COOPERATIVES UNDER DUTCH LAW – A FLEXIBLE FORMAT NOT ONLY FOR FARMERS

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ABSTRACT
The Dutch cooperative is a very flexible legal entity under Dutch law. The main restriction concerns the mandatory purpose of a cooperative under Dutch law. This must be to provide in certain (economic) material needs of its members by virtue of contracts, other than insurance agreements, entered into with its members. These contracts must be in the course of the business that the cooperative operates or causes to be operated for the benefit of its members. There are many ways to structure a cooperative and to design the optimal governance structure for a particular cooperative. Three base governance models are used frequently, the traditional model, the hourglass- model and the supervisory board +/ board of management model. Although Dutch law does not provide that a cooperative has capital divided in shares, there are ways to attract (outside) equity and to grant the equity providers certain distribution rights.

KEY WORDS: Cooperative, members, governance, participations, Dutch law.

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COOPERATIVAS BAJO LA LEY HOLANDESA: UN FORMATO FLEXIBLE NO SOLO PARA LOS AGRICULTORES

RESUMEN
La cooperativa holandesa es una entidad jurídica muy flexible bajo la ley holandesa. Su principal restricción radica en el propósito obligatorio que una cooperativa debe tener según la ley holandesa. Este debe ser satisfacer ciertas necesidades materiales (económicas) de sus miembros, en virtud de contratos, distintos de los de seguro, celebrados con sus miembros. Tales contratos deben estar en la línea del negocio que la cooperativa desarrolla o hace que se desarrolle, para el beneficio de sus miembros. Hay muchas maneras de organizar una cooperativa y diseñar la estructura de gobierno óptima para una cooperativa concreta. Tres modelos básicos de gobernanza se utilizan frecuentemente: el modelo tradicional, el "modelo de reloj de arena" y el modelo de consejo de supervisión + consejo de dirección. Si bien el capital de una cooperativa holandesa no está dividido en acciones, existen formas de atraer capital (externo) y de otorgar ciertos derechos de distribución a los proveedores de capital.

PALABRAS CLAVE: Cooperativa, miembros, gobernanza, participaciones, ley holandesa.

CLAVES ECONLIT: G3, K22, L2.

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1. Introduction

The cooperative has a long history in the Netherlands. Originally the cooperative was considered to be a species of the association, but over the years it has developed into a separate legal form governed by specific legislation[1]. In the beginning the cooperative was an instrument to improve the economic position of farmers. As the cooperative is a relative flexible legal entity with less applicable mandatory law compared with, for instance, a private or public limited liability company, it also became a popular legal form to develop other economic activities. The cooperative has evolved from a not for profit entity aimed at serving its members to an entity with possibilities to create similar characteristics as a company with capital divided into shares[2]. Over the last two decades the number of Dutch cooperatives has increased substantially. There are even more Dutch cooperatives than public limited liability companies (*naamloze vennootschap* or *NV).* Around 8000 cooperatives are registered with the trade register[3]. Dutch

1. Koster, H., 'De rechtsvorm van de coöperatie: verleden, heden en toekomst', *Rechtsgeleerd Magazijn Themis* 2013-2.

2. Verstraten, M.A.B 'De coöperatieve joint venture', *Ondernemingsrecht* 2016/47

3. According to the website of NCR (the Dutch Council for Cooperatives, a cooperative knowledge center and network for cooperative enterprises in the Netherlands), www.cooperatie.nl viewed on 3 April 2017. Other figures are mentioned as well. The actual number is difficult to determine because

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cooperatives vary in size and number of members. There are some Dutch cooperatives that are really very big. According to its 2016 Annual Accounts at year-end 2016, the number of members of Coöperatieve Rabobank U.A. (“Rabobank”) totaled 1,927,000[4]. Rabobank employs 40,029 internal employees (in FTEs) and 5,538 external employees (in FTEs). Rabobank is active in 40 countries. Also in the agricultural sector there are very big cooperatives, such as Zuivelcoöperatie FrieslandCampina U.A., with 18,906 member dairy farmers (13,300 member dairy farms)[5]. But there are also very small cooperatives with only a few members. This may be for instance a local initiative to improve the living conditions in a small village or render certain services that otherwise would not be available.

The objective of this article is to discuss various legal aspects of the Dutch cooperative[6]. In paragraph 2, I will describe the characteristics of the Dutch cooperative. Paragraph 3 gives a general overview of the different categories of cooperatives that operate in the Netherlands. In paragraph 4 I will focus in on the position of its members. Certain aspects of governance within the cooperative, its corporate bodies and their authorities will be discussed in paragraph 5, including a general description of the most frequently used governance models. The financing of cooperatives will be discussed in paragraph 6 and I will conclude with some separate issues that are relevant to Dutch cooperatives in paragraph 7. As this article will show, the cooperative under Dutch law is a very flexible legal entity, with many options to choose from. As a result, many cooperatives are unique in the way they are structured and completely tailor-made for the purpose they serve. This article can therefore only show a general outline of the possibilities offered by Dutch law Dutch for cooperatives.

of the lack of public information at the Dutch Trade register in this respect. Furthermore, it should be noted that not all cooperatives are active. According to information on the website: http://www.collective-action.info/sites/default/files/webmaster/_PUB_Cooperaties-in-Nederland-2016.pdf, viewed on 25 April 2017, in 2016 around 2500 cooperatives were actively operating a business of some sort.

4. https://www.rabobank.com/en/images/annual-report-2016.pdf, p. 13, viewed on 27 April 2017.

5. https://www.frieslandcampina.com/en/organisation/cooperative/ viewed on 17 October 2017.

6. The European Cooperative Society (SCE), as regulated in EU Regulation N0. 1435/2003 and the Dutch implementation Act of September 2006, Stb.2006, 425 as amended, will not be included.

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2. Characteristics

A Dutch cooperative, known as a '*coöperatie*', is a legal entity with legal personality[7]. It is considered to be an association incorporated as a cooperative[8]. According to its articles of association, its objects must be to provide in certain material (economic) needs of its members by virtue of contracts, other than insurance agreements, entered into with its members. These contracts must be in the course of the business that the cooperative operates or causes to be operated for the benefit of its members. This description of a cooperative shows that there are quite a number of elements that should be met in order to qualify as a Dutch cooperative. If a legal entity qualifies as a cooperative, then it will have certain mandatory legal consequences.

2.1. Legal entity

Dutch law uses the so-called closed system for legal entities within the incorporation doctrine. This means that in principle the Dutch nationality of a legal entity with legal personality is established by its incorporation in the Netherlands[9]. The creation of a Dutch legal entity is subject to mandatory provisions of Dutch law. Formal criteria apply in order to determine the status of an entity. The underlying idea is that it must be established without doubt that a certain entity is a legal entity. Therefore Dutch law provides that a (Dutch) legal entity cannot be created if a deed executed by a Dutch civil law notary is lacking, in as far as required by

7. The association (*vereniging),* cooperative (*coöperatie*), mutual (*onderlinge waarborgmaatschappij*), public limited liability company (NV), private limited liability company (BV) and foundation (*stichting)* are governed by the provisions of Book 2 Dutch Civil Code (DCC).

8. Art. 2:53 paragraph 1 DCC. Originally the name cooperative association (*'coöperatieve vereniging'*) was used.

9. This is the doctrine that has been applicable in The Netherlands for many years, art. 10:117 and 118 DCC. However, due to developments resulting from important case law of the Court of Justice of the EC/EU like the Sevic case (13 December 2005, Case C-411/03), and more specifically the Cartesio case (16 December 2008, Case C-210/06) and the Vale case (12 July 2012, Case C-378/10) this doctrine is slightly shifting. These cases show a recognition of cross-border transfer of the seat of a company from one EU Member State to another EU Member State, resulting in a cross-border conversion. A company incorporated in another EU Member State may become a Dutch company upon this conversion, even though there is no Dutch legislation that applies to this specific cross border conversion. I will not further elaborate on this subject.

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law[10]. For every legal entity governed by Book 2 Dutch Civil Code certain criteria are specified. The Court may decide to dissolve a legal entity that does not fall within the statutory description[11].

2.2. Elements of an Association

The fact that the cooperative is also considered to be an association, be it a specific regulated form, means that it has members, not shareholders. Dutch law does not provide that the capital of a cooperative is divided in shares[12]. The reason for this choice has to do with the fact that the personal and financial engagement of the members vis-à-vis the cooperative is different to the position of shareholders vis-à-vis a company[13]. The fact that a cooperative also qualifies as an association means that at a least two persons must incorporate a cooperative[14]. However, one of the main characteristics of an association, the prohibition against distributing profits among its members[15] does not apply to the

10. The only exception to the requirement of the deed executed by a Dutch notary concerns the so-called informal association, art. 2:28 DCC. It is a legal entity, but because it is not incorporated by notarial deed and the articles of association are not included in a notarial deed, other rules apply to this association than to an association that is incorporated by a notarial deed or subsequently had its articles of association included in a notarial deed. For instance, an informal association cannot acquire real estate and each managing director is personally liable (together with the informal association) for all debts the informal association incurred during his or her period of management.

11. Art. 2:21 DCC. This does not happen often. Considering the drastic nature of this measure, the Court is required to give the legal entity the opportunity to amend its articles in order to comply with the statutory provisions applicable to its specific form as a legal entity prior to its decision to dissolve that legal entity.

12. See about shares in a cooperative from a tax perspective the Dutch Supreme Court (24 February 2012, ECLI:NL:HR:2012:BR4792 - in a case regarding the EC Directive nr. 90/434/EEG of 23 July 1990, as amended, on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States) considering the possibility for a Dutch cooperative to provide in its articles of association for "a capital divided in shares or participations".

13. See also §2.1.3 of the advice of the Dutch Social Economic Council on the composition of supervisory boards of legal entities that operate a business (*vervolg advies betreffende de samenstelling van toezichthoudende organen van rechtspersonen die een onderneming drijven*), 19 April 1985, nr. 7 § 2.1.2, SER 1985/7. https://www.ser.nl/~/media/db_adviezen/1980_1989/1985/b06323.ashx ('SER 1985/7').

14. Art. 2:26 paragraph 2 DCC requires a multiple act.

15. Art. 2:26 paragraph 3 DCC.

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cooperative. Dutch law does not provide for specific conditions that apply to the distribution of profit or reserves of a cooperative[16]. The possibility and the decision-making process to distribute profits, either to members or others, must be provided for in the articles of association, see further below under 6.

2.3. Objects requirement: provide in certain material needs of its members by virtue of a contract with its members

The articles of association of a Dutch legal entity must contain the objects of that legal entity[17]. However, in the case of a cooperative, the law requires a specific legal objective. The purpose of a cooperative must be to provide in material needs of its members. This statutory requirement is not very clear. The term "material needs" implies needs on an economic level[18], which are not necessarily tangible or material. The cooperative should be focused on the representation of the interests of its members. As a result of this requirement, ordinarily a party can only become a member of the cooperative in the event that the cooperative can fulfil the needs of this member.

The statutory description of a cooperative not only refers to this objective but connects another requirement to it. The cooperative must fulfil the needs of its members by virtue of a contract with its members. In other words, not the mere relationship with a member when fulfilling its needs is sufficient; it should (also) do so on the basis of a contract with its member[19]. The entering into such contracts shall be a part of the objective of a cooperative. The element of entering

16. Art. 2:53a paragraph 1. A cooperative is under the obligation however to maintain the reserves mandatory by law, art. 2:373, paragraph 4 DCC. See also Asser/Maeijer & Kroeze 2-I* 2015, nr. 604. Van der Sangen, G.J.H, Rechtskarakter en financiering van de coöperatie: een onderzoek naar de civielrechtelijke kenmerken van de coöperatie in het licht van de vraag of daaruit beperkingen voortvloeien voor de financiering van haar ondernemingsactiviteiten, Tjeenk Willink, Deventer, 1999 (Van der Sangen (1999)) § 4.1.3.

17. For each specific legal entity Book 2 DCC includes a specific provision, art 2:27 paragraph 4 sub b DCC applies to an association.

18. Van der Sangen (1999), § 3.3.

19. There is dispute among the Dutch academics if and if so, to what extent this is a formal requirement. Some argue that the "economic relationship" between the cooperative and its members may also be incorporated in the membership itself and does not necessarily need a separate contract. See for various opinions also Asser/Rensen 2-III*2012 nrs. 221 and 222.

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into contracts with its members does not have to be strictly on the level of the cooperative. Although there is no specific provision under Dutch law to that extent, the contracts with the members may also be entered into by a subsidiary of the cooperative[20].

The connection between membership and contract is essential in the nature of the cooperative, but the law allows a cooperative to provide in its articles of association that the contracts entered into with its members may also be entered into with others. However, if the cooperative enters into such contracts with others ("third party contracts"), it does so on the basis that the contracts with its members do not become inferior in significance (*ondergeschikte betekenis)*[21]. This only applies to the contracts also entered into with its members, not to other contract that are of a different nature. In practice, many cooperatives make provision for this possibility in their articles of association. The "inferior significance " criterion is rather vague. There is no specific quantitative ratio between member contracts and third party contracts. If the "inferior significance" requirement is not observed it will not result in the third party contracts being declared null and void, but it may result in a dissolution of the cooperative by court order[22].

2.4. Operating its business for the benefit of its members

The statutory definition of a cooperative makes it very clear that there must be a significant link between the operation of the business by the cooperative and the economic connection with its members. Art. 2:53 paragraph 1 DCC provides specifically that the cooperative must operate the business or *causes it* to be operated (*doet uitoefenen)* for the benefit of its members. The words "causes it to be operated" imply that it is allowed to have another entity operating the business for the benefit of the members. Although the law does not specifically

20. In agreement Dortmond, P.J.: 'De coöperatie; van vereniging naar houdstermaatschappij en beursrechtspersoon', Inaugural lecture, Kluwer, Deventer, 1991 (Dortmond (1991)); Van der Sangen (1999), specifically § 3.4 with respect to the question to what extent the cooperative must be in control over such subsidiary. In disagreement Galle, R.C.J., *De coöperatie*, Tjeenk Willink, Zwolle, 1993, (Galle (1993),p. 168. See 3.4 with respect to the question to what extent the cooperative must be in control over such subsidiary.

21. Art. 2:53 paragraphs 4 and 5 DCC.

22. I am not aware of any court orders that are rendered to dissolve a cooperative on the grounds of violating this specific prohibition.

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explain to what extent this is allowed, the phrasing of this paragraph implies that it requires the cooperative to determine the policy within that other entity or business and therefore should be in control over the subsidiary[23]. A structure that is often used in this respect concerns a cooperative that causes the business to be operated by a wholly owned subsidiary.

The other essential part of this criterion concerns the fact that either way the business must be operated *for the benefit* of the members of the cooperative. Members of a production cooperative for instance will also benefit from the compensation for the products delivered.

In the original concept of a cooperative, the members would contribute to the cooperative in order to enable it to operate its business. The cooperative that is a self-financing entity. In paragraph 6 I will briefly discuss whether it is allowed to attract third party equity from others than the members and provide such third parties with certain profit rights.

3. Categories of cooperatives[24]

As indicated in the introduction, there are many different kind of businesses that use the cooperative as a legal form. The size and purpose may differ quite significantly. The paragraph sets out the main differences between the categories[25].

23. The extent of being "in control" is not clear. Van der Sangen concludes that the qualification "causes it to be operated" requires that the cooperative has decisive power over the subsidiary, Van der Sangen (1999) page 257. Rensen is of the opinion that if a cooperative maintains a company that operates a business as a result of which the material needs of the members are directly or indirectly promoted, this sufficiently satisfies the criterion "causes it to be operated". He requires the cooperative to be a shareholder with at least the ability to direct to a certain extent the way the business is operated, Asser/Rensen 2-III* 2012 nr. 224. More recently he is of the opinion that the cooperative must be able to exercise the majority of the votes in the general meeting. , Rensen, G.J.C., "Een coöperatieve beursnotering" *WPNR* 2016/1107. See furthermore Dortmond (1991) page 9. See further below in 3 Cooperative as holding company.

24. § 2.1.2, SER 1985/7.

25. The cooperative has been very popular in international (tax) structures as a "sub holding". This was due to the fact that the capital of a cooperative is not divided into shares. The relevant tax legislation has recently been amended, changing the situations in which the cooperative is attractive from a tax perspective. I will not further elaborate on this subject.

Business cooperatives

These are cooperatives in which members operate their businesses by themselves. The cooperative is more or less fully in service of the business operations of its members. This type of cooperative is used in the agricultural businesses but also by small and medium enterprises. This category can further be divided in the following types.

a) distribution cooperatives acting as a wholesale vendor of the products produced by its members;
b) production cooperatives, in which case members are entrepreneurs, investing jointly in financing production capacity;
c) central buying cooperatives buying raw materials or other business that members need for their own businesses; and
d) service cooperatives offering certain services to their members (mainly insurance and credit companies).

Users or consumers cooperatives

This type of cooperative buys certain goods as a wholesale buyer on behalf of its members who buy these products from the cooperative. This scale up results in better prices for the members compared to the situation where each of them has to individually bargain with the other party. Service companies like banks or insurance companies may also belong to this category.

Energy cooperatives

Over the last few years many private persons joined in cooperatives to share or sell the surplus of energy generated from their rooftop solar cells, meeting local energy needs using local sustainable energy initiatives.

Employee cooperatives

Members of these types of cooperatives are also employees of their cooperative, creating special participation rights other than those under employment law[26].

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Professionals cooperatives

Traditionally professionals such as lawyers, notaries, doctors used to operate their joint business in the form of a limited partnership. However, the choice of legal form has changed quite substantially in the last twenty years. Apart from the NV the cooperative is quite often used as the legal entity to operate businesses like audit firms.

Cooperative as holding company

A cooperative does not necessarily have to operate a business itself but may do so by means of a subsidiary[27]. In that situation, although the cooperative itself is a mere holding company, the business criterion is still satisfied. However, the subsidiary also has to satisfy the criterion of entering into contracts with members of the cooperative in order to mitigate the risk that the cooperative would not meet all the legal statutory requirements. In other words: the cooperative characteristics may be satisfied either at the level of the cooperative or at the level of a subsidiary but only in their entirety[28].

4. Members

Having members (and not shareholders) is one of the distinctive elements of a cooperative, being a species of an association. The position of members of a cooperative is largely governed by the general statutory provisions applicable to

26. In the past there was some doubt about whether an employee cooperative would meet the definition of a cooperative. The issue was whether an employment agreement would be entered into in the business of the cooperative. In the legislation process in the 1960's, it became clear that it would be possible provided that the cooperative entered into different contracts with third parties other than with its members. See Dortmond, P.J. "De zuivere holdingcoöperatie, een coöperatie?" in Sangen, G.J.H. van der, Galle, R.C.J., and Dortmond, P.J., (eds), *De coöperatie, een eigentijdse rechtsvorm*, Boom, Amsterdam, 2007, (Dortmond (2007)), p. 2.

27. See also 2.4.

28. See Van der Bijl, P.C.S., 'De coöperatie als houdstermaatschappij; houdstercoöperatie en concerncoöperatie', *Ondernemingsrecht* 2010/23, 2.5. The Minister of Justice remarked in the explanatory notes to a proposal to amend Book 2 DCC that it is no longer necessary that the members enter into contracts with the cooperative itself but that it is allowed that they enter into contracts with the legal entity that actually operates the business. Parliamentary documents TK 1982-1983, 17725, nr. 3 page 75.

associations and the articles of association of the cooperative. Many statutory provisions regarding a member or membership are not mandatory. This means that the statutory provision applies, unless the articles of association provide differently. There are three relationships to be distinguished between a member and the cooperative, the transaction relationship (see under 2), the financing relationship (see under 6) and the control relationship (i.e. voting rights).

4.1. Liability of members

Contrary to the NV or the BV, private companies limited by shares, the members of a Dutch cooperative may be liable for the deficit upon liquidation after dissolution of the cooperative. Whether or not this is the case and if so to what extent depends on the articles of association of the cooperative. Apart from the fact that the name of a cooperative must include the word "*coöperatief*" it also must refer to the level of liability of its members by including a certain abbreviation included in its name, as indicated below.

Statutory liability

Statutory liability (*Wettelijke aansprakelijkheid* or W.A.) means that unless the articles provide otherwise, all members are equally liable for the deficit of the cooperative upon dissolution. Former members will remain liable up to a year after they ceased to be a member[29]. Liability is joint and several which means the (former) members are liable on a pro rata basis for any part that cannot be recovered from another (former) member. Therefore the liability for the shortfall shall be in proportion to his share, which shall be equally among the members unless the articles of association provide for a different basis. This form is not used in practice.

Excluded or limited liability

The articles of association of a cooperative may provide for a deviation from statutory liability (upon dissolution of the cooperative), again to be included in

29. Art. 2:55 DCC. This statutory provision includes more specific elements to this liability, which I will not discuss.

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the name of the cooperative. The articles of association may provide that there will be no liability on the part of the members (*Uitgesloten aansprakelijkheid* or U.A.) or that the liability of the members will be capped at a certain amount (*Beperkte aansprakelijkheid* or B.A.).[30/31]

4.2. Voting rights

A membership of an association must include certain voting rights. Unless a member is suspended he or she must have at least one vote in the general meeting[32]. These voting rights can be exercised in the general meeting of members (see 5.2). Therefore, voting rights imply also the right to attend and speak at the general meeting. A member must be invited to the general meetings in accordance with the procedure provided for by law and the articles of association in order to be able to exercise these rights. Voting rights may also be attributed to members of other corporate bodies, for instance members of the board of management. The articles of association may even provide for the possibility that persons who are not a member have voting rights in the general meeting (the outsiders). Enabling these outsiders to cast more than half of the number of votes cast by the members is prohibited[33]. The articles of association may provide for multiple voting rights. For example, it is possible to provide that the number of votes that members may cast at a general meeting will be related to the volume of economic transactions between the member and the cooperative.

4.3. Obligations

It is possible to provide in the articles of association that members will have other rights, but also that they will have certain obligations. This can be directly provided for in the articles of association or indirectly, by giving a certain corpo-

30. Art 2:56 paragraph 1 DCC.

31. The Supreme Court (27 March 1976, NJ 1977/612 Sol/Cebeco) ruled that members of a cooperative with statutory or limited liability cannot offset any claim under this liability with a claim such member has against the cooperative. The members' liability is considered to be a guarantee in favor of the creditors of the cooperative.

32. Unless the general meeting is a meeting of deputies – see below under 5.2.

33. Art. 2:38 paragraph 3 DCC.

rate body like the board of management or the general meeting the right to decide upon such obligations[34]. The cooperative can also stipulate certain rights for the benefit of its members with third parties, provided this is in line with the purpose of the cooperative, and it can claim the fulfillment of the obligations under this agreement by third parties, including damages[35]. The cooperative may for instance bargain for discounts for its members with another organization. This is also referred to as "member contracts" and is considered to be a third party stipulation. The cooperative can assume liabilities for the account of its members if this authority is specifically included in the articles of association. It is not possible to change the rights and obligations of a member by resolution without his individual consent, unless this authority was clearly reserved in the agreement. Simply referring to articles of association, by- laws or general conditions is not sufficient to create this flexibility[36]. A member must be notified in writing about this change in order to have effect. It is also possible that the articles of association of a cooperative provide for certain conditions including obligations for a member that apply in the event of withdrawal of such member[37].

4.4. Member involvement

The level of involvement of members varies with each cooperative. There are cooperatives where members do not have any, or hardly any obligations vis-à-vis the cooperative. Others are more closed, with members that are deeply bound towards the cooperative[38]. This difference in member involvement will be reflected in the governance of the cooperative and in particular in the management structure of the cooperative. If there is a high commitment from the members in terms of financing of the cooperative or high delivery or performance obligations, the role of members is expected to be more intense. The interference of these members in strategy and risks will probably be much higher than in a situation where

34. Art.2:34a DCC.

35. Art. 2:46 DCC, unless the articles provide differently.

36. Art. 2:59 paragraph 1 DCC.

37. Art. 2: 60 DCC, see also 4.5 end of membership.

38. Also 1.2 and principle 5.1.B NCR Governance Code (see below under 5.6): "The control of the members should serve to support successful cooperative entrepreneurship."

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members do not have this connection or obligation and are merely profiting from certain benefits the cooperative has to offer them.

While exercising his rights, a member may pursue his own interests. There are boundaries however. Each member must observe the general principles of reasonableness and fairness as stated in art. 2:8 DCC. This article provides that the legal entity and all who are connected to its organization by virtue of law or its articles of association must act towards each other in such a way as required by reasonableness and fairness. This means that each member must consider his actions and make sure that they are not in conflict with reasonableness and fairness in relation to the cooperative, other corporate bodies or his fellow members[39].

4.5. Admittance of members and end of membership

The board of management decides on the admittance of new members. If the board of management denies admittance, then the general meeting may overrule this decision[40]. A membership is personal, unless the articles of association provide that it is transferrable[41]. The articles of association may provide that only persons meeting certain criteria are admissible as a member. There are certain statutory provisions regarding the end of a membership, such as death, notice by a member[42], notice by the cooperative and deprivation when a member acts contrary to the articles of association, statutory provisions or intentionally harms the cooperative[43]. It is possible to stipulate in the articles of association that certain conditions will apply when a member decides to end his membership, provided that these conditions maintain the liberty to end the membership. The conditions must comply with the purpose and mission of the cooperative ("*in overeenstemming met haar doel en strekking*")[44]. Examples of such conditions are

39. Similar Principle 5.1.D NCR Governance Code.

40. Art. 2:33 DCC.

41. Art. 2:34 paragraph 1 DCC.

42. In the event that the articles of association do not exclude all liabilities of the members or former members of a cooperative, additional provisions apply to the termination of a membership, art. 2:61 under c DCC.

43. Art. 2:35 DCC.

44. Article 2:60 DCC. In practice it was not always clear in what detail the conditions must be provided for in the articles of association. In its decision of 12 June 2015 (ECLI:NL:HR:2015:1601 - DRENTS

financial compensation, for instance a mandatory payment by the leaving member of a certain amount relative to the contract with the cooperative or no refund to a leaving member of his investments in the cooperative[45]. Another condition may be a limitation of the number of members that may leave the corporation during a financial year[46].

5. Governance

5.1. General

From a statutory governance perspective there are similarities but also differences between a regular association and a cooperative. Both legal forms have a general meeting of members and of course must have a board of management. However, it is only with respect to the cooperative that the law provides for the possibility of a supervisory board. This does not mean that a regular association cannot have a supervisory board. It is just not provided for by law. If an association wants to have a supervisory body it should have an appropriate provision in its articles of association to further regulate the appointment, dismissal, tasks and authorities of this supervisory body. It should be noted, however, that it is expected that the law will change in this respect. A general statutory provision about the supervisory board of a legal entity referred to in Book 2 DCC is expected to be implemented in the (near) future. A proposal for this change had been submitted to Parliament[47].

This two-tier structure, management and supervision concentrated in two separate corporate bodies, is the traditional governance model in the Netherlands

OVERIJSSELSE COÖPERATIE KAAS B.A.) the Dutch Supreme Court ruled that the requirement of art. 2:60 DCC is that the condition for withdrawal is included in the articles of association is met if the members could have known about this condition and its nature and the magnitude of the resulting obligations can be determined from the articles of association.

45. District Court Arnhem 3 June 1999, JOR 2000/92 annotated by Rensen.

46. Although this condition limits in a way the liberty to end the membership, it would be possible to provide this in the articles of association to the extent that the end is not too much in the future. See also Asser/Rensen 2-III* 2012 nr. 242.

47. See proposal for amendment of Book 2 DCC *"Wet bestuur en toezicht rechtspersonen"* ((second) Act Management and Supervision legal entities), Parliamentary documents TK 2015-2016, 34 491 nr. 2, proposed article 11.

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for private and public limited liability companies, BVs and NVs. On I January 2013 the (first) Act on Management and Supervision entered into force. This Act provides for a legal basis for the one- tier board system for NVs and BVs comprising both executive and non-executive members. The executive members are responsible for the company's daily management; the non-executive members will have at least the statutory task of supervising the board of management in the performance of their management duties. The general course of affairs of the company is the responsibility of all board members, both executive and non-executive. The non-executive members in a one-tier board system are part of the board of management and are directly involved in and have a direct influence on the passing of board resolutions. The present statutory provisions regarding a one-tier board only apply to an NV or a BV. A general statutory provision for a one-tier board applicable to all legal entities is expected in the (near) future[48].

As described above, the major issues regarding the corporate bodies of a cooperative and the relationship between these corporate bodies and their respective authorities are described in the Dutch Civil Code. To a certain extent, the articles of association may deviate from non-mandatory statutory provisions, fine-tuning the particular governance suitable for the cooperative in question. Furthermore, the NCR, the Dutch Council for Cooperatives has issued a non-binding NCR Governance Code.

5.2. General meeting of members and members' council

The position of the general meeting of members (the "general meeting") is largely governed by the general statutory provisions applicable to associations and its articles of association. The term "general meeting" has two meanings[49]. The first meaning is the actual gathering of the members in the meeting. The other meaning concerns the general meeting as a corporate body, used in the context of the authorities attributed to it. Apart from the more general provisions regarding the notice period and the rules about the decision making, there are certain provisions regarding the authority of the general meeting. All author-

48. See proposal for amendment of Book 2 DCC "*Wet bestuur en toezicht rechtspersonen*" ((second) Act Management and Supervision legal entities), Parliamentary documents TK 2015-2016, 34 491 nr. 2, proposed article 9a.

49. See Art 2:38/39 DCC and art 2:40 DCC.

ities that are not attributed to other corporate bodies fall within the scope of authority of the general meeting[50]. Furthermore, there are certain decisions that are under the scope of the mandatory authority of the general meeting. This concerns the right to resolve to amend the articles of association, to approve the balance sheet of assets and liabilities and to adopt the annual accounts, to convert the cooperative into another legal entity, to have the cooperative enter into a legal merger or legal split-off and finally to resolve to dissolve the cooperative. In principle, the general meeting is also authorized to appoint, suspend and dismiss managing directors and, if applicable, supervisory directors. However, the articles of association may provide differently, see paragraph 4.3.

The composition of the general meeting may vary. In the traditional format, members of the cooperative (who are not suspended) will be part of the general meeting. In many cases the general meeting will only consist of members. However, as indicated in paragraph 4, it is possible to provide in the articles of association that members of other corporate bodies or outsiders (i.e. non – members) will also have the right to vote in the general meeting. These voting rights are restricted however to a maximum of fifty per cent of the number of votes cast by members[51].

Another possibility is to provide in the articles of association of the cooperative that the general meeting shall consist of deputies elected by and from the members, the so-called members council *("ledenraad")*[52]. This may be a very good way to organize a large cooperative with many members, not only from a practical point of view, but also to enhance the decision-making process. There are many possible ways to construe the election and the election procedure of the deputies in the articles of association. The deputies may be elected for a short period of time, only for certain meetings or indefinitely. There are, however, some mandatory rules. Every member must be able to either directly or indirectly participate in the election of the deputies. An example of an indirect election would be a large cooperative that has various divisions[53], each with a sepa-

50. Art. 2:40 paragraph 1 DCC.

51. Art. 2:38 paragraph 3 DCC.

52. Art. 2:39 DCC.

53. Art. 2:41a DCC allows a cooperative to have divisions. These divisions do not have to be organized in separate legal entities, but may be organized within the cooperative, with their own general meeting and board of management. The authority and governance of these divisions within the cooperative may be regulated by bylaws. See further below in footnote 69.

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rate board of management. The members of the board of management are elected by the members of the (division of the) cooperative. The articles of association of the cooperative then may provide that the deputies are elected by the boards of management of the divisions. The articles of association will set out the number of votes a deputy is entitled to cast in a general meeting. Although not specifically provided for in the law, it is possible to make provision in the articles of association for a "mixed" structure in the general meeting, i.e. that the general meeting consists of members and deputies[54]. In my opinion it is also possible to make provision in the articles of association that there will be a "normal" general meeting, consisting of members, entitled to decide on certain issues and a members council that will have the authority to decide on other matters[55]. The NCR Governance Code provides (5.2.4.1) that in the event that for a period of three successive years i) the number of members of the cooperative exceeds 500 and/or ii) less than 50% of the members of the cooperative are attending the general meeting, the board of management will submit a proposal to the general meeting to amend the articles of association to allow a members' council to be established. It is then up to the general meeting to decide whether or not to institute the members council by changing the articles of association. If a members council is established, then it will draw up a profile for its size and composition reflecting the nature of the members of the cooperative. The members council should aim for a high-quality and diverse composition.

The law allows a great deal of flexibility for the general meeting to organize itself and its authority. The articles of association may provide for simple or extra majorities or require a certain number of the members to be present at a meeting to adopt certain resolutions. It is also possible to provide that certain resolutions of the general meeting may only be adopted upon the proposal of another corporate body or – to the extent not limited by law[56] - that such a resolution is subject to the approval of another corporate body.

Finally, it is possible that the articles of association provide that certain resolutions are subject to a referendum[57]. For instance, if the general meeting consists

54. See also Asser/Rensen 2-III* 2012 nr. 96.

55. See Asser/Rensen 2-III* 2012 nr. 97 for overview of concurring and disagreeing opinions on this position.

56. Amendment articles of association, legal merger or legal split off.

57. Art. 2:39 paragraph 2 DCC.

of deputies, the articles may provide that certain major decisions need the referendum in order to include the opinion of all members. If a resolution of the general meeting is subject to a referendum then the execution of such resolution will be suspended pending the result of the referendum.

5.3. Board of management

General

Under art. 2:44 paragraph 1 DCC, the task of the board of management is to manage the cooperative, save for any limitations in the articles of association. Dutch law does not specifically define what this management is. The different mandatory tasks are provided for in different parts of the Dutch civil code, but are not exhaustive. I will list a few. The board of management represents the cooperative, it will keep its books and records and maintains adequate administration[58]. Within six months after the end of a financial year it will also prepare the annual accounts of the cooperative[59].

Every member of the board of management is bound towards the cooperative to properly perform his/her tasks[60]. These tasks concern all management duties that are not attributed to other managing directors by virtue of law or the articles of association. It is therefore possible to divide certain management tasks among the managing directors. Every managing director is responsible for the general course of affairs of the cooperative[61].

Around the turn of the century - as in many other countries - there was a public debate in the Netherlands about "good governance" of listed companies.

58. The administration shall be kept in a way that at all times the position of the debtors and creditors of a legal entity can quickly be determined and that these positions and the status of liquidity, considering the nature and size of the enterprise will give a reasonable overview of its capital, Supreme Court 11 June 1993, NJ 1993, 713 *Brens/Sarper*.

59. Art. 2:58 paragraph 1 DCC.

60. Art. 2:9 DCC.

61. It is not clear what "general course of affairs" means under Dutch law. Many authors have attempted to further define what should fall under this responsibility. There is a general notion that this should include the overall financial and strategic performance. See Bier, B "Wetsvoorstel Wet bestuur en toezicht rechtspersonen: enkele gedachten bij horizontaal, verticaal en diagonaal toezicht," *Ondernemingsrecht* 2017/105, Kluwer (Bier (2017)), and in particular footnote 19 for an overview of the various authors about the meaning of "general course of affairs".

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This resulted in the first Dutch corporate governance code ("DCGC") in 2003. This code has been amended three times and quite dramatically on the last occasion in 2016 ("2016 Code"). The DCGC applies to all companies whose registered offices are in the Netherlands and whose shares or depositary receipts for shares have been admitted to listing on a stock exchange, or more specifically to trading on a regulated market or a comparable system, and to all large companies whose registered offices are in the Netherlands (balance sheet value > euros 500 million) and whose shares or depositary receipts for shares have been admitted to trading on a multilateral trading facility or a comparable system[62]. Although the DCGC is not applicable to cooperatives, the Supreme Court ruled that there are "in The Netherlands accepted insights regarding corporate governance as reflected in…. the Code"(*De in Nederland aanvaarde inzichten omtrent corporate governance zoals neergelegd in… de Code*)[63]. The 2016 Code (as its predecessors) contains so- called "Principles" and "Best Practice Provisions". One of the aspects of these principles concerns the fact that a board of management is responsible for maintaining proper risk management system and should closely monitor the internal control and risk management system suitable for the line of business of the legal entity. In my opinion the maintenance of a proper internal control and risk management system is so essential for running a business of some size properly, that I think this responsibility also applies to a board of management of other legal entities, such as a cooperative[64].

Appointment of managing directors

As indicated above, the general rule is that members of the board of management (*statutaire bestuurders or* managing directors) are appointed by the general

62. http://www.mccg.nl/dutch-corporate-governance-code viewed on 3 May 2017. In 2017, Dutch listed companies are still required to report on compliance with the DCGC that was designated through secondary law as the applicable DCGC (2008 Code) in the 2016 financial year. The management report relating to the financial year that starts on or after 1 January 2017 shall refer to the 2016 Code, see Resolution of 29 August 2017 to amend Resolution of 23 December 2004 to adopt further requirements regarding the contents of the financial report (Official gazette747).

63. Supreme Court 13 July 2007, ECLI:NL:HR:2007:BA7970. See for further reflection of court decisions referring to the corporate governance code in situations that do not fall directly under the corporate governance code Bier, B et al *Overzicht Corporate Governance in Nederland 2003-2013* , report Nyenrode Business Universiteit in assignment of the Monitoring Committee Corporate Governance Code. file://asdfs02/Redirect/Bier/Downloads/Eindrapport%20Nyrenrode%20DEF.pdf

64. Bier (2017).

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meeting from among its members. The appointment may take place in or outside an actual meeting. If, according to the articles of association, the appointment takes place outside a meeting – as happens quite often with large cooperatives with many members, then the members must be given the opportunity to come up with candidates. It is possible that this right is restricted and only attributed to a number of members acting jointly. However, the threshold for such a number may not exceed one fifth of the number of members that may participate in the election. Furthermore, it is possible that the articles of association set a minimum of votes that a candidate must collect in order to be appointed as managing director, provided that this number does not exceed two thirds of the votes cast[65].

Under certain mandatory restrictions, the articles of association may deviate from the general rule. The first deviation is that the articles of association may provide that there is no qualification that a managing director must be a member of the cooperative and therefore may also be an outsider[66]. The second deviation concerns the authority of the general meeting to appoint a managing director. The articles of association may provide that the appointment by the general meeting will occur upon a binding nomination of a candidate. A binding nomination in this respect means that the articles of association provide that another corporate body such as the supervisory board or a specific other party, like a governmental institution, is authorized to make a nomination for the candidate to be appointed. This nomination may include one or more persons. The general meeting cannot ignore this nomination. Unless it overrules the nomination by a majority with a maximum of two thirds of the votes cast, the candidate is considered to be appointed[67].

Another deviation is that one or more managing directors, but less than half of the total number of managing directors may be appointed directly by other persons than the general meeting[68]. With respect to the managing directors who are not to be appointed by such other persons, the articles of association may

65. Art. 2:37 paragraph 5 DCC. The same provision applies to the appointment by departments.

66. There are different opinions regarding the question if the articles may provide (indirectly) that members may not be managing directors, see also Asser/Rensen 2-III* 2012 , nr. 143.

67. Art. 2: 37 paragraph 4 DCC. Furthermore, the articles of association may provide that at the particular meeting a certain number of votes must be able to vote, such number may not exceed two third of the votes that can be cast by all the members jointly when exercising their voting rights.

68. Art 2:37 paragraph 3 DCC.

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provide that the method of election will be different (than the appointment by the general meeting) provided that every member may join directly or indirectly in the voting process regarding the appointment of a managing director. The latter means that when the general meeting appoints the members of the supervisory board (supervisory director or *commissaris*), the articles of association may provide that the supervisory board may appoint the managing directors. By the first appointment (of the supervisory director), a member is *indirectly* involved in the appointment of the managing director. Another example would be that the managers of a division[69] are appointed by the members and the managing directors are appointed by the managers of the divisions.

Dismissal of managing directors

A managing director may at all times be suspended or dismissed by the appointing body, even if such managing director was appointed for a limited period of time. The articles of association may set a supermajority for such decision (if the appointing body was the general meeting). It is not completely clear whether it is also possible to provide in the articles of association that if another body was authorized to appoint a managing director, the general meeting would (also) be authorized to dismiss a managing director. As this is in line with the associative character of a cooperative and the democratic nature of its general meeting, I consider this to be possible[70]. Furthermore, if a supervisory board has been established, a managing director appointed by the general meeting may be suspended by a resolution by the supervisory board, unless the articles of association provide otherwise.

69. As a general rule for associations the law allows the institution of so called divisions (*afdelingen)* within the association. In particular if the association is very big or has a national operating character, the articles of association may provide for a more complex structure in which the association has various divisions that are unities within the larger context of the association. Members may be allocated to a specific division in order to organize a certain region or certain professions. A division is not a legal entity, but is a part of the main association. However, it is possible that under certain circumstances a division is to be considered as an association itself and therefore is a separate legal entity. I will not further discuss this matter in this article. See also Asser/Rensen 2-III* 2012, nrs. 189 and 190.

70. See Asser/Rensen 2-III*, nr. 159.

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5.4. Supervisory Board

The main statutory duty of a supervisory board of a cooperative as defined in the Dutch civil code is to supervise the policy of the board of management and the general affairs of the cooperative and the enterprise it operates. Furthermore, the supervisory board may render advice to the board of management[71]. The articles of association may include additional tasks for the supervisory board[72]. Many articles of association provide for certain ex-ante supervision tasks (as opposed to the ex-post task, the supervising afterwards). The articles of association may for instance provide that certain resolutions of the board of management need the prior approval of the supervisory board. To a certain extent, the supervisory board may also have an "employers" role. As previously indicated, some articles of association even provide that the managing directors will be appointed by the supervisory board. The supervisory board would typically also evaluate each managing director on a yearly basis (and also the functioning of the board of management in its entirety). When fulfilling its duties, the supervisory board will focus on the interest of the cooperative and the enterprise it operates[73]. A member of the supervisory board, when performing his or her task, must consider all interests involved and not only the interest of a specific party[74]. Each supervisory director (and each managing director) must sign the annual accounts of the cooperative[75]. The statutory provisions regarding the appointment and dismissal of managing directors as discussed above are also applicable to the appointment and dismissal of supervisory directors[76]. Only natural persons are electable for appointment.

71. Art. 2:57 paragraph 2 DCC.

72. Art. 2:57 paragraph 5 DCC.

73. Art. 2:57 paragraph 2 DCC

74. This concerns both managing directors and supervisory directors also for other Dutch legal entities, see Supreme Court 9 July 2010, ECLI:NL:HR:2010:BM0976, NJ 2010/544 (ASMI), Supreme Court 12 July 2013, ECLI:NL:HR:2013:BZ9145, Supreme Court 14 September 2007, ECLI:NL:HR:2007:BA4117 and Supreme Court 4 April 2014 ECLI:NL:HR:2014:799 (Cancun).

75. Art. 2:58 paragraph 2 DCC. The annual accounts are adopted by the general meeting. Only after adoption the annual accounts prepared by the managing board and signed by each member of the managing board and supervisory board, unless for a missing signature an explanation is given, become the official annual accounts.

76. Art.2:57a paragraph 1 DCC.

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For many cooperatives the institution of a supervisory board is optional. It will be up to the general meeting to decide whether a supervisory board is necessary or not. The general meeting can decide to include in the articles of association the establishment of a supervisory board. For certain cooperatives a supervisory board is mandatory. This concerns cooperatives that qualify as a so-called "large cooperative" (*structuur coöperatie)*. This is the case in the event that the equity of a cooperative[77] equals at least 16 million euros, the cooperative or its dependent company[78] has established a works council under a statutory obligation and the cooperative or its dependent company employs over 100 employees in the Netherlands[79]. If this situation occurs, the cooperative must submit this information to the trade register within two months after its annual accounts have been adopted[80]. After three years of uninterrupted registration, the cooperative becomes a large cooperative by operation of law[81]. This means that the cooperative must have a supervisory board consisting of at least three individuals[82]. The procedure of appointment of such members differs from the normal procedure[83]. The supervisory directors will be appointed by the general meeting upon nomination by the supervisory board[84]. The general meeting and the works

77. According to its balance sheet with explanatory notes.

78. According to Art. 2:63a DCC a dependent company means for the purpose of defining a "large cooperative" (a) a legal person to which a cooperative or one or more dependent companies, solely or jointly and for its or their own account, contribute(s) at least one half of the issued capital (b) a partnership, a business undertaking of which has been registered in the commercial registry and for which a cooperative is fully liable as a partner towards third parties for all obligations (translation Warendorf online Kluwer 2016).

79. Art. 2:63b paragraph 2 DCC.

80. Art 2:63b paragraph 1 DCC. There are certain exemptions to his obligation. See art. 2:63d DCC. The structure regime does not apply to a cooperative that operates exclusively or almost exclusively as a holding or finance company of dependent companies, provided that the employees of dependent companies are represented in a works council that has certain authorities related to the appointment of supervisory directors.

81. Art. 2:63c DCC.

82. Art. 2:63f paragraphs 1 and 3 DCC.

83. Van Solinge, G, "Benoeming van bestuurders en commissarissen van een structuurcoöperatie", *Ondernemingsrecht* 2012/78.

84. Art. 2:63f paragraph 2 DCC.

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council have the right to recommend candidates for this nomination. This recommendation is non-binding[85]. The general meeting must appoint the person nominated by the supervisory board unless the works council or the general meeting objects against this nomination. An objection may only be based on three limited grounds: (i) the proper procedure for appointment has not been observed, (ii) the expectation that the nominated person is unsuitable for the performance of his duties as a supervisory director or (iii) the expectation that appointing the nominee will result in the supervisory board not being properly constituted[86]. Furthermore, some persons are unable to be appointed as a member of the supervisory board. This concerns persons that are employed by the cooperative or its dependent company or are persons that are managing directors or employees of unions that are normally involved in discussions about the collective bargaining agreements of the cooperative or its dependent companies[87]. A supervisory director of a large cooperative automatically resigns as a member of the supervisory board four years after his or her appointment[88]. He or she may be reappointed by following (again) the procedure described above. Finally, certain decisions of the board of management are subject to the approval of the supervisory board by virtue of law[89].

5.5. Different governance models

The actual corporate governance model used by Dutch cooperatives differs for each cooperative. This depends mainly on the way the business of a cooperative is structured. Although the governance of a cooperative is usually tailormade in the articles of association, many cooperatives use similar models[90]. In this paragraph I will describe the models which are obviously used by cooperatives that have a more substantial business and have a supervisory board.

85. Art. 2:63f paragraph 4 DCC.

86. Art. 2:63f paragraph 6 DCC.

87. Art. 2:63h paragraph 1 DCC.

88. Art. 2:63i paragraph 1 DCC.

89. Art. 2:63j paragraph 1 DCC.

90. Galle, R.C.J., 'De bestuurlijke inrichting van de moderne coöperatie. Coöperaties van A t/m Z' in *Handboek Coöperatie Convoy* 2012, Galle, R.C.J. (ed.).

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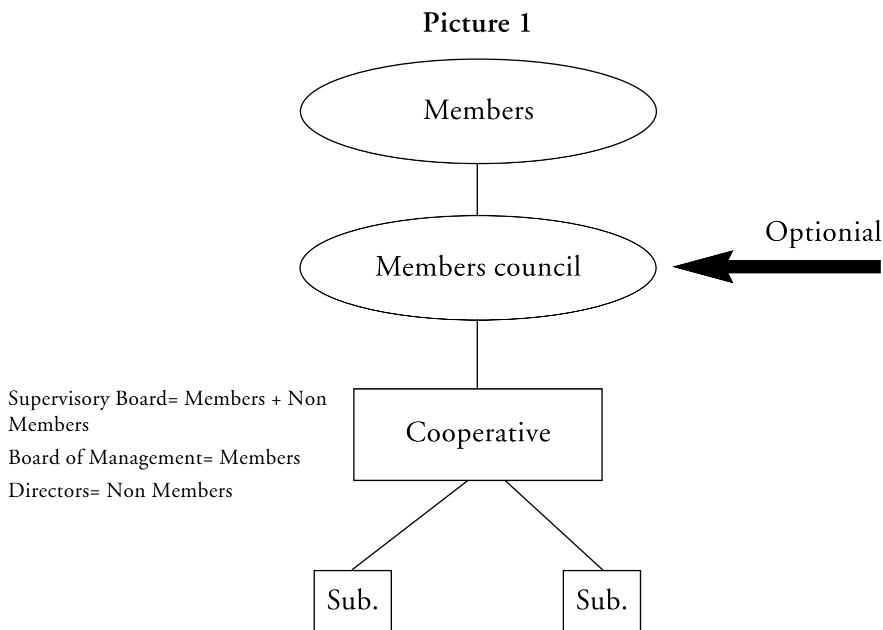
The traditional model

Based on the law, the following base model can be construed.

Picture 1



In this model, the role of the members is quite dominant. The board of management consists of members that are appointed by the general meeting. As members of the board of management in this case are often not only board members but also operate their own business as a member, the level of delegation to a more hands-on management (not being the statutory board) is quite common. These managers are professionals, are not members and bear the usual title of *"directeur"*. I will refer to these non-statutory managers individually as directors and jointly as the executive board. In this model the supervisory board only has the powers and authority that come with its statutory task. The articles of association will not provide for additional powers. In practice, the traditional model will have supervision on two different levels. The supervisory board will supervise the board of management in line with its statutory duty and the board

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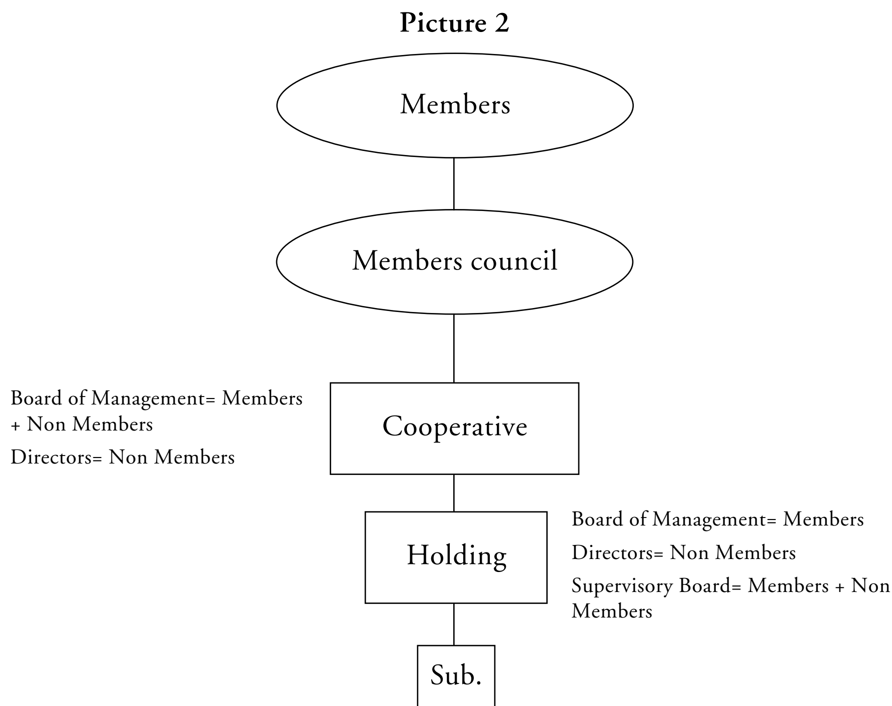
of management will supervise the directors and the executive board. This may not be an optimal structure as the executive board de facto *manages* the cooperative although this is not the body to which the law has attributed this task.

As indicated in picture 1, a members' council is optional and is not often established in the traditional model, thereby optimizing the influence of the individual members and their participation in the general meeting[91].

Hourglass model

Picture 2



91. See also Galle, R.C.J., "Bestuur en toezicht in de coöperatieve onderneming", in Lückerath-Rovers, M., Bier, B., Ees H. van, and Kaptein, M. (eds.), *Jaarboek Corporate Governance 2013-2014*, Kluwer, Deventer, 2013, (Galle (2013)), paragraph 6.

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In this model the cooperative is involved in the relationship with its members. The actual activities for the benefit of the members are not done by the cooperative itself, but at a different level, by the holding or even by the subsidiaries. The cooperative functions more like a holding and financing vehicle for the activities, but considering the nature of a cooperative and the statutory requirement on its legal form, it should be the cooperative that enters into the contracts with the members. However in practice the actual interaction may be between the members and the subsidiary of the cooperative.

There is a personal union between the cooperative and the holding in such a way that the members of the board of management of the cooperative are the same persons as the members of the supervisory board of the holding. The directors of the cooperative are the members of the board of management of the holding. By structuring the boards this way, the situation described for the traditional model that resulted in a double supervision is evaded. This may be different in the situation that the holding company qualifies as a so-called "large company" (*structuurvennootschap)*[92]. In that case, the general meeting is authorized to appoint the supervisory directors upon a non-binding nomination by the supervisory board[93]. The works council however has certain special powers regarding the appointment of the supervisory directors. The works council has the right to make a *binding* nomination for the appointment of one third of the members of the supervisory board. The nominee must be put up for election unless the nominee is considered unfit for the proper performance of his task as supervisory director or if after his appointment the supervisory board would not be "properly constituted"[94]. This may interfere with the personal union.

92. Art. 2:153 DCC applicable to the large NV and art. 2:263 DCC applicable to the large BV. This means that unless certain exceptions apply a BV or NV must file a statement with the trade register if: (a) according to the balance sheet with explanatory notes, the sum of the issued capital of the company and its reserves is at least euros 16 million, (b) the company or a dependent company, has, pursuant to a legal obligation, established a works council and (c) the company and its dependent companies together normally employ at least one hundred employees who work in the Netherlands. After three years of uninterrupted registration as such, the company becomes a large company by virtue of law, art. 2:154/264 paragraph 1 DCC.

93. Art. 2:158/268 paragraph 4 DCC.

94. Art 2:158/268 paragraph 6 DCC. In practice there are some possibilities to mitigate the consequences of this provision.

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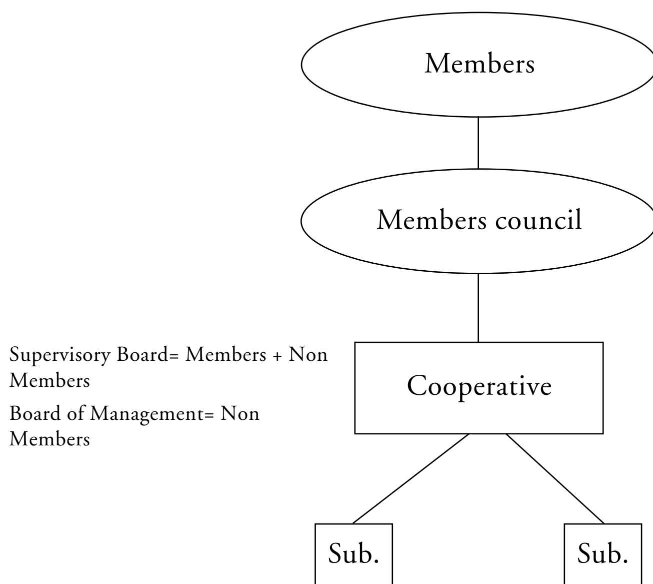
The supervisory board +/ board of management model

Picture 3



In this model the general meeting/members council appoints the supervisory directors. The supervisory board consists of members and non-members and appoints the members of the board of management[95], that consists of only non-members, i.e. full time professionals. The articles of association provide for additional powers for the supervisory board and often for more influence of the members council on certain issues specifically regarding business that has a direct link to the business of the members[96]. This model has become quite popular. It does not have the double supervision problem and is more aligned with the modern insights of proper governance.

95. Which is possible because the members appoint the (members of the) supervisory board and therefore are indirectly involved in the appointment of the members of the board of management.

96. See also (Galle 2013), p. 154.

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5.6. Governance code for cooperatives

A Governance Code for Cooperatives was drawn up by the NCR in 2005 (the NCR Code). Since then the NCR Code has been updated twice[97], the last time was in 2015[98]. Chapter 1.1 of the NCR Code states:

The NCR Governance Code for Cooperatives is not binding. This code will be applied voluntarily by Dutch cooperatives. Basis of this code is Dutch company law. However, we believe that most of the principles and best practice provision in this code are based on basic cooperative assumptions that apply worldwide and that it can be helpful as guidelines towards the governance of cooperatives worldwide.

The NCR Code expressly states that no preference is made regarding any particular model as described above. It only remarks that the traditional model is rapidly being replaced by the supervisory board + model. The NCR Code covers all the corporate bodies of a cooperative. It is divided into separate chapters regarding the board of management, the supervisory board and the members. It further describes the role and composition of the board of management and the supervisory board, the remuneration of its members and the relationship with the board of management, the supervisory board and the members. The NCR Code gives guidance about, for instance, the instruments to be employed to maintain a suitable internal risk management and control system and the procedure to be followed in the event of a conflict of interest between a managing director or a supervisory director and the cooperative.

Every two years, the NCR will monitor compliance with the code. The aim is to make an inventory of the use of the code and the quality of the explanations in the event of non-compliance.

97. See for reflection on (previous) NCR Code (2011) Engelaar, M.E. 'Corporate governance bij coöperaties; de NCR-code 2011' *Ondernemingsrecht* 2012/77.

98. http://www.cooperatie.nl/sites/default/files/ncr-code_boekje_en.pdf

6. Financing of the cooperative

From a legal perspective a cooperative is very flexible in obtaining its financial means. There are several ways to finance a cooperative apart from a straight forward loan by third parties[99].

Dutch law does not provide for a cooperative with a capital divided into shares. That does not mean that members are not involved in financing the cooperative by way of equity contribution. It is possible to provide in the articles of association that upon joining the cooperative, a member must pay an admission fee. Another way to increase equity is to reserve all or part of the profits. Many cooperatives reserve a certain amount of the generated profits each year in order to increase (or maintain) their equity. Unless the articles of association provide differently, the general meeting is authorized to reserve (part of) the profits[100]. It is also possible to provide in the articles of association that the profits are not allocated to a general reserve, but to separate "equity accounts" to which individual members are entitled. The part of the profit to be allocated to such individual reserve can be related to the contribution by such member or the size of the business between the cooperative and such member. But also other references are possible.

A member of a cooperative is not entitled to this equity as such. There are no specific provisions in the Dutch civil code about distribution of profits or reserves to members or others. This means that the articles of association may provide for a certain entitlement to profits or reserves. It is possible to provide in the articles of association that the general meeting shall decide which part of the profit as appears from the balance sheet of the adopted annual accounts shall be reserved and which part shall be distributed. Another example would be the provision that a member is entitled to a part of the equity of the cooperative upon the termination of his membership[101]. In the absence of such a provision, a member does not have any direct right to a distribution. The articles of association must

99. See for an elaborate overview of the evolution of the cooperative and its financing, Van der Sangen (2007) and Van der Sangen (2012), §25.7 .

100. Art. 2:40 paragraph 1 DCC. The law does not attribute this authority to another corporate body.

101. This distribution upon termination of membership is like a repayment of contribution. Normally this will only be the case in the event that the termination is for good cause. See for the problematic side of this way of financing Van der Sangen (2007) §4 and Van der Sangen (2012) § 2.1.4.

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provide for the destination (or how this will be decided upon) of a possible positive balance upon liquidation of its estate after dissolution of the cooperative[102].

If the members are (to a certain extent) liable for the liabilities of the cooperative upon its dissolution, this is also a form of self-financing. If the cooperative falls short and is not able to fulfil its obligations and pay its debts, then the members have to come up with the remainder or part of the remainder. This member liability has been a very important element in getting outside financing as well.

In some cooperatives, particularly agricultural cooperatives, it is not uncommon for members to agree to a partial payment of the goods delivered to the cooperative. The remainder is paid afterwards after the closing of the financial year, and therefore this is considered a form of suppliers credit. The articles of association may also provide that if the annual accounts show that the operating balance of the cooperative over a certain financial year is negative, members must reimburse the deficit to the cooperative. This is structured as an additional obligation of the members. Finally, the articles of association may include an obligation for members to provide a loan to the cooperative[103].

It is possible to provide in the articles of association that the cooperative may issue participation rights ("Participations") against equity contribution. The articles of association may provide that these Participation shall share in the profits of the cooperative. The holder of these Participations has a contractual relationship with the cooperative. The articles of association may include certain provisions to protect the position of the holders of Participations, as a result of which they also have a more internal oriented relationship. This may even be structured in a way that the holders of Participations form a separate corporate body, the Meeting of Participation holders. Art. 2:38 paragraph 3 DCC allows the members of this corporate body (who are not members) to exercise voting rights in the general meeting, provided that the number of votes is less than half of the votes cast by the members[104]. This way of financing facilitates a more direct link to capital contribution and certain economic rights of the holders of Participations.

102. Art. 2:27 paragraph 3 DCC. The liquidator must transfer the remainder to the persons entitled to this remainder or, in the absence of these entitled persons, to the members, art 2:23b paragraph 1 DCC.

103. See also Van der Sangen (2012), page 219.

104. See also Van der Sangen (2007) p. 168 and Van der Sangen (2010) p. 223. He also suggests the possibility that the holders of participation rights only have influence in the general meeting if it concerned certain reserves matters such as the adoption of the annual accounts or the discharge of managing directors and supervisory directors.

Is it also possible for external parties (i.e. parties that are not a member) to hold these Participations? The reason why this question of admissibility was raised relates to the fact that the purpose of the cooperative must be the economic connection with its members. Furthermore the statutory definition of a cooperative refers to operating the business for the benefit of its members. Do these two elements allow entitlement to profits and reserves by third parties? If this is structured in a way that holders of these participation rights are only entitled to a part of the profits or reserves, then - in my opinion - this is possible and does not interfere with the statutory description of a cooperative[105].

A very well-known example of a cooperative that uses this structure is Rabobank. The articles of association[106] allow the issue of (registered) Participations ("Rabo Participations"). These Rabo Participations qualify as equity of Rabobank. After approval of the supervisory board, the board of management may decide to issue the Rabo Participations and determine the par value of these Rabo Participations. The rights of the Rabo Participations are determined in a Participation Charter, adopted by the board of management and the articles of association. Holders of Rabo Participations do not have the right to attend the general meeting of Rabobank. Rabo Participations cannot be pledged or encumbered with a right of usufruct. The board of management may decide to pay a "compensation" to the holders of Rabo Participations, either profits or out of reserves ("distributions"). A holder of Rabo Participations may issue certificates for Rabo Participations ("Rabo Certificates"). Rabo Participations are presently held by Stichting AK Rabobank Certificaten ("STAK"), a Dutch foundation. STAK holds the Rabo Participations by way of administration (*ten titel van beheer*) and issued Rabo Certificates to which certain terms and conditions of administration apply. Currently there are 297.961.365 Rabo Certificates issued by STAK with a nominal value of EUR 25,00 each. The Rabo Certificates are freely trans-

105. Also public listing of these certificates was considered to be possible. See Dortmond (1991). Dortmond suggests to have a special purpose foundation (STAK) hold the participation rights as a trustee. The STAK will issue depository receipts (certificates) for these participation rights which will be listed. The STAK, being the legal owner of the participation rights, will exercise the voting rights attached to the participation rights at the general meeting in the interest of the holders of the depository receipts. See with some hesitation to third party equity Asser/Rensen 2-III* 2012, nr. 225.

106. Article 47 as viewed on 27 April 2017 on https://www.rabobank.nl/images/statuten-rabobank_29814779.pdf?ra_resize=yes&ra_width=800&ra_height=600&ra_toolbar=yes&ra_locationbar=yes

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ferable in accordance with terms and conditions of administration of STAK and traded on Euronext Amsterdam[107]. The Rabo Certificates are perpetual and have no fixed maturity date. They constitute the most deeply subordinated capital[108]. The holders of Rabo Certificates do not have any rights vis-à-vis Rabobank. Any distributions received by STAK on the Rabo Participations shall be paid by STAK to the holders of the corresponding Rabo Certificates.

7. Conclusive remarks

In practice there are various questions regarding the flexibility of the cooperative as a legal entity. The law includes some specific elements for the description of a cooperative. For many years there has been a debate to what extent these elements constitute mandatory requirements. To be more specific, what are the consequences if a cooperative does not (fully) comply with all the elements of the description? There have been quite some cooperatives that were incorporated to serve as a so called holding vehicle. Although as described above it is possible that a cooperative holds shares in a company that actually operates the business, there must be a connection with the members, their business and the contracts entered into with the members. Would a structure that involves a cooperative as holding for investment companies be sufficient to meet the requirement of operating a business? I do not see why not if the other requirement "for the benefit of its members" is met[109]. Another relevant question remains the contracts with others than the members. Article 2:53 paragraphs 3 and 4 DCC allow a cooperative to provide in its articles of association that it may enter into contracs with third parties that are the same as the contracts with the members, provided that the magnitude is not as such that the contracts with the members are of minor importance. This means that if the cooperative enters into contracts with third

107. According to https://www.rabobank.com/nl/investors/funding/certificates/index.html viewed on 3 May 2017.

108. See also the prospectus regarding the offering of Rabo Certificates on 11 January 2017, p. 8.

109. See also Dortmond (2007) pages 7 and 8 and his reference to the remark of the Minister of Justice with respect to a similar question regarding the definition of business asked in relation to new legislation regarding partnerships (Parliamentary documents TK 28 746, nr. 5 and EK 28 746, C, page 9) and Asser/Rensen 2-III* 2012, nr. 221.

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parties that are not the same as the contracts with the members, there is no restriction[110]. But what if such contracts are the same or partly the same?

These questions and many others will remain under discussion. But that does not outweigh the positive side of the cooperative, a very flexible, but reliable format to do business.

110. Asser/Rensen 2-III* 2012, nr. 223.

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