LEGAL FRAMEWORK ANALYSIS

NATIONAL REPORT: SWITZERLAND

ICA-EU PARTNERSHIP

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I. Introduction

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

The main objectives of the legal framework analysis are to:

-provide general knowledge of the national cooperative legislation and of its main characteristics and contents, with particular regard to those aspects of regulation regarding the identity of cooperatives and its distinction from other types of business organizations, notably the for-profit shareholder corporation (the *sociedad anónima lucrativa* in Spanish; the *société anonyme à but lucratif* in French).

-to evaluate whether the national legislation in place supports or hampers the development of cooperatives, and is therefore "cooperative friendly" or not, and the degree to which it may be considered so, also in comparison to the legislation in force in other countries of the ICA region (or at the supranational level).

-to provide recommendations for eventual renewal of the legal frameworks in place in order to understand what changes in the current legislation would be necessary to improve its degree of "cooperative friendliness", which is to say, to make the legislation more favourable to cooperatives, also in consideration of their specific identity.

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

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Regina Natsch publishes on cooperative law, she writes expert opinions, holds speeches and moderates panels on cooperative law topics. As a practising lawyer, she advises and assists companies of various legal forms both in and out of court. She is active on boards of directors. At the national level, Regina Natsch is committed to improving awareness of cooperatives as a legal form and to making cooperatives more widespread.

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i. General Context

The Federal Constitution of the Swiss Confederation[1] does not affect the cooperative law. It is exclusively regulated by the 29th title (Art. 828 - 926 CO) of the Swiss Code of Obligations (hereinafter: “CO”).[2] Swiss cooperative law is at the end of the regulations concerning the forms of the numerus clausus of the Commercial Enterprises in Switzerland. It is not specifically regulated in a separate act,[3] however about 90 articles of the CO relate exclusively to it. Although the most recent version of the CO is dated 1 January 2021, the title of the cooperative law has not been generally revised since 1937.[4] A few minor, punctual changes consist of adjustments to the revised general accounting rules according to Art. 957 seqq., or to comply with the FATF Recommendations. Others are purely linguistic amendments, such as the replacement of “judge” (“Richter”) by “court” (“Gericht”).

In addition to the general provisions of the CO, individual regulations from special laws shall also apply, precising or even derogating the general provisions, depending on the types of special cooperatives.[5]

Associations of persons under *public* law are governed by federal and cantonal public law even where the association is formed to pursue cooperative purposes.[6] The

[1] Federal Constitution of the Swiss Confederation of 18 April 1999 (Status as of 1 January 2021, SR 101).
[2] Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911 (Status as of 1 January 2021; SR 220; https://www.admin.ch/opc/de/classified-compilation/19110009/index.html).
[3] See however Verordnung des Bundesgerichts über den Genossenschaftskonkurs of 20 December 1937 (Status as of 1 January 1997; SR 281.52).
[4] Natsch Regina, in: Kren Kostkiewicz Jolanta et al. (ed.), Orell Füssli Kommentar, OR Kommentar, Schweizerisches Obligationenrecht, 3. edition, Zurich 2016, Art. 828 N 19 (cited: OFK OR-Author)
[5] For example, the banking legislation, the legislation concerning social security insurance, etc.
[6] So-called cooperatives under public law; Art. 829 CO.

establishment, organization and dissolution of these associations is based almost exclusively on the public law of the Confederation or the Cantons. The relationship between the members and these associations is also governed exclusively by public law. In particular, these are agricultural cooperatives for joint land use or land improvement.[7] The general cooperative law from the CO is subsidiarily applicable to these associations.[8]

However, private credit, insurance and especially social insurance cooperatives are in principle regulated in the CO, whereas the CO contains sporadic special regulations for this kind of cooperatives.[9] In addition, depending on the sector of cooperatives, other laws from public law are additionally applicable.[10] In applying the different regulations, the principle that the *lex specialis* takes precedence must be respected. Although especially social insurance cooperatives play an important role in the Swiss social security system, they will not be discussed any further here, as this would exceed the scope of this report.

Last but not least, there is the possibility of cooperative unions. These are unions of three or more cooperatives that have explicitly subjected themselves to the rules according to Art. 921 et seqq. CO ("Genossenschaftsverband").

There is no explicit reference to the ICA Principles of cooperative identity in Swiss cooperative law. Nevertheless, various ICA Principles are implemented in Swiss cooperative law. For example, the Swiss cooperative law knows the voluntary and open membership (including the collective self-help principle); the democratic member control; the member economic participation (if the articles of association provide a capital, because this is not mandatory) and autonomy and independence. Reference to the seventh principle, Concern for Community, can be seen in provisions such as Art. 913 CO. This article prescribes that, in the event of liquidation, that the assets of the dissolved cooperative remaining after payment of all its debts and repayment of any shares may be distributed among the members only where the articles of association provide for such distribution.[11] Where the articles of association make no provision for such distribution among the members, the liquidation surplus must be used for the society's purpose or to promote charitable causes.[12]

The fifth ICA Principles of Education, Training and Information may be found often directly in the cooperative's purpose, as well as the cooperation with specified or non-specified other cooperatives.

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7 BAUDENBACHER CARL, in: Honsell Heinrich/Vogt Nedim Peter/Watter Rolf (ed.), Basler Kommentar, Obligationenrecht II, Art. 530-964 OR inkl. Schlussbestimmungen, 5. edition, Basel 2016, Art. 829 N 9 (cited: BSK OR II-AUTHOR).

8 OFK OR-NATSCH, Art. 829 N 2.

9 See e.g., Art. 841, Art. 848, Art. 849 (3), Art. 861, Art. 862, Art. 869 (1), Art 870 (1), Art. 877 (3), Art. 893, Art. 903 (6) and Art. 920 CO.

10 BSK OR II-BAUDENBACHER, Art. 828 N 29.

11 Art. 913 (2) CO.

12 Art. 913 (4) CO.

ii. Specific elements of the cooperative law

a) Definition and objectives of cooperatives

The cooperative ("Genossenschaft", "société coopérative", "società cooperativa", "societad cooperativa") under Swiss private law is legally defined in Art. 828 (1) CO. Art. 828 (1) CO as follows: *"A cooperative is a corporate entity consisting of an unlimited number of persons or commercial enterprises who join together for the primary purpose of promoting or safeguarding the specific economic interests of the society's members by way of collective self-help or which is of public utility"*. Art. 828 (2) CO also explicitly states: *"Cooperatives with a predetermined nominal capital are not permitted"*. Art. 828 CO is mandatory law.

Therefore, the following elements can be considered the basic elements defining a cooperative: (1) the self-help principle (promoting of members' interests); (2) the pursuit of direct benefit for the members and (3) the "Prinzip der offenen Tür" ("open door principle").[13] Another element is (4) the grassroots democracy with the principle of "one head – one vote", regardless of any financial or other contribution.[14]

In Swiss law, the "Company Limited by Shares" ("Aktiengesellschaft" ("société anonyme", "società anonima", "societad anonima")[15] has always been considered capital-related, where the capital contribution and not the member itself is the central issue and the voting weight is based on the capital contributed. The cooperative on the other hand is considered to be person-related, where the personal participation of the members is the decisive focus. In particular, the Company Limited by Shares should pay dividends and the cooperative should promote the interests of the members through the specific activities of the cooperative itself. Another popular form of legal entity is the "Limited Liability Company" ("Gesellschaft mit beschränkter Haftung", "société à responsabilité limitée", "società a garanzia limitata", "societad cun responsabladad limitada")[16], as a capitalized company with a strongly personalistic character, but a predetermined nominal capital.

In addition, there are also partnerships, which cannot be qualified as legal entities, and which do not have their own legal personality.[17]

Under Swiss law, a cooperative can pursue objectives other than member-promotion. It can act also in the interest of non-members or even solely in the interest of the

[13] OFK OR-Natsch, Art. 828 N 10.
[14] Art. 885 CO; as to breaks into the principle "one head – on vote" see iii. d) Cooperation among cooperatives.
[15] See Art. 620 et seqq. CO.
[16] See Art. 772 et seqq. CO.
[17] See Art. 530 et seqq. CO.

community at large.[18] Such cooperatives of public utility can be found e.g., in education or development aid.

There are credit cooperatives which, in addition to the general regulations in CO, are partially regulated by special laws (in particular banking legislation). Over the years, some of them have come very close to the corporate form of the Company Limited by Shares.[19] They allow non-member transactions or even promote them.

There are also insurance cooperatives which, too, are partially regulated by special laws. These have come very close to the laws concerning Companies Limited by Shares. Here, the insurance contract is in the foreground, from which contractual rights and obligations can be derived. Membership is therefore mostly created and structured according to the basic principles of a contractual insurance-relationship.[20]

However, there are various major players in the economy who are widely accepted and happen to be large cooperatives that represent their own (profit-oriented) interests, rather than the interests of their members.

Cooperatives under Swiss law are allowed to carry out any economic activity and the law does not exclude cooperatives from certain economic sectors of activity.

b) Establishment, cooperative membership and governance

ESTABLISHMENT

Cooperatives are registered in the commercial register of the place at which they have their seat.[21] There is no special separate register for cooperatives. The entry in the commercial register is constitutive, i.e., the cooperative is only established as soon as the entry in the commercial register has been made. In other words, registration is necessary for the establishment of cooperatives in Switzerland.[22]

As further prerequisites for the foundation, the law states that the articles of association must be drawn up and approved by the constituent assembly.[23] Therefore the articles of association are drawn up in writing and submitted to an assembly convened by the founder members for consultation and approval.[24] This assembly also appoints the necessary governing bodies.[25] The law also stipulates that mandatorily, at least seven

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18 Art. 828 (1) CO: The cooperative may be “gemeinnützig ausgerichtet” (“poursuit un but d’utilité publique”, “persegue uno scopo di utilità pubblica”), which may be translated in English as “of public utility”, “non-profit-making”, “charitable”, “serving the public good” or similar.

19 MEIER-HAYOZ/FORSTMOSER/SETHE, Schweizerisches Gesellschaftsrecht, Mit neuem Firmen- und künftigem Handelsregisterrecht und unter Einbezug der Aktienrechtsreform, 12. edition, Berne 2018, § 19 N 158.

20 MEIER-HAYOZ/FORSTMOSER/SETHE, § 19 N 160.

21 See the commercial register online: www.zefix.ch; Art. 835 CO.

22 Art. 830 CO.

23 Art. 830 CO; in the future, public notarisation will be required for incorporation, however, entry into force is not expected until 2023.

24 Art. 834 (1) CO.

25 Art. 834 (3) CO.

members must be involved when a cooperative is formed.[26] If however, the number of members in an existing cooperative drops below the minimum, the provisions of the laws concerning companies limited by shares regarding the Defects in the Organization of the Company shall apply analogously.[27] This means that a member or creditor may request the court to take the required measures to remedy the defect. Ultima ratio is the judicial dissolution of the cooperative, if the deficiency is not remedied within a set period of time.[28] In turn, this provision means, that as long as no one appeals to the court, dropping below the minimum number of members will not have any direct consequences for the cooperative.[29]

MEMBERSHIP

The general principle is, that new members may be accepted into a cooperative at any time.[30] The cooperative is therefore in principle obligated to accept every third parties as members (open-door principle). Nonetheless, the articles of association may lay down more detailed provisions concerning the governing accession, if the principle of unlimited membership is respected. However, the articles of association must not impose excessive obstacles to accession.[31] Every accession requires a written declaration.[32] The directors decide on acceptance of new members, unless under the articles of association a mere declaration of accession is sufficient or a resolution of the general assembly is required.[33] Restrictive provisions in the articles of association must correspond to the purpose or the economic requirements of the cooperative and may not primarily exclude any new members. Therefore, depending on the purpose of the cooperative, a very small number of interested parties is also conceivable. This on its own does not create excessive obstacles to accession. Conceivable restrictions are for example; the size of the member-company; families with children; willingness to take on office; professional requirements; political or governmental affiliation; willingness to participate in the cooperative capital, and so on. According to unanimous doctrine and practice, however, accession to a cooperative cannot be enforced, even if a person fulfills the statutory requirements for entry. In other words, it remains at the discretion of the cooperative whether a person is admitted or not. Rejected written declarations for accession cannot be challenged in court. The open-door principle therefore remains *lex imperfecta*. An actual obligation for admission can only result from the articles of association themselves.[34]

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26 Art. 831 (1) CO.
27 Art. 831 (2) CO.
28 See Art. 731*b* CO; the judge sets the timeline, considering all circumstances.
29 OFK OR-NATSCH, Art. 831 N 11.
30 Art. 839 (1) CO.
31 Art. 839 (2) CO.
32 Art. 840 (1) CO; for the sake of completeness, it should be noted that where, in addition to being liable with its assets, a cooperative provides for personal liability or the liability to make additional contributions on the part of individual members, the declaration of accession must state such obligations expressly (Art. 840 (2) CO).
33 Art. 840 (3) CO.
34 OFK OR-ENGLER, Art. 839 N 3 et seqq.

Provided no resolution has been made to dissolve the cooperative, every member is free to leave.[35] This is possible due to the “freedom of exit”. This right to leave at any time is a principle meant as a counterpart of the open-door principle. However, resignation may be excluded by the articles of association or by contract for a maximum period of five years; even during this period, resignation may be declared for important reasons.[36] Although the law does not name for a specific formal requirement for resignations, in practice the articles of association usually demand the written form.[37] The articles of association may state in addition that the departing member is obliged to pay an appropriate severance penalty where in circumstances his departure causes the cooperative significant losses or jeopardizes its continued existence (a so-called “Auslösungssumme” or “release sum”).[38] The amount of the release sum does not have to be fixed in the articles of association itself. Therefore, the amount of the release sum is to be determined by the cooperative on a case-by-case basis or if a dispute arises by the court.[39] Any permanent ban on or excessive obstacles to departure imposed by the articles of association or by agreement is void.[40]

GOVERNANCE

Every member has one vote at the general assembly of members or in the ballot.[41] This so-called “Kopfstimmprinzip” (one member, one vote principle) applies regardless of the capital invested in the cooperative and is mandatory.[42]

In general, there are just the three following exceptions to this principle: (1) The admissibility of different voting power at the assembly of delegates[43]; (2) the exclusion from voting rights in the cases of resolutions concerning the discharge of the board[44] and (3) the statutory granting of the Chairman’s casting vote.[45] There can be assemblies of delegates in cooperative unions, in cooperatives with more than 300 members, and in those where the majority of the members are cooperatives themselves. The assembly of delegates represents the change from direct to parliamentary democracy. Usually, in the assembly of delegates, not every delegate has the same number of votes. The voting power is often graded, e.g., depending on the size of the member cooperative.

The law mandatorily prescribes three organs for the cooperative: (1) the legislative organ, in principle the general assembly of members[46]; (2) the executive organ, the board

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35 Art. 842 (1) CO.
36 Art. 843 (1) and (2) CO.
37 OFK OR-Engler, Art. 842 N 1 et seq.
38 Art. 842 (2) CO.
39 OFK OR-Engler, Art. 842 N 6.
40 Art. 842 (3) CO.
41 Art. 885 CO.
42 OFK OR-Natsch, Art. 885 N 1.
43 Art. 892 (3) and Art. 922 (3) CO.
44 Art. 887 CO.
45 OFK OR-Natsch, Art. 885 N 1. If the Chairman is a member, this leads to two votes for him or her.
46 Art. 879 et seqq. CO. Under certain circumstances, a ballot or an assembly of delegates may be in place of the general assembly.

of directors[47] and (3) a control organ, the auditor,[48] which can be dispensed with in exceptional cases.[49] The articles of association may provide for further organs, whereby the three organs mentioned above have inalienable powers, which are named and regulated by the law and cannot be delegated.[50]

The general assembly of members is by law the supreme governing body of the cooperative.[51] By law, the most fundamental decisions have to be made by the general assembly and it also holds the power – and is required – to elect the other two organs. However, the board of directors and the auditor are independent, when it comes to their sphere of competence. The so-called "Paritätsprinzip" (parity principle) applies[52], according to which each body has inalienable powers. This is in contrast to the omnipotence theory, according to which the general meeting can make all decisions, and the leader principle, which states that the board of directors can draw all competences to itself.

The board of directors consists of at least three persons. A majority of them must be members.[53] A cooperative must be able to be represented by a person, who is resident in Switzerland. This person must be a director, a business manager or an executive officer.[54] The directors are elected for a maximum term of office of four years, but may be re-elected unless the articles of association provide otherwise.[55] The articles of association may authorize the general assembly of members or the directors to delegate responsibility for managing the society's business or parts thereof and for representing the society to one or more persons, business managers or executive officers, who need not be members of the cooperative.[56]

The directors must conduct the business of the cooperative with all diligence and employ their best endeavors to further the cooperative's cause. In particular, they have the duty to:[57] (1) prepare the business of the general assembly of members and implement its resolutions and (2) to supervise the persons entrusted with the cooperative's business management and representation with regard to compliance with the law, the articles of association and any applicable regulations and to keep themselves regularly informed of the society's business performance. The directors are furthermore responsible for ensuring that the minutes of their meetings, the minutes of the general assembly, the necessary accounting records and the membership list are kept properly, that the profit and loss account and the annual balance sheet are drawn up and submitted to the auditor for examination in accordance with the statutory provisions and that the prescribed notifications concerning accessions and departures of members are made to the

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47 Art. 894 et seqq. CO.
48 Art. 906 f. CO.
49 Art. 906 (1) in conjunction with Art. 727a (2) CO;
50 MEIER-HAYOZ/FORSTMOSER/SETHE, § 19 N 119.
51 Art. 879 (1) CO
52 MEIER-HAYOZ/FORSTMOSER/SETHE, § 19 N 120.
53 Art. 894 (1) CO.
54 Art. 898 (2) CO.
55 Art. 896 (1) CO.
56 Art. 898 (1) CO.
57 Art. 902 CO.

commercial registry. In addition, where there is good cause to suspect over indebtedness, the directors must immediately draw up an interim balance sheet at sale values. Where the last annual balance sheet and subsequent liquidation balance sheet or an interim balance sheet show that the claims of the society's creditors are no longer covered, the board of directors must notify the court. The court must commence insolvency proceedings, unless the requirements for a stay of such proceedings are fulfilled.[58]

All persons engaged in the administration, business management or auditing or liquidation of the cooperative are liable to the cooperative for the losses arising from any willful or negligent breach of their duties.[59] And in addition to that, any director or liquidator who willfully or negligently breaches his statutory duties with regard to the over indebtedness of the cooperative is liable to the cooperative, the individual members and the creditors for the losses arising.[60]

c) Cooperative financial structure and taxation

COOPERATIVE FINANCIAL STRUCTURE

The cooperative can have (but does not need to have) share capital, since the members should also have the opportunity to make their contribution with active participation. It is possible to customize the articles of association for the relevant purpose and goals of the cooperative, but cooperatives with a predetermined nominal capital are not permitted.[61] The share capital is much less important for the cooperative than for the Company Limited by Shares or the Limited Liability Company.[62]

In the case a share capital is required in the articles of association, the amount of capital is volatile, as it depends on the number of shares and thus on the sum of the capital shares. Each member of the cooperative must acquire at least one share. The articles of association may stipulate that multiple shares may be acquired without any limit or up to a specified maximum per member. If not stipulated otherwise, not every member of the cooperative has to take over the same number of shares. The number of members of the cooperative and therefore the cooperative shares and the resulting maximum amount is not determined, since the open-door principle is valid for the cooperative.[63] The cooperative thus has a voluntary and volatile share capital, which sometimes makes it considerably more difficult for it to obtain third-party capital.

Instead of, or in addition to, a share capital, the cooperative can provide for customized obligations such as entry fees, membership fees, compensation for the use of

[58] Art. 903 (1) and (2) CO.
[59] Art. 916 CO.
[60] Art. 917 (1) CO.
[61] Art. 828 (2) CO.
[62] MEIER-HAYOZ/FORSTMOSER/SETHE, § 19 N 40 and 43.
[63] Art. 828 (2) CO.

cooperative facilities, withdrawal fees, etc.[64] The amount of share capital and/or such other financial contributions may be linked to, or can be structured in proportion to, the use of the cooperative's assets. The cooperative can also increase its creditworthiness by anchoring personal liability[65] and/or obligations to make additional contributions[66] in the articles of association.

Share certificates are issued out in the member's name. They may not be made out in the form of negotiable securities, but only as documents in proof.[67]

The articles of association determine whether the departing members or their heirs have claims on the society's assets and, if so, what those claims are. Such claims must be calculated on the basis of the net balance sheet assets excluding reserves at the time the member leaves the cooperative.[68] The articles of association may grant the departing member or his heirs the right to the full or partial repayment of the value of his shares excluding a possible entry fee. They may stipulate that this repayment be deferred for up to three years after the member's departure.[69] Even where the articles of association make no such provision, the cooperative remains entitled to defer the repayment for up to three years where it would cause the society considerable losses or jeopardise its continued existence. Any entitlement of the cooperative to a severance penalty paid by the departing member is unaffected by this provision.[70] Where the articles of association make no provision for a settlement entitlement, departing members or their heirs have no such entitlement.[71] Where the cooperative is dissolved within one year of the member's departure or death and the assets are distributed, the departed member or his heirs have the same entitlement as the members present on dissolution.[72]

Unless the articles of association provide otherwise, any net profit on the cooperative's business operations passes in its entirety to the society's assets (institutional capital).[73] Typically, the cooperative should not make a profit at all, because any profit at cooperative level is a withheld direct benefit to the members. Nevertheless, if a profit was made, the procedure is as follows:[74] Where distribution of the net profit among the members is provided for, it is distributed according to the use of the society's facilities by individual members, unless the articles of association dictate otherwise,[75] while the nominal value of the shares of the members – if there are any at all – is irrelevant and is not considered. This process could be described as "patronage refunds", although the Swiss law does not recognize this term. However, these regulations are dispositive. They

[64] Art. 867 (1) CO.
[65] Art. 869 seq. CO.
[66] Art. 871 CO.
[67] Art. 853 (3) CO.
[68] Art. 864 (1) CO.
[69] Art. 864 (2) CO.
[70] Art. 864 (3) CO.
[71] Art. 865 (1) CO.
[72] Art. 865 (2) CO.
[73] Art. 859 (1) CO.
[74] OFK OR-NATSCH, Art. 859 N 3.
[75] Art. 859 (2) CO.

can be amended by means of a provision in the articles of association,[76] whereby the cooperative type and the concrete purpose of the individual cooperative must be considered.[77]

If a member share capital exists, the articles of association can stipulate that a dividend out of the profit is to be paid on it. Without such a provision in the articles, the shares are non-interest bearing. However, the portion of the net profit paid out on the shares must not exceed the usual rate of interest for long-term loans without special security.[78] According to the law, purely financial aspects should not be the purpose of membership in the cooperative itself, but only a means to an end.[79]

Where the net profit is used for a purpose other than to build up the society's assets, each year one twentieth of it must be allocated to a reserve fund. Such allocations must be made for at least 20 years; where share capital exists, they must in any event be made until the reserve fund is equal to one fifth of the society's capital.[80] The articles of association may stipulate that the reserve fund must be accumulated more rapidly or to a higher level.[81] In addition, the articles may provide for funds for welfare purposes[82], or the members may decide on further reserve investments if the permanent prosperity of the company deems it advisable.[83] There are other special regulations (e.g. banking-regulations) concerning the distribution of net profit and reserves in the case of special forms of cooperatives.[84]

Capital increases in cooperatives - if they have a share capital at all - take place on the one hand through the entry of new cooperative members, as they have to acquire shares or, on the other hand, by the acquisition of (more) shares by current members, if this should be permitted by the articles of association. A formal increase procedure as in the law of Companies Limited by Shares does not exist in the cooperative law, however, the general assembly could decide to newly install a share capital or to raise the nominal value of the shares in a cooperative with already existing share capital.

The cooperative is liable with its assets for its obligations. It is liable exclusively, unless the articles of association provide otherwise.[85] But the articles of association may provide, except in the case of licensed insurance cooperatives, that after the society's assets, the members have limited or even unlimited personal liability.[86] Instead of or in addition to such personal liability, the articles of association may require the members to make additional contributions, which may be used only to cover net losses for the year.[87]

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76 OFK OR-Natsch, Art. 859 N 3.
77 BSK OR II-Neuhaus/Balkanyi, Art. 859 N 6.
78 Art. 859 (3) CO.
79 Druey Jean-Nicolas/Druey Just Eva/Glanzmann Lukas, Gesellschafts- und Handelsrecht, 11th edition, Zurich/Basel/Geneva 2015, § 19 N 22.
80 Art. 860 (1) CO.
81 Art. 860 (2) CO.
82 Art. 862 CO.
83 Art. 863 (2) and (3) CO.
84 Art. 861 CO.
85 Art. 868 CO.
86 Art. 869 (1) CO and Art. 870 (1) CO.
87 Art. 871 (1) CO.

The liability to make additional contributions may be unlimited or else limited to specified amounts or to a specified proportion of the member's contribution or share in the society.[88] Where the articles of association make no provision on how additional contributions are to be shared among the members, the amount due from each is determined according to the value of his share in the society or, where no such shares exist, on a per capita basis.[89] Any provisions made in the articles of association which limit liability to a specific time or to particular obligations or groups of members are void.[90]

In contrast to the Company Limited by Shares, in the case of the cooperative there is basically no possibility to become a so-called "participant", i.e., a mere "investor member", contributing capital only for the financing and therefore benefitting exclusively from financial advantages, but not from participation rights. However, a special regulation applies to banking cooperatives: Bank cooperatives (and only these cooperatives) can issue in their articles of association additionally so-called "Beteiligungsrechte" ("equity capital") to raise capital.[91]

Every cooperative is free to conclude loan agreements with its members, unless this is not excluded by the articles of association. The framework conditions are described in the corresponding loan agreement.[92]

The assets of the dissolved cooperative remaining after payment of all its debts and repayment of any shares (if not excluded by the articles of association) may be distributed among the members only where the articles of association provide for such distribution.[93] Unless the articles of association provide otherwise, in this case the assets are distributed among the members as at the time of dissolution or their legal successors on a per capita basis. The statutory entitlement of departed members or their heirs to a financial settlement is reserved. Where the articles of association make no provision for such distribution among the members, the liquidation surplus must be used for the cooperative's purpose or to promote charitable causes. Unless the articles of association provide otherwise, the general assembly of members decides on this matter.[94]

TAXATION

In general, cooperatives are taxed by both the federal government and the cantons according to the rules and tariffs of all legal entities.[95] In the case of federal tax, cooperatives pay the profit tax at the same rate as the other legal entities, i.e., with a proportional rate of 8.5%.[96] Also, in all cantons, cooperatives are generally taxed

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[88] Art. 871 (2) CO.
[89] Art. 871 (3) CO.
[90] Art. 872 CO.
[91] Bundesgesetz über die Banken und Sparkassen of 8 November 1934 (Status as of 1 January 2021; SR 952.0), Art. 11 (2bis) and Art. 14 seqq.
[92] Art. 312 et seqq. CO.
[93] Art. 913 (2) CO.
[94] Art. 913 (2)-(5) CO.
[95] Art. 68 of the Federal Act on Direct Federal Taxation of 14 December 1990 (Status as of 1 January 2021; DBG; SR 642.11) as well as Art. 27 (1) and Art. 30 of the Federal Act on Tax Harmonisation of 14 December 1990 (Status as of 1 January 2021; StHG; SR 642.14).
[96] Art. 68 DBG.

according to the regulations and tariffs applicable to all legal entities. Concerning the federal tax, cooperatives do not have to pay capital tax since 1 January 1998, in the same way as the other legal entities. However, almost all cantons tax the capital of cooperatives in accordance with the provisions applicable to all legal entities under their legislation.

Swiss legislation does not contain any special provisions regarding the taxation of cooperatives. Under certain circumstances, e.g., if the purpose is purely non-profit, a tax exemption can be obtained. However, this possibility exists regardless of the legal form.

iii. Other specific features

d) Cooperative internal and external control and cooperation among cooperatives

INTERNAL AND EXTERNAL CONTROL

In the case of cooperatives, Swiss law does not provide for an external public control. The only "external" control is exercised by the auditors, who must conduct an audit in accordance with the generally applicable principles of Swiss law.[97] Under certain circumstances, it is even possible to dispense with an auditor entirely ("opting-out").

In Switzerland, a differentiation is made between the obligation to carry out an ordinary or a limited audit. Cooperatives that exceed two of the following thresholds in two successive financial years, must have their annual accounts reviewed by an auditor, which is elected by the general assembly,[98] in an ordinary audit: (a) a balance sheet total of 20 million francs; (b) sales revenue of 40 million francs; (c) 250 full-time positions on annual average.[99] If the requirements for an ordinary audit are not met, the cooperative must have its annual accounts reviewed by an auditor in a limited audit.[100] Even in this case (a) 10% of the members, (b) members holding at least 10% of the capital or (3) members with a personal liability and/or with an obligation to make additional contributions may request an ordinary audit,[101] as may the general assembly by resolution or by corresponding inclusion in the articles of association (so-called "opting-in").[102] On the other hand, with the consent of all members, a limited audit may be dispensed with at any time (also already at the foundation) if the cooperative does not have more than ten full-time employees on annual average (so-called "opting-out").[103] If the members have dispensed with a limited audit, this also applies for subsequent years.[104]

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97 Art. 906 CO in conjunction with Art. 727 et seqq. CO.
98 Art. 879 (2) (2) CO.
99 Art. 906 (1) CO in conjunction with Art. 727 (1) (2) (a) - (c) CO.
100 Art. 906 (1) CO in conjunction with Art. 727a (1) CO.
101 Art. 906 (2) CO.
102 Art. 906 (1) CO in conjunction with Art. 727 (3) CO.
103 Art. 727a (1) and (2) CO.
104 Art. 727a (4) CO.

All in all, the cooperatives largely control themselves. In addition, cooperatives governed by special laws may be subject to additional control organs (e.g., banking or insurance-regulations).

COOPERATION AMONG COOPERATIVES

A cooperative with its legal personality may be a member of a cooperative or another company. Basically, the general rules of this company apply. However, two cases are specifically regulated within the cooperative's legislation. In both cases, the law allows a break into the principle of "one head - one vote". The first case concerns (secondary) cooperatives in which the majority of the members are cooperatives. They may delegate all or some of the powers of the general assembly of members to an assembly of delegates by means of the articles of association.[105] Rules governing the composition, election and convocation of the assembly of delegates are laid down in the articles of the secondary cooperative, whereas every delegate has one vote, unless a different provision for voting rights is explicitly made.[106]

The second special case explicitly stipulated by law is the "Genossenschaftsverband" (cooperative union).[107] Three or more cooperatives may form a secondary cooperative and constitute it as a cooperative union.[108] Only if the participating cooperatives want it that way, such a cooperative union is created.

Unless the articles of the union provide otherwise, the supreme governing body of the union is the assembly of delegates; the articles of the union determine the number of delegates from the member-societies.[109] The one member, one vote principle applies, however, it is not mandatory, and the articles of the union can stipulate otherwise.[110]

The cooperative union has to build a board of directors, which – unless the articles of the union provide otherwise – is made up of members from the member-societies.[111] The articles of the union may grant the directors of the union the right to monitor the business activities of the member-cooperatives.[112] Furthermore, they may even grant the directors of the union the right to challenge in court the resolutions made by the individual member-societies.[113] It is thus a very strong integration with a possibly far-reaching surrender of autonomy to the union. The cooperative union is therefore sometimes referred to as a "concern on its head".

[105] Art. 892 (1) CO.
[106] Art. 892 (2) and (3) CO.
[107] Art. 921 et seqq. CO.
[108] Art. 921 CO.
[109] Art. 922 (1) and (2) CO.
[110] Art. 922 (3) CO.
[111] Art. 923 CO.
[112] Art. 924 (1) CO.
[113] Art. 924 (2) CO.

II. Degree of "cooperative friendliness" of the national legislation

One reason for the stagnation in the creation of new cooperatives in Switzerland is probably the fact that, although the personalized element of the cooperative is rightfully strongly emphasized, too little attention is paid to the organization of the financial aspects.[114] Thus, on the one hand, raising equity and debt capital can prove to be a challenge. Many cooperatives have no share capital at all, because such capital is not required by law. As a result, they do not fit into the conventional assessment schemes for financing decisions. In the opinion of the national expert, however, this does not mean that the legal framework needs to be redefined, but rather that more work needs to be done to clarify what a cooperative is and what diverse structuring options it offers (which could be of interest to the capital market).

On the other hand, a barrier cited by the national expert is the fact that cooperatives in Switzerland are generally unable to recognise "investor membership", i.e., purely financial participation. As elaborated above, only bank cooperatives have this option under certain conditions.[115] In the opinion of the national expert, there should be no barriers to allowing such a possibility at the legislative level for cooperatives other than banks.

Furthermore, the national expert acknowledges the argument that the requirement of at least seven founding members goes too far. Such an argument would plead for a reduction or abolition of the requirement and refer to the Company Limited by Shares and the Limited Liability Company, both of which can also be founded as single-member companies. In fact, a reduction could actually serve the creation of new cooperatives. However, true "*joint* self-help" is only possible with at least two members.

Overall, the national expert considers that there are almost no real barriers in Swiss cooperative law. On the contrary, there are numerous advantages, especially due to the great flexibility and thus the possibility to adapt the cooperative form to individual requirements.

However, the cooperative is still (wrongly) not very well established in Switzerland. For a long time, the cooperative has been neglected also in the universities and in publications – and even more so in the consulting sector. Fortunately, there has been some changes here lately. This is because the legal form of the cooperative is becoming more and more popular, especially in the start-up sector.

[114] MEIER-HAYOZ/FORSTMOSER/SETHE, § 19 N 177.
[115] Art. 923 CO.

In the not-for-profit sector, the legal form of the cooperative is very well established. However, this legal form reaches its limits when only economic purposes are to be pursued.

Cooperative legislation is slow, and a comprehensive revision of cooperative law is currently not on the agenda. Nor is such a revision desired by the vast majority of those concerned and interested. On the contrary, there are concerns that a comprehensive reform would restrict the scope of action available today, as the current Swiss cooperative law is an extremely liberal set of rules. However, the greater the freedom of organization, the higher the demands on individual responsibility. A good balance between efficient management and effective control, i.e., good corporate governance, is indispensable.

In principle, each cooperative is responsible for its own good corporate governance. Large cooperatives in particular follow the Swiss Code for best practice for Corporate Governance, which is not sector-specific.[116] The recently published Cooperative Governance Guide, which is geared to the specific characteristics of cooperatives, is also cross-sectoral.[117]

There is no cross-sectoral state support for cooperatives purely on the basis of their legal form. The information on the page "SME Portal – for small and medium-sized enterprises" of the Swiss Confederation[118] even tends to discourage them.

However, non-profit building cooperatives may enjoy certain state advantages. For example, in some places building land is allocated preferentially or exclusively to non-profit building cooperatives; cantonal and communal rules apply. Non-profit building cooperatives may also enjoy state advantages when it comes to financing, as they can benefit from public housing subsidies.[119] In addition, the cooperative movement itself has created financing instruments for non-profit housing developers.[120]

Various private actors are actively working to strengthen cooperatives with public relations work, educational offers, events, research and start-up and innovation programmes, such as SENS[121] (formerly: CooperativeSuisse) with its programme SCHUB (Social Cooperative Hub)[122] and its SwissCoopStarter[123] or *idée coopérative*.[124]

The legislation and especially the jurisdiction in Switzerland are quite cooperative friendly. This, due to the great flexibility of the legal regulations. There are only a few

116 Economie Suisse, "*Swiss code of best practice for corporate governance: English version*", see https://www.economiesuisse.ch/sites/default/files/publications/economiesuisse_swisscode.
117 See https://www.ideecooperative.ch/laboratorium/publikationen/.
118 See https://www.kmu.admin.ch.
119 See https://www.bwo.admin.ch/bwo/de/home
120 See https://www.wbg-schweiz.ch/dienstleistungen.
121 See https://sens-suisse.ch/.
122 See https://schub.swiss/.
123 See https://schub.swiss/angebot/coopstarter/.
124 See https://www.ideecooperative.ch/.

mandatory standards. This makes it possible to customize cooperatives perfectly to individual needs.

III. Recommendations for the improvement of the national legal framework

Compared to the rules concerning companies limited by shares, the cooperative law grants more elasticity and flexibility and contains less severe rules of responsibility. (Atypical) Cooperatives also benefit from these privileges, yet some of the largest cooperatives in Switzerland have completely detached themselves from the ideological model of a cooperative.[125] Here, some voices demand a differentiation within the cooperative law, so that these – mostly large – cooperatives which behave in the market like profit-driven companies limited by shares, cannot benefit from the privileges granted by law to the ideologically and dogmatically "pure" cooperatives.[126] However, such legal differentiation would be quite complex, as size alone is not a suitable distinguishing criterion.

In the economic reality, the principle of self-help as well as the orientation of the cooperative towards the promotion of its members has been softened in extremis by some atypical cooperatives. However, in the opinion of the national expert, the cooperative law is flexible enough to allow such a paradigm change without revision.[127] In the opinion of the national expert, no fundamental changes are necessary for the cooperatives' development's sake. On the contrary: the existing legal regulations, most of which are simple and easy to understand, cover and regulate all essential points – the rest is left to private autonomy (and thus to private responsibility). The national expert believes that this elasticity and the related possibility to create tailor-made solutions for the enormous variety of Swiss cooperatives should not be given up lightly, by introducing new and detailed regulations.[128] The prosperity of the atypical cooperatives may seem repulsive from a dogmatic point of view, however there is no damage in a legal sense.

125 In Switzerland, the two largest retailers (Coop and Migros) are organized as (admittedly rather atypical) cooperatives.
126 See MEIER-HAYOZ/FORSTMOSER/SETHE, § 19 N 178 et seq.
127 OFK OR-NATSCH, Art. 860 N 3.
128 OFK OR-NATSCH, Art. 860 N 3.

IV. Conclusions

The current cooperative law - practically unchanged since it came into force in 1937 - contains only a few mandatory provisions. The legislative intention was to give the individual cooperatives as much freedom as possible in their organisation. Basic cooperative values are clearly in focus due to the legal conception. However, unlike in certain foreign legal systems, they are not "specified" down to the last detail. Not even the basic idea of collective self-help, which is ideally above all else, is demanded by the legislator without restriction. Thus, cooperatives with non-contributory membership, with non-member business or with a social purpose are also legal. Even the ideally envisaged grassroots democratic decision-making with a head-vote principle is not an indispensable characteristic of every cooperative. The law itself provides for certain intrusions with the so-called assembly of delegates. In summary, it can be said that the law leaves room not only for "ideal-typical", grassroots-democratically organised self-help organisations, but also for "atypical" cooperatives. The Swiss cooperative landscape makes extremely extensive use of these freedoms granted by law.

Especially in "atypical" cooperatives, the personal relationship of the individual member to "their" cooperative is often in the background. Sometimes the members do not have to make any personal contribution at all, since the specific cooperative does not stipulate any cooperative capital or any other obligations to perform or tolerate on the part of its members. Even the member's duty of loyalty, which is provided for in principle by law, then has hardly any concrete content. In such cases, the individual members' opportunities for participation are correspondingly weak (whereby in such constellations, the members often have no interest in active participation at all). Such "atypical" cooperatives are repeatedly and heavily criticised from the ideological side.

In the national expert’s view, the "USP" of cooperatives under Swiss law is precisely that this legal form can be so flexibly tailored to the most diverse needs. This freedom must be carefully preserved. It allows a great deal of flexibility, but also requires independent action and continuous self-regulation. In the opinion of the national expert, the current main deficit of the legal form of the cooperative is its low level of awareness in the public consciousness. For a long time, the cooperative has been treated like a wallflower by academics and practitioners. Fortunately, the cooperative - also thanks to the strengthening of the Social Economy - is now increasingly coming back into the public consciousness.

A total revision of the cooperative law - as has been demanded for decades and with very different motives, but always without success - would not serve the diverse Swiss cooperatives. Politicians have also recognised this. A parliamentary initiative submitted in June 2021 aims to make individual targeted adjustments.[129] This is because, in the opinion of the National Council's Committee for Legal Affairs, some peculiarities of the current system stand in the way of greater use of the cooperative form and thus the

[129] https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20210479

spread of the cooperative idea. The initiative demands in particular that the minimum number of members be reduced from the current seven and that the cooperative members' rights of participation and control be strengthened. At the same time, the cooperative's character as a personal association that serves the direct promotion of the cooperative members should be maintained. Additional administrative burdens should be avoided; in particular, large cooperatives should not be put on an equal footing with large public limited companies. Cooperative law should continue to respect the diversity of real forms of cooperatives and preserve its freedom of organisation – the national expert shares this view.

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