

THE MAKING OF THE SOCIAL AND SOLIDARITY ACT FROM THE COOPERATIVE PERSPECTIVE*

by Caroline Naett**

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Translated from the French by Jesse Bryant.

**Secretary General of CoopFR.

The Social and Solidarity Economy Act passed on 31 July 2014 has a large component on cooperatives. While cooperatives are responsible for many of the measures that concern them, several are the result of ministerial decisions and have led cooperatives to change their positions. This article retraces the lively internal debates that cooperatives had during the process of drafting the bill as well as their expectations about what should happen next.

L'élaboration de la loi ESS du point de vue du mouvement coopératif

La loi relative à l'économie sociale et solidaire, adoptée le 31 juillet 2014, comporte un important volet coopératif. Si les coopératives sont à l'origine de nombreuses dispositions les concernant, parmi ces dernières plusieurs sont le résultat de la volonté du ministre de l'ESS et ont amené ces structures à faire évoluer leurs positions. Cet article retrace les débats internes qui ont animé les coopératives pendant le processus d'élaboration de la loi, ainsi que leurs attentes sur les suites à donner à ce texte.

La elaboración de la ley de economía social y solidaria desde la perspectiva del movimiento cooperativo

La legislación relativa a la economía social y solidaria, aprobada el 31 de julio 2014, incluye un importante componente cooperativo. Aunque las cooperativas son al origen de numerosas medidas que les conciernen, otras son el resultado de la voluntad del ministro y ellas han incitado a las cooperativas a cambiar sus posiciones. Este artículo retraza los debates internos que han atravesado las cooperativas durante el proceso de elaboración de la ley, así como sus esperanzas relativas al seguimiento de la ley.

The Social and Solidarity Economy (SSE) Act was passed on 31 July 2014. Its principal purpose is to clarify the scope of the SSE, confirm it as a major player in the economy and employment in local communities, and provide the basis for significantly expanding the SSE.

It is an ambitious and substantial piece of legislation both in terms of its size (98 articles spread over 9 sections) and the very broad range of subjects covered, reflecting the diversity of SSE organisations and their presence in virtually every business sector from the local to international level.

The legislation is the outcome of nearly two years of intense work and a complex consultation and drafting process. The “co-construction” requested by Minister Benoît Hamon⁽¹⁾ brought together an impressive number of SSE players. The receptiveness and availability of the minister and his staff deserve special mention. Faced with the rich diversity of the SSE, their task must not have always been easy. The minister’s leadership and commitment greatly helped rally all the players around a common objective and minimize disagreements.

(1) Benoît Hamon, Deputy Minister attached to the Department of the Economy and Finances and in charge of the SSE from May 2012 to April 2014.

The legislation also demanded complex coordination between the government, departments and parliament. In total, eleven departments (Agriculture, Housing and Regional Development, Interior, Voluntary Sector, Work and Employment, Social Affairs, Economy and Finances, Environment, Cities, Justice, Civil Service and Decentralisation) and at least fifteen directorate-generals were involved in drafting the bill. This is a record. There are very few legislative texts that have involved so many players. A second record was broken in the National Assembly. Of the eight standing committees, six were consulted, not counting the committee responsible for the SSE. The SSE concerned all of the committees apart from Defence!

In this respect, the drafting of the bill had the positive effect of acting as a tremendous tool for educating and raising awareness in government departments and agencies. Several of them probably did not realise that they were doing the SSE before discovering it during the drafting of the bill – starting with Department of the Economy and Finances, which is responsible for the SSE.

The economic importance and diversity of the cooperative movement are reflected in the text by its prominent role – nearly a third of the articles are devoted to cooperatives. This attention to cooperatives is also the result of the cooperative movement’s strong commitment to modernising its rules and adapting its organisations to a changing environment.

In France, 23,000 cooperative enterprises employ more than a million people and have 24.4 million members (Coop FR, 2014). Present in every sector (agriculture, artisanal industries, banking, distribution, housing, services, transportation, commercial fishing, education, etc.), cooperatives play a major role in several sectors: 40% of agri-food, 60% of retail banking, and 30% of retail distribution.

The Social and Solidarity Economy Act contains provisions that apply to all cooperatives, in particular the amendments to the law of 10 September 1947 concerning the cooperative statute, and provisions that are specific to the different categories of cooperatives – worker cooperatives, community-interest cooperatives, business and employment cooperatives, cooperatives

of retailers, affordable housing co-ops, cooperatives of sole traders, transport cooperatives, and agricultural cooperatives. The purpose of all of these provisions, which are a response to the demands of the cooperative movement, is to overcome the obstacles to the movement's growth and foster the creation of new cooperatives.

It is also worth noting that a new cooperative form – a cooperative of residents – was created, which is a group of people who want to buy, manage and live together in the building where they reside. This pioneering statute provides concrete solutions to the housing problems in our country and was an integral part of the requests expressed by the cooperative movement during the preparatory work for the SSE Act. While the form was adopted as part of the 2014 law on affordable housing and urban renewal⁽²⁾, it concerns cooperative law.

Several key provisions relate to worker cooperatives (*sociétés coopératives de production*, or SCOPs) and are part of the “Cooperative Shock” campaign announced by the government⁽³⁾. The new mechanism for SCOP start-ups, which facilitates converting a healthy conventional firm into a worker cooperative, and unions of SCOPs, which aim to develop existing SCOPs, are two important innovations of the SSE Act.

The purpose of this article is not to go into detail about these provisions but rather to highlight the important parts of the legislation for the cooperative movement and identify significant new developments.

(2) Law no. 2014-366 of 24 March 2014 on affordable housing and urban renewal, *Journal officiel*, 26 March 2014.

(3) Speech by Benoît Hamon, 35th SCOP Congress, Marseille, 16 November 2013.

Definition of the scope of the SSE

The definition of the principles and scope of the SSE set out in article 1 of the legislation establishes two important principles: good governance as a fundamental principle of the SSE and recognition that the cooperative form is rightly part of the SSE.

These two points, which seem obvious today, could not be taken for granted during the first discussions on the bill and were the subject of debate. There was a strong temptation to define the scope of the SSE based on business sectors and/or social and environmental criteria, which would have reduced the SSE to enterprises with a social objective, irrespective of their legal form, and created an artificial barrier between the SSE's traditional enterprises (cooperatives, mutuals, non-profits) and conventional firms that recognise the principles of the SSE.

This situation, which grew out of the debates about a SSE label, was unacceptable for cooperatives, who saw themselves as an integral part of the SSE regardless of their specific legal form or business sector. Above all, it completely denied the fundamental role that cooperatives had played in reviving the idea of the social economy in the 1970s and creating the organisations that represented them (CNLAMCA, GRCMA; Duverger, 2014).

The leading role of the cooperative movement and its commitment to the SSE were reaffirmed during the drafting of the SSE bill. Referring to the early stage of the legislation, the former chief of staff for the minister

in charge of the SSE commented that “the families of the social economy were not, at least in the first few months, equally committed. Not all of them believed in this law or that they needed the measures in this law, which explains a certain imbalance in the construction of the bill. I can only congratulate the cooperative movement and almost all of its families for their willingness to help, including during the discussions on certain sticky points. The commitment of the cooperative movement was genuine [...]. The other families were slower on the uptake [...]”⁽⁴⁾.

Lastly, defining the SSE on the basis of business sectors or social criteria with the underlying intention of “separating the wheat from the chaff” (Vercamer, 2014) allowed considerable room for a subjective assessment based on the form and stated aim rather than on substance and type of organisation, intangible and explicitly stated in the legislation as far as cooperatives are concerned.

Another issue of article 1 concerns the definition of the criteria for membership in the SSE, opening the door to an enterprise that is not set up as a cooperative, non-profit or mutual enterprise. An insistence on democratic governance was the central issue for cooperatives. Without this condition, support for opening the SSE would have been greatly compromised. The same goes for the rules governing the allocation of profits, keeping them for the benefit of the enterprise and placing strict limits on redistribution to members. Democratic governance and the allocation of a cooperative’s profits to the development of the cooperative and its members are the pillars of the cooperative movement and the features that most clearly separate cooperatives from conventional commercial firms. The inclusive definition chosen by the lawmakers, which extends the traditional SSE to any enterprise that follows the principles of the SSE and leads to a dilution of the organisational principles of our sector and thus a loss of identity, was unacceptable.

Reform of the law of 1947

The SSE Act reflects another internal revolution of the cooperative movement: the collective involvement in a reform of law no. 47-1775 of 10 September 1947 on the cooperative statute, legislation that applies to all cooperatives.

Since 1992, there has not been any fundamental change to the law of 1947, and the cooperative movement was very careful not to trigger one and even lobbied lawmakers against making any amendment to this law. In an uncertain political climate, it seemed risky to allow the possibility of questioning the fundamental principles of cooperatives. In 2009, the chairman of the Groupement national de la coopération (GNC, which became CoopFR) gave a detailed explanation of this position during a legal seminar on simplifying cooperative law (Detilleux, 2010).

“For the past ten years we have been quite cautious, not from a lack of ideas or legal boldness, but because of a political climate that, if not hostile, has been at least indifferent and even worrying. On the occasion of the law of 1999 creating the Caisses d’Épargne, the government at the time introduced an amendment – under the pretext of helping cooperative banks – intended to remove the ceiling on pay. Demutualisation and economic liberalism were in the air.”

(4) Jérôme Saddier, head of staff and special advisor to Benoît Hamon from May 2012 to January 2014, ADDES Conference, 17 June 2014.

This amendment, tabled by a left-wing government supposedly in favour of cooperatives, traumatised the cooperative movement. At a time when a wave of demutualisations could be seen in other, neighbouring countries, in particular in Britain (Pflimlin, 1999), the cooperative movement rallied together to get this amendment rejected. Following the arrival of right-wing governments, the cooperative movement was criticised on numerous occasions, and this context, in addition to a climate dominated by free-market ideology (Draperi, 1999), led the movement to deliberately make the law of 1947 untouchable by keeping it out of all legislative debate.

This did not prevent all reform, as can be seen by the adoption of the statute on the community-interest cooperative in 2001, but cooperatives preferred to use a simplifying law or provisions for small and medium-sized enterprises to introduce amendments to their specific statutes and allow them to evolve.

A first step towards the idea of a more concerted legislative effort was the launch of a parliamentary commission on the SSE, assigned to the MP Francis Vercamer by the Prime Minister⁽⁵⁾. Encouraged by the more favourable political climate, the cooperative movement strongly rallied together to identify the particular changes to propose, which concerned one or several cooperative families, and to begin thinking more proactively about change and the cooperative statute and the law of 1947. The commission did not have enough time to present such proposals, and it was probably too early for the cooperative movement. However, the seed was planted for revising the law of 1947.

(5) Letter from the Prime Minister, François Fillon, to the MP Francis Vercamer, 2 October 2009.

On the announcement of a SSE bill in autumn 2012, the cooperative movement was almost ready and able to make its proposals to the government. On the specific provisions, the cooperative movement was the driving force behind the proposals of the Vercamer Commission, which took up almost all of its recommendations. As most of them were not followed up, they were put forward again during the drafting of the bill.

The reform of the law of 1947 could have gone one of two ways: an ambitious revision significantly strengthening the common legislative cooperative core of the law of 1947 by streamlining the particular statutes; or a lighter revision. The first possibility was quickly dismissed, but the simple fact of being able to mention it to the different cooperative families without them immediately rejecting it was already progress. Nevertheless, a comprehensive revision of cooperative law simplifying this body of fragmented and disjointed legislative and regulatory texts remains a shared dream and an objective that should be supported by an ambitious and audacious cooperative movement (Gros and Naett, 2010).

The second approach was more of a tidying up of the law of 1947 to make it more coherent, up to date, simpler and more attractive for starting up new cooperatives. The law of 1947 actually allows a cooperative to be formed without needing to refer to a specific statute, but this provision is little used.

Based on exploratory work that had already been undertaken by CoopFR, some proposals could be drafted rather quickly and incorporated in the bill starting with the first versions of the text. The remarkable responsiveness of all the cooperative families to drafting proposals for amending

the law of 1947 and their support throughout the legislative process deserve special mention.

In the end, two major areas concerning the definition of a cooperative and opening a cooperative's business to unaffiliated third parties, supplemented by a large number of small changes that are important at their level, were identified. Most of the proposals put forward by the cooperative movement are now part of the legislation.

A discussion about the desirability of allowing the creation of membership groups in the law of 1947 was inconclusive. The idea was to enhance cooperative governance to allow the membership of users with different kinds of profiles that do not fit the public-interest objective as required by the community-interest cooperative statute. This is the case, for example, of a cooperative that markets local products and is made up of farmers, specialist producers and consumers.

Cooperative identity strongly reaffirmed

The definition of a cooperative in article 1 of the law of 1947 needed to be updated and rewritten to make it clearer and easier to understand. Unchanged since 1947, this definition was largely based on consumer cooperatives, the most common type of cooperative in France at that time, and the challenge was to develop a definition that applied to all existing and future cooperative sectors.

It is important to mention that, from the start of the work in the cooperative movement and without any reservations by any part of the movement, the objective was to reaffirm cooperative principles. This approach, which may seem obvious now, might not have been so obvious just a few years ago.

This approach showed that cooperatives were increasingly affirming their principles and the unique features of cooperatives individually and collectively. This trend, which has been apparent for several years, began after a long period when cooperatives tended to downplay their identity in a climate of financialization, ultra-liberalism and distrust of collective projects with old-fashioned connotations (Gross and Naett, 2010). The financial, economic and social crisis of 2008 reversed this trend and made different and sustainable economic models more attractive. This could already be seen in the work carried out by Coop FR in 2009 on the values that motivate cooperative leaders today and the publication of the booklet *Qu'est ce qu'une cooperative* (What is a Cooperative?) in the same year. The International Year of Cooperatives in 2012 surely also played an important role. For that occasion, a large number of publicity campaigns were run, which reinforced the positive image of cooperatives and increased government attention.

Very quickly, a consensus was formed on a definition based once again on cooperative principles and the International Cooperative Alliance's definition (ICA, 1995). Already mentioned in various articles of the law, the cooperative movement was determined to assert these principles starting with the first article and adopted the following definition:

"A cooperative is a company formed by several people voluntarily united to meet their economic and social needs through their joint effort and

the establishment of the necessary means. It can operate in any branch of human activity and adheres to the following principles: voluntary membership open to all, democratic governance, the economic participation of its members, training of its members, and cooperation with other cooperatives.”

The symbolic significance of this approach did not go unnoticed by commentators (Hiez, 2014).

Opening cooperatives to unaffiliated third parties

The SSE Act provides another opening to the cooperative statute by allowing cooperatives to undertake transactions with non-member third parties up to 20% of their turnover. It thus relaxes the double capacity principle in which a cooperative only serves its members. This constraint is difficult to abide by today, and many cooperatives depart from it through their particular statute. This arrangement, which does not undermine the primary objective of serving members, meets the needs of potential cooperative entrepreneurs who want to embed the cooperative in the community and serve local associations, local residents, etc.

This issue of a cooperative's relationship with partners was raised for cooperatives of residents for example. They had been thinking about the possibility of renting a hall or other property owned by the cooperative to local associations or neighbours. This was not allowed under the law of 1947 and was one of the major obstacles to creating cooperatives of residents.

The cooperative audit

One of the major innovations of the SSE Act for cooperatives is the extension of the cooperative audit to all cooperatives. It is currently practiced by a limited number of cooperative families (agricultural cooperatives, cooperatives of the self-employed, affordable housing co-ops, transportation cooperatives, worker cooperatives, and commercial fishing cooperatives). Carried out every five years, the cooperative audit checks that the cooperative's organisation and operations adhere to cooperative principles and rules and serve members' interests as well as any applicable specific rules and, if necessary, proposes corrective measures.

The extension of the cooperative audit was not requested by the cooperative movement. It came about as a result of a government initiative. During the discussions about a SSE label and the requirements for membership in the SSE, the cooperative movement praised the cooperative audit so much that Benoît Hamon decided all cooperatives should benefit from it!

One could have expected considerable opposition to this governmental proposal by the cooperative families that previously were not required to carry out cooperative audits. It is actually a stringent procedure, conducted by an independent external auditor, and requires a certain investment of time and money by a cooperative. It can therefore be seen as penalising, in particular, small cooperatives, or large cooperatives that are already subject to numerous other reviews and audits.

On the contrary, the whole cooperative movement agreed to the minister's proposal without too many reservations. In keeping with the wish to reaffirm the principles and specific features of cooperatives, the movement views the audit as a tool for transparency, better governance, and internal and external communications about the specific features of their business model.

Cooperatives are also fully aware that they have to show, qualitatively and quantitatively, how they differ from conventional firms when defending their legal statute and business model at the national, European and international level. The cooperative audit must be a tool that strengthens their argument about cooperatives and the legitimacy of their request for an appropriate legislative and regulatory framework.

This is the spirit that drove cooperatives during the preparatory work for the legislation and that has to be reflected in the drafting of the implementing decrees. The discussions with the lawmakers were not always easy as the cooperative audit was the largest part of the work concerning cooperatives. It led to a considerable number of meetings and discussions and the drafting of numerous proposed amendments.

While the cooperative movement showed good will, the government initially proposed cumbersome and restrictive audit procedures erecting a barrage of sanctions in case of non-compliance at each stage. The ultimate sanction would even give the minister the possibility of withdrawing the cooperative status from contravening companies, a status that was never something granted by government. Cooperatives are not cooperatives by ministerial approval. They are cooperatives because they adhere to cooperative principles written into the law. Eventually, between the government's proposals based on auditing practices and a cooperative approach centred on members' powers, a compromise was reached with a system of gradual penalties that leaves room for cooperative governance.

Another topic of discussion where cooperatives did not win their case was a special provision in the auditing procedure for large cooperatives that are already legally required to publish an annual report on their corporate social responsibility (CSR) in which they have all incorporated a section on cooperative governance. The proposal of cooperatives was aimed at avoiding multiple procedures, given there is significant overlap between the information published in a cooperative's CSR report (democratic activities, the cooperative's operations, etc.) and the information that could be required in the cooperative audit. A cross reference between the two procedures would have been justified.

A second important point is that the law only imposes the audit on cooperatives. Other SSE enterprises are simply required to follow guidelines for best practices, which is much more flexible.

Cooperatives had suggested an audit, no longer strictly cooperative in this case but rather adapted to the different families, applied to all SSE enterprises defined by the law and, at the very least, to non-statutory commercial companies that could join the SSE by a simple statement without later monitoring their practices. This was in no way a retaliatory measure on the part of cooperatives ("since we have to do it, the others should have

to do it too”), but rather a determination to think together about a tool for communications and promoting the sector’s uniqueness as well as a tool for monitoring practices. The proposal was discussed by the SSE’s other families and rejected by them.

Representative bodies

The SSE Act also includes a large chapter on the national representation of the SSE with the Higher Council of the SSE (Conseil supérieur de l’ESS) and the French Chamber of the SSE (Chambre française de l’ESS).

The Higher Council of the SSE is not a new creation. It is a continuation of the Higher Council of the Social and Solidarity Economy (Conseil supérieur de l’économie sociale et solidaire) created in 2006. An advisory body that consults with government and lawmakers, the Council’s task is to make the SSE better known and represent its interests in public policy. Cooperatives sit on the Council and play an active role.

Lacking operational means, the Council has not been given up until now the full measure of its capacities. Let us hope that recognition at the legislative level will give it a new impetus and the necessary resources to fulfil its announced ambitions and the remit it has been granted. This new legitimacy must not detract from the responsibility that SSE enterprises also share. They need to take the initiative to develop concrete proposals for public policy and speak with a distinct and identifiable voice in public debates.

The creation of a French Chamber of the SSE (CFESS) responsible for representing and promoting the SSE raises more questions. This can be seen as a positive step forward with the recognition and affirmation of the role of a national representative body that is solely comprised of SSE actors and that operates independently from government. However, it is questionable whether it was necessary to include a provision in the law for an organisation that should come from a strictly private, freely chosen and independent initiative of the SSE’s families about how to unite to make their voice heard by government. None of the cooperative organisations is written into the law with a composition and a mandate defined by lawmakers. If this had been the case, they would certainly view it as a breach of the organisation’s freedom of expression and independence. The CFESS should be able to criticise policies and express its disagreement. Yet how much room for manoeuvre will there be for an organisation established by the law and whose funding will probably partly depend on government subsidies?

Only the future will tell. The CFESS was created on 24 October 2014. The cooperative movement is one of its founding members. Although it did not introduce this initiative, it actively participated in all the discussions that led to the creation of the CFESS with the hope of establishing a light and responsive organisation acting as the voice of the SSE in public policy.

Cooperatives have their own advisory body, the Higher Council of Cooperation (Conseil supérieur de la coopération, or CSC). The CSC has existed for nearly 100 years, and its latest version was established by a decree in 1976. Its “promotion” to the legislative level is welcomed by cooperatives. The CSC also sees its role reinforced by new responsibilities in the context

of the cooperative audit. The law stipulates that the Council shall define the principles and develop the standards for the cooperative audit. The implementing decrees will undoubtedly include new responsibilities for approving auditors, for example, and checking they fulfil their remit.

Conclusion

While there are many positive developments in the legislation, cooperatives nevertheless have some regrets. Very present at the European and international level since the start of the movement (the International Cooperative Alliance, the organisation that represents cooperatives internationally, was created in 1895), cooperatives regret that this aspect does not play a larger role in the SSE Act. European regulations and international standards play an increasing role in the normal operations of our enterprises. Around the world and in Europe as in France, the unique features of the SSE and cooperatives are little known and poorly understood. The legislative and regulatory framework can be a source of reverse discrimination that penalises cooperatives compared to conventional firms. The French authorities must have a voice in Brussels and in all international bodies to defend the SSE model enshrined in the law.

Another point that cooperatives need to watch closely is that the necessary means are provided to ensure that the legislation is properly implemented. The SSE Act is a first step. It presents a framework for action, but it is not the end. Public policies genuinely in favour of our sector now need to be developed.

Hugues Sibille (2014) sees one of the paradoxes of the SSE in the legislation. We have a great SSE Act but no SSE public policies, i.e. declared objectives, administrative and budgetary resources, and a system of actors and negotiation. We can only share his conclusion: “This risks being a token law. The government can justifiably say it has done its job. And the actors of the SSE continue as before, each for themselves. SSE business as usual.”

A first strong signal that calls for cooperation is the establishment of an interdepartmental office. It currently exists in the simplest form, run by a small staff, in the Directorate General of Social Cohesion and, despite its motivation and availability, has not been able to hide its lack of resources and inability to respond to every request.

Expertise also needs to be developed in all parts of government that cooperatives are regularly in contact with (Agriculture, Distribution, SMEs, Finance, Employment, etc.) so that cooperatives have a contact person who has been trained in the sector’s specific features.

Lastly, to reach its objective of expanding the SSE, the legislation must be accompanied by appropriate financial instruments to help strengthen equity for our companies, fund and support start-ups, and contribute to funding the largest investments. In this regard, the remit of the Public Investment Bank (Banque publique d’investissement, or BPI) to provide, in consultation with the actors, finance under terms suited to the specific features of the organisations covered by the law is absolutely essential and must be jointly and effectively monitored by government and the actors together.

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