 are about the cooperative principles, but take a very pedagogic approach:

- Cooperative societies are democratic organisations controlled by their members who actively participate in setting their policies and making decisions, and every member has equal voting rights.
- Members shall receive dividends from profit according to their shares and contribution after an amount necessary for reserve and social services has been deducted and set aside.
- Co-operative societies are autonomous self-help organisations controlled by their members, and if they enter into agreement with other organisations including governments or raise capital from external sources, shall do so on terms that ensure democratic control by their members and maintain their autonomy.
- Co-operative societies provide education and training for their members, elected representatives, managers and employees so as to enable them to contribute effectively to the development of their societies.
- Co-operative societies serve their members most effectively and strengthen the societies' movement by working together through local, national, regional and international structures.
- Co-operative societies work for the sustainable development of their communities through policies approved by their members.
- Cooperative societies and their businesses are owned by the members and the businesses are done for members and not with members, they do not trade or do business with members but rather for members, and do not buy from members but facilitate members to sell their goods without the societies taking ownership over the goods.
- The employees, management and staff of the cooperative societies play a facilitating role in the cooperative societies' businesses without taking ownership from the members.

Following this formulation, the drafters of the Act have translated the internationally recognized cooperative principles so as to make them intelligible to cooperative actors. This reading is therefore more pedagogical than a mere reproduction of internationally recognized cooperative principles.

The penultimate point is particularly full of teaching and reflects what a real relationship between a cooperative and its members should look like: Cooperative societies and their businesses are owned by the members and the businesses are done for members and not with members, they do not trade or do business with members but rather for members, and do not buy from members but facilitate members to sell their goods without the societies taking ownership over the goods.

Moreover, the Act (article 4 (1)) obliges cooperatives to adopt these cooperative principles in their by-laws.

Article 3 of the Act refers to the objectives of cooperative societies. It is very important for cooperative members to know why they are gathered within the framework of a cooperative society.

Cooperative societies are established to solve problems collectively (which members cannot solve individually), and to coordinate the knowledge, skills, wealth and labour of the members for better results.

Cooperative societies are also established to promote self-reliance among members, to collectively protect, withstand and solve economic problems, and to improve the living standards of members (by reducing production and service costs, by providing input or service at a minimum cost or by finding a better price for their products or services).

Cooperatives are finally established to expand the mechanism by which technical knowledge could be put to practice, to develop and promote saving and credit services, to minimise and reduce the individual impact of risks and uncertainties, to develop the social and economic culture of the members (through education and training), and to empower the members to have ownership along commodity value chains by facilitating business development for the members.

Authorized activities

According to article 4 (1) of the Act, all cooperative societies have to abide by the guiding principles defined at article 4 (3 to 10). The expression "All cooperative societies" used at article 4 refers to cooperative societies involved in any kind of activity. It supposes that the Act has not placed any limit in the activities of cooperative societies even if the Bill was initiated and drafted according to the experience of agricultural cooperatives. Yet, in other systems, the legislator clearly states that cooperatives can engage in activities in all areas of human life. This is the case in the OHADA zone (Organization for the Harmonization of Business Law in Africa), by reference to article 5 of the Uniform Act related to cooperative societies¹⁷.

In other contexts, the legislator goes further and defines special rules applicable to cooperatives depending on the activities. The OHADA and EAC legislators have not followed this option, perhaps because of the large number of countries they gather. But also, it might seem difficult to define such rules accurately, in a supranational context. On the contrary, the South African legislator has followed this path

¹⁷ Hiez, D. & Tadjudje W. (2013) : "The OHADA Cooperative regulation", in Hagen Henry and al. (Editors), *International Handbook of cooperative law*, Springer, 89-113.

by laying down specific rules for cooperative housing, worker co-operatives, financial services co-operatives and agricultural cooperatives (South Africa Cooperatives Act, 2005)¹⁸.

Forms and modes of establishment

Cooperative societies can be established at different levels. We will mention here the forms and mode of establishment of primary cooperatives and deal with apex organisations in another section.

A cooperative society cannot be created by one person. The first objective of a cooperative, as mentioned above, is to solve problems collectively which members cannot solve individually. It means that a cooperative, under this Act is not possible with a single member. In fact, the number of members in a primary society shall not be less than ten. The founders (at least ten members) must be people living in the same area. This is what is commonly called a common bond. But the Act allows an exception. In fact, a cooperative society may sell some of its shares to persons outside its area when the society faces shortage of capital. This must be the only reason why a cooperative society allows people outside its area to get membership (article 5 (5) of the Act).

When these two conditions are met, the founders should write their bye-laws according to article 9 of the Act¹⁹. The bye-laws represent the contract among the founders, on the one hand, and between the founders and their future cooperative. But the contract (bye-laws) is not enough to give the founders legal personality to operate. Article 7 of the Act provides that a cooperative society shall be registered by the appropriate authority in the Partner State.

The Act is not specific about the exact nature of such authority at national level. It is the duty of national authorities to determine the competent body²⁰. To get the registration, the founders shall submit an application for registration to the appropriate authority together with the following particulars : minutes of the founders' meeting ; the bye-laws of the society²¹; names, addresses and signatures of the members; names, addresses and signatures of the members of the Board of Directors of the society; a detailed description which proves that the registered members of the society have met the requirements for membership; documents showing the amount of the capital of the society and that the capital has been collected and deposited in a bank account, and if there is no bank in the area, that it has been deposited in

¹⁸ For more information about former national laws, see Theron, J. (2010) : "Cooperative policy and law in east and southern Africa: A review", CoopAFRICA Working Paper No.18, International Labor Organisation: <http://ilo.org/public/english/employment/ent/coop/africa/download/wpno18cooperativepolicyandlaw.pdf>

¹⁹ Article 50 attaches particular importance to address and the initiators should take this into consideration even at the moment of their first reflection : every society should have an address registered in accordance with article 7. To this effect, all service of process, notices and other communications to the society shall be sent to that address. To keep the address official, the cooperative society shall inform the appropriate authority of any change in such address within thirty days.

²⁰ Article 52 of the Act mentions that an agency shall be established by law, responsible for organising, registering, promoting or supporting cooperative societies and for rendering training, conducting research and other technical support to societies. The establishment of the agency shall be determined by the societies and documented by way of a resolution passed through the national apex co-operative organisation. Also, the Act requires that at least half of the members constituting the board of the agency shall be selected from the co-operative societies.

²¹ The bye-laws must be written according to article 9 of the Act.

a place designated by the appropriate authority; and other particulars that may be specified in the regulations or directives issued for the implementation of the Act (article 7 (2) of the Act).

The appropriate authority registers a cooperative society and issues a certificate of registration within 15 days when it is satisfied that the application for submitted registration has fulfilled the requirements for registration. If the appropriate authority rejects the application for registration of a society, it has to give a written explanation to the representatives of the society within 15 days. The certificate of registration issued to a cooperative society is evidence that such society is registered (article 7 (3-6) of the Act). A cooperative society registered under the Act has juridical personality from the date of its registration and has limited liability (article 8 of the Act).

Apparently, the Act would allow the appropriate authority to issue a temporary registration certificate to a cooperative. That is what an analysis of article 7 (7) would reveal, even if the provision seems poorly worded: “When the appropriate authority is satisfied that the requirements under sub section (2) have been met, it shall grant a temporary certificate to the society which may serve not more than a year and the appropriate authority shall cause the rest of the requirements to be observed within a specified period of time”. This could happen if the cooperative did not fulfill all the registration requirements, but at least the essential among them. In this case, the appropriate authority would give the cooperative time to observe the missing conditions since the temporary certificate is only valid for one year.

Registration is very important since it gives the right to the cooperative society to engage in any business as from the date of registration without the necessity of securing an additional trade licence.

A cooperative society can be suspended in the same way that it is registered. In practice, where a society is found operating outwith of the objectives for which it is established, it may be suspended by the appropriate authority from carrying out any activities permitted by the Act. Where a society is suspended, it has to submit a request to reverse the suspension. If the appropriate authority finds merit in the request, it may reverse the suspension. In case the authority does not reverse the suspension of a cooperative society, it has to give a written explanation to the General Assembly. The General Assembly may appeal to the High Court against any decision made by the appropriate authority.

IV. Functioning of cooperatives

Membership

Article 11 (1) of the Act defines four conditions that individuals must meet in order to become members of a cooperative. The first condition relates to the majority in age. Any individual may become a member of a society where such individual has attained the age of 18. The second condition concerns the financial capacity of the applicant. The individual should be able to pay the share capital and registration fee required by the society. The third condition refers to the commitment of the applicant to observe the terms of the contract that binds him/her to the cooperative. That is why the applicant has to be willing to implement his or her obligation and observe the objectives and bye-laws of the society. The fourth and last condition is more general and involves a commitment by the applicant to respect the applicable legal

and regulatory framework. For instance, he or she should be ready to fulfil other requirements which may be specified in the regulations and directives issued for the implementation of the Act²².

The Act is not specific about the membership procedure. Article 9 of the Act provides that the requirements for accession to cooperative societies must be listed in bye-laws. This presupposes that it is within the competence of the initiators to decide, for example, whether the application will be made in writing or orally, or whether probity or professionalism are required. This seems to be justified because not all cooperatives are invested in the same activity and, depending on the context, the requirements may vary. The most important is that the requirements are accepted and respected by members, and also are consistent with cooperative law.

The Act does not strictly focus on the concept of common bond which, in principle, relates to some requirements for membership in cooperatives. The Act requires that cooperatives include, as members, only people living in the same area. But there is one exception: a society may sell some of its shares to persons outside its area when it faces shortage of capital (article 5 (5) of the Act).

On the other hand, Kenya's national law provided that a person (other than a cooperative society) cannot be qualified for membership of a cooperative society unless, among other requirements, his or her employment, occupation or profession falls within the category or description of those for which the cooperative society is formed, and he or she is resident within, or occupies land within the society's area of operation as described in the relevant bye-laws. This means that cooperative members must share either a community of occupation or activity, or a geographical proximity²³.

This requirement of Kenyan law is in line with the seventh cooperative principle, regarding commitment to the community, which also reflects the commitments of ecological development of cooperatives, because of their territorial anchorage.

Membership in cooperative societies creates rights and obligations for cooperators. A member of a society has the right to obtain services and benefits according to his or her participation in the society, to participate in the meetings of the society and to vote, to elect and to be elected, to withdraw from the society on request with payment of benefits.

In addition to the rights, these cooperator also has obligations. A member of a cooperative society is obliged to respect the bye-laws, directives and decisions of the society, and to perform those activities which ought to be performed in accordance with the bye-laws and directives of the society. He or she is also obliged to pay for a share of the capital and registration fee, to protect the common property of the society, to conserve the environment as mitigation against climate change, to promote gender equity in decision making, and to support youth participation in cooperative societies to ensure continuity (article 12 of the Act).

²² A society other than a primary society may become a member of another society under this section if such society wishing for membership is registered with the appropriate authority.

²³ Article 14 of the Kenyan Cooperative societies Act, Revised Edition 2012 [2005].

Through the last three duties of cooperators, the legislator of East Africa shows a strong commitment to sustainable development, gender promotion, and intergenerational dialogue. This is particularly noteworthy and is not always reflected in other legislation.

Cooperators have to conserve the environment as mitigation against climate change. This assignment is also in line with the seventh cooperative principle (commitment towards the community). Cooperators have to promote gender equity in decision making. Classically, there are men and women's organizations in our communities. But a mix would reduce spending and promote economies of scale. But in this case, women should be sufficiently represented in decision-making processes, and not left behind, as is commonly the case. Cooperators have to support youth participation in cooperative societies to ensure continuity. But how can they do it? For example, by raising young people's awareness of the potential of cooperatives, by inviting them to become members, by involving them in decision-making processes, and so on. These are important values for the development of cooperatives.

Membership in a cooperative society is not final. A cooperator may decide to leave, or can be dismissed by the cooperative as the result of a punishment. According to article 13 of the Act, on the one hand, a member of a cooperative society may leave the society on his or her own initiative. On the other hand, a member may be expelled from the cooperative society by a decision of the General Assembly for failure to observe the regulation (the Act) or bye-laws. But in case of expulsion, the rights of an expelled member shall be respected in accordance with the bye-laws of the cooperative society. A person who is expelled may re-apply for membership, but the re-admission is only possible following an approval by the General Assembly (article 13 of the Act).

Financial aspects

The Act remains faithful to the internationally recognized cooperative principles, with regard to financial aspects. It specifies that at least part of the resources and funds of the cooperative constitute a common heritage that cannot be divided among the members of the cooperative. These resources include mainly the reserves.

The Act has not reserved a section to share capital as is the case in other laws. However, a combination of articles 7 and 14 makes it possible to draw the rules. The Act doesn't require a minimum or maximum amount of share capital. Indeed, amongst other conditions of registration, the initiators must produce "documents showing the amount of the capital of the society and that the capital has been collected and deposited in a bank account, and if there is no bank in the area, that it has been deposited in a place designated by the appropriate authority" (article 7 (2-f) of the Act).

Similarly, the share capital is variable, to the extent that by decision of the General Assembly, it can be increased. This can be done on the occasion of the entry of new members, or by additional contributions of cooperators. The shares must be of the same par-value (article 14 (1 and 3) of the Act). Also, cooperatives may issue shares and sell them to non-members (investor-members) if they face a shortage of capital (article 14 (6) of the Act), having followed a membership procedure determined by the bye-laws of the society (article 14 (7) of the Act).

At the end of the financial year, cooperative societies have to deduct at least twenty percent of the net profit and allocate it for the reserve fund. The amount allocated for the reserve fund shall not exceed thirty percent of the capital of the society, and shall be deposited in the savings account of the society. The distribution of the remaining net profit shall be determined by the General Assembly, and when a member receives net profit, he or she may buy an additional share (article 31 of the Act).

The combination of these two paragraphs of section 31 of the Act makes it possible to identify a strategy to improve the finances of cooperative societies: the amount allocated for the reserve fund shall not exceed thirty percent of the capital of the society, and when a member receives net profit, he or she may buy an additional share (article 31 of the Act).

The amount of the reserve cannot exceed thirty percent of the value of the share capital. One might think that it is a stable value, depending on the number of cooperators. However, when a cooperator receives patronage refunds, he or she may subscribe for an additional share, which entails further increasing the value of the compulsory reserve.

Governance aspects

Every cooperative society must have a General Assembly, a Board of Directors and a Control Committee.

General Assembly

The supreme organ of any cooperative society shall be the General Assembly. The General Assembly is entitled to pass decisions after evaluating the general activities of the society, to approve and amend the bye-laws and internal regulations of the society, and to elect and dismiss the members of the General Assembly, control committee and when necessary members of other sub-committees.

The General Assembly is also entitled to determine the amount of shares of the society, to decide on how the annual net profit of the society is distributed, to make decisions on the audit report, and to receive work reports and give proper decision.

Finally, the General Assembly is entitled to decide upon merger and acquisition, to approve the annual work plan and budget, and to decide any issue submitted by the Board of Directors and other committees (articles 18 and 19 of the Act).

The General Assembly shall meet at least once in a year, and if the Board of Directors or one-third of the members of the General Assembly requires a meeting to be called, an emergency meeting may be held by giving 15 days prior notice. Where the Board of Directors fails to call an emergency assembly, such meeting shall be called by the appropriate authority and shall in such case be deemed to have been called by the Board of Directors (article 20 of the Act).

Board of Directors

Every cooperative society must have a Board of Directors accountable to the General Assembly. The modalities for the election of the members of the Board of Directors, including the number of members, are determined by the bye-laws. Meanwhile, there are some rules provided by the Act. First of all, the

members of the Board are elected for a term of office of three years. Secondly, members of the Board of Directors shall not be elected for more than two consecutive terms, and they may be dismissed at any time by the General Assembly. Thirdly, a member of the Board of Directors who vacates office for whatever reason shall submit for inspection, the activities the member performed during his or her term of office (article 21 of the Act).

All the same, the powers and duties of the Board of Directors shall also be determined by the bye- laws. Such power shall include some points, particularly the following : maintaining the minutes of the meetings of the society, maintaining the documents and books of accounts of the society, preparing the annual work programme and budget of the society, implementing the work programme upon approval, calling the General Assembly in accordance with the bye-laws of the society, and submitting reports to the General Assembly on the activities of the society; and (g) executing such other decisions made by the General Assembly (article 22 of the Act).

Control Committee

Every cooperative society must have a Control Committee accountable to the General Assembly. The bye-laws determine the number of members of the Control Committee. As with the Board of Directors, the term of office of the members of the Control Committee is three years, and no member of the Committee shall be elected for more than two consecutive terms (article 23 of the Act).

The Control Committee is intended to ensure that the Board of Directors carries out its responsibilities properly, to ensure that the funds and property of the society are properly utilised, to ensure that the various activities of the society are carried out pursuant to the bye-laws and the regulations of the society, and to perform other duties assigned by the General Assembly (article 24 of the Act).

Responsibility

According to article 9-2 of the Act, the powers, responsibilities and duties of management bodies have to be determined by the bye-laws. Unlike in the OHADA cooperative regulation, the legislator in the EAC has not provided a legal framework for the liability regime of cooperative leaders.

Cooperation among cooperatives

Article 5 of the Act provides that cooperative societies serve their members most effectively and strengthen the societies' movement by working together through local, national, regional and international structures. Also, a cooperative society may, according to its nature, be established at different levels as may be determined by the members.

A very interesting point is that the Act recommends that one national apex cooperative organisation is established in each Partner State. In the OHADA zone, there are usually several apex organizations in the countries, which is not likely to unify the cooperative movement. Requiring a single organization at the

national level will oblige the national actors to come and work together, especially since the cooperative movement is represented in the agency responsible for promotion and registration of cooperatives. The key roles of the national apex cooperative organisation include promoting cooperative societies, formulation and review of policy and legislation, and serving as a platform for cooperative societies at the national level.

Audit and control

Two types of audit can be distinguished: financial audit and cooperative or organizational audit.

Concerning the financial audit, the Act provides that the appropriate authority should at least once a year audit or cause to be audited by a person assigned by it, the accounts of any cooperative society. The financial audit includes the examination and verification of overdue debts if any, cash, balance, securities and assets and liabilities (article 35 of the Act).

As for the cooperative or organizational audit, it is also conducted by the appropriate authority or a person to be assigned by it. The cooperative or organizational audit concerns an inspection of the cooperative's organisation, work execution, documents and financial condition. Usually, a cooperative or organizational audit is required when a request for the inspection is made by a majority of the members of the Board of Directors, the Control Committee or General Assembly, or not less than one-third of the total number of members of the cooperative society (article 36 of the Act).

The Act requires at least a yearly financial audit but leaves the decision on a cooperative audit to members. The cooperative audit concerning the quality of management of cooperative societies cannot be deduced from the balance sheet alone (financial audit). In this way, the cooperative audit should be made mandatory for all cooperative societies, so that the appropriate authority can control their ability to respect cooperative principles.

The purpose of the audit, whether financial or organizational, is to identify managerial misconduct and provide sanctions. It may concern any person who is or was entrusted with the management of a cooperative, or who is or was an officer or an employee of a cooperative. In the course of the audit or inspection, the concerned persons can be sanctioned if they are found to have made any payment contrary to the regulations or bye-laws of the cooperative, to have caused any damage to the assets of the society by breach of trust, wilfully or negligently, or to have misappropriated the property of the cooperative society.

When someone is found responsible, the appropriate authority who receives the report must give the concerned person an opportunity to present his or her defence within fifteen days. Also, the appropriate authority shall ask the person who has been found responsible for misappropriation of the funds or property of a cooperative society to return the property or re-pay the funds with interest including compensation and damages, and where the person concerned is not willing to do so, the authority shall take the appropriate legal measures (article 37 of the Act).

The Act seems to be more focused on sanctions arising from a financial audit. With respect to the organizational audit, it could have been expected from article 38 to cite, as a cause of dissolution, non-compliance with the cooperative principles set out in the Act, or the bye-laws. Nevertheless, article 38

provides that the cooperative society may be dissolved following a court order. This presupposes that a failure to respect the cooperative principles or the bye-laws may result in a lawsuit and then provoke the dissolution of the cooperative.

Public policies and tax treatment

The main public policy concerns access to land resources for cooperatives. As mentioned above, the Act has been driven by agricultural cooperative organizations. It was the Eastern Africa Farmers' Federation (EAFF) which commissioned the study prior to the reflection on the establishment of the Act. It is therefore not surprising that agricultural cooperatives benefit from this public policy.

Article 29 of the Act provides that, without prejudice to any incentives permitted under land laws or investment laws in the Partner States, cooperative societies are entitled to access land from the Government, as an incentive for business expansion in accordance with the national policies and laws. To access land from the Government, cooperative societies shall meet some criteria. The first is related to registration and duration: the cooperative society must be registered for at least five years. Secondly, the society must have at least three years of accounts audited by an accredited audit company. Thirdly, the cooperative society must be engaged in an activity for which additional land will add value. Fourthly and finally, the cooperative society must demonstrate that it has paid patronage refunds to its members for the past three years.

As for tax treatment, the Act provides two main exemptions²⁴ for cooperative societies properly registered. On the one hand, there is an exemption from corporate tax, for cooperative societies whose annual income does not exceed US\$ 500,000 (although individual members shall be liable to pay income tax). On the other hand, there is an exemption from value added tax, for societies whose annual income does not exceed US\$ 1,000,000 (article 30 of the Act).

These tax benefits contrast with the provisions of other legislations, namely European ones²⁵. Usually, tax exemptions are provided based on the cooperative's ability to respect cooperative principles, or to focus on services to its members. The Act does not rely on cooperative ethics considerations to grant exemptions, but only on annual income. Organizations could rely on this consideration to avoid paying taxes, even if they do not operate according to cooperative principles.

The cooperative audit should be strengthened to distinguish ethically responsible cooperatives and grant them tax exemptions.

Generally, taxation is a matter of sovereignty that should be the responsibility of the national authorities, with all the fluctuations that may occur, while Community law usually requires more stability. In the OHADA zone for example, the legislator has not considered the tax issue, which remains a matter for national authorities.

²⁴ In accordance with incentives permitted under investment laws or tax laws in the Partner States.

²⁵ See for example Karlshausen L. (2001) : « La fiscalité des coopératives au regard du droit européen, in Jérôme Blanc and al., *Les contributions des coopératives à une économie plurielle*, Les cahiers de l'économie sociale, 243-264.

Settlement of disputes

The Act gives priority to alternative dispute resolution. Thus, it provides for two main modes, conciliation and arbitration.

Within the framework of the conciliation, each party shall elect a reconciliation team, and the chairperson (of the reconciliation team) shall be elected in accordance with the agreement of the two parties²⁶. If the parties reach agreement, then the dispute is settled. But if the dispute is not settled by conciliation, the parties shall be referred to arbitration. In fact, before going to arbitration, the parties must try to solve the dispute through conciliation (article 44 of the Act).

As for arbitration, it consists of three persons²⁷ of high reputation and impartiality. The arbitrators shall conduct their hearing and perform their duties in accordance with the Civil Procedure Code or similar law in the Partner State (article 45 of the Act).

The arbitrators have the power²⁸ to hear disputes not settled by conciliation regarding the organisation, management, or operations of the cooperative society which arise between : members or former members and members; members and representatives of former members or persons claiming in the name of the deceased members; members, former members or representatives of former members or heirs of deceased members and any officer, representative of the Board of Directors or employee of the society; the society or the Board of Directors and any former Board of Directors, any officer, agent, or employee or any former officer, agent or employee of the nominee heir, or representatives of deceased former members or employees; or the society and any other society.

V. Amalgamation, division and dissolution

Amalgamation and division

Through a special resolution, the General Assembly of a cooperative society can take the decision to form a new society. The formation of a new society, in this sense, can be done by dividing the cooperative society into two or more societies, by registering a new society, or by amalgamating itself with one or more societies.

²⁶ If the two parties fail to reach agreement on election of a chairperson, the chairperson shall be elected by the appropriate authority.

²⁷ Each party of the dispute shall appoint one arbitrator, and the third arbitrator, who shall be the chairperson, shall be appointed by both parties. The appropriate authority shall appoint the chairperson, when the parties fail to appoint one under subsection (article 46 of the Act).

²⁸ The arbitrators have the same power, as a civil court, for summoning witnesses, for the production of evidence, issuing of orders or taking any legal measures. Appeals against the decisions of the arbitrators may, as the case may be, be instituted in the High Court, or court with similar powers accountable to the local government in the Partner State where the society is situated (articles 48 and 49 of the Act).

These transactions are in principle only possible between societies (cooperatives) and do not concern mutations to commercial companies. From this point of view, the Act protects the cooperative identity by respecting its peculiarities. Consequently, even if the Act does not say so, the conversion of a cooperative into a commercial company could only be effected by prior dissolution of the cooperative before the creation of the commercial company. Such an approach corresponds to the desire to preserve the specificities of cooperatives.

To become effective, the resolution on the amalgamation or division of the cooperative society has to be registered by the appropriate authority with some verification. The appropriate authority should make sure that the members and creditors that do not agree have been paid off or their payment is guaranteed. It should also make sure that the previous registration of the affected societies is cancelled as soon as the newly formed society by amalgamation or by division is registered. Finally, it should make sure that the rights and duties of the affected societies shall be transferred to the newly formed society, and that the rights and duties of a society which has lost its identity by division shall be transferred to the newly formed societies (article 10 of the Act).

Dissolution

The Act distinguishes between the causes and the procedure.

Concerning the causes, article 38 of the Act provides that a cooperative society can be dissolved where a special resolution for its dissolution is passed by the members, where the number of members of the primary society falls below ten, where a court of competent jurisdiction orders for its dissolution, or where an audit reveals that the society is bankrupt.

Whatever the cause, a cooperative society the dissolution of which is determined is supposed to notify the appropriate authority within seven days from the date of the decision for its dissolution.

With regard to the procedure, the first step is to assign a liquidator. Where the dissolution of a society is decided following one of the four above-mentioned causes, the appropriate authority may assign a liquidator, and if necessary determine that his or her remuneration be paid out of the accounts of the society. The liquidator receives records, documents and properties of the society as soon as he or she is assigned, and takes the necessary measures to protect them from damage (article 39 of the Act).

To fulfil his or her mandate, the liquidator performs a number of acts and must have powers in order to carry out his or her duties properly. For instance, the liquidator has all the necessary powers to complete the winding up proceedings especially to investigate all claims against the society and decide on the priority of payment among them, to collect the assets of the society, to distribute the assets in accordance with the plan of liquidation approved by the General Assembly of the society, to carry on the work and activities of the society in so far as may be necessary for the proper liquidation of the affairs of the society, to represent the society in legal proceedings, and to call meetings of the members as may be necessary for the proper conduct of the liquidation.

After carrying out the above-mentioned activities, the liquidator issues notices in the newspapers before the distribution of the property of the society takes place, and proceeds with the distribution where no

claim is presented within two months from the date of such notice²⁹. Upon completion of the winding up of the proceedings, the liquidator prepares and submits a report to the appropriate authority, and deposits the records and documents of the cooperative society in such places as the appropriate authority may direct (article 40 of the Act).

Articles 41 and 42 of the Act explain how cooperative creditors will be notified of the dissolution proceedings and how they will be paid, and after the payment of claims has been completed or verified, that sufficient deposit for payment has been made, the liquidator may distribute the assets of the cooperative society among the members based on the amount due to each member³⁰. This is the refund of shares. But the Act says nothing about the fate of cooperative funds, while article 31 states that such funds should not be distributed among members. In the OHADA law, the resource available after the reimbursement of shares is paid to another cooperative or to an entity promoting cooperative principles.

When the winding up proceedings are completed, the certificate of registration shall be returned to the appropriate authority who shall cancel the registration of the cooperative society. To this end, the cooperative society ceases to exist from the date of such cancellation (article 43 of the Act).

VI. Conclusion

At the end of this analysis of the East African Community Act governing cooperative societies, two major questions arise. The first relates to the adaptability of the Act to other forms of cooperatives, apart from agricultural cooperatives. For example, the only public policy envisaged concerns access to Government land, which is more favorable to agricultural cooperatives. The Bill was initiated by agricultural organizations, and the Act does not mention specific rules applicable to activities. Extensive research is needed to answer the question, unless the issue should be resolved by each Partner State.

The second is about the effectiveness of tax policy for cooperatives, while tax exemptions are not based on cooperatives' ability to respect cooperative principles. This should be monitored and evaluated in the medium term. Similarly, to make a connection with the first question, are the amounts indicated in the Act, for the exemption, valid for all forms of cooperatives? If so, in my view, there would be disproportionality in the sense that financial cooperatives, for example, seem more capitalized than agricultural cooperatives.

The East African community has developed an appropriate legal framework for cooperatives. The framework is appropriate insofar as the adoption procedure has taken into account, as far as possible, the opinions of all the actors concerned. The Act is modern and consistent with internationally recognized cooperative principles and values. Moreover, the context is supranational, and national authorities retain important prerogatives. National provisions not contrary to the Acts of the Community shall remain valid.

²⁹ To this end, no claimant shall have a right after the expiration of the two months limitation period.

³⁰ Indivisibility of the society's assets and funds: Except as otherwise prescribed under section 42, the society's assets and funds shall not be divided among members or among any other parties (article 32 of the Act). Article 42 deals with the payment of debts to the creditors.

Similarly, national parliamentarians are represented in the Community Parliament. The Act's entry into force appears to have been followed by awareness programs, which may lead to a favorable reception and enforceability.

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