



**International Co-operative
Alliance – Africa**
A Region of the International
Co-operative Alliance

LEGAL FRAMEWORK ANALYSIS

ESWATINI NATIONAL REPORT

June, 2021



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ABBREVIATIONS

AGM	Annual General Meeting
ESASCCO	Eswatini Association of Savings and Credit Cooperatives
ESNYCA	Eswatini National Youth Cooperative Alliance
ESWAFCU	Eswatini Farmers Cooperatives Union
FSRA	Financial Service Regulatory Authority
ICA	International Cooperative Alliance
SACCOs	Savings and Credit Cooperatives Societies

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1.0 INTRODUCTION

1.1 Objectives of the Legal Framework Analysis

The Legal Framework Analysis (LFA) is undertaken under the auspices of the Framework Partnership Agreement “Cooperatives in Development – People Centered Businesses in Action” between the International Cooperative Alliance (ICA) and the European Commission to which the Alliance Africa is a co-signatory.

Cooperatives benefit from regulations acknowledging their specificities and ensuring a level playing field with other types of business organizations. The absence of a specific legal framework for cooperatives or a weak legal framework may damage cooperatives, while in contrast a supportive regulation may allow their development. This is the reason why knowledge and evaluation of cooperative legislation is a necessary tool for ICA offices and members to support their advocacy and recommendations on the creation or improvement of legal frameworks, to document the implementation of cooperative legislation and policies, and to monitor their evolution. Against this background, the objectives of the LFA are: (i) to acquire general knowledge of the national legislation on cooperatives, including but not limited to the legislation in force in the 107 countries represented by ICA members, as well as of supranational cooperative legislation if existent; (ii) to evaluate the national jurisdictions covered by the LFA according to their enabling environment for cooperatives, in order to compare national cooperative laws with pre-determined indicators, based on a scale of “cooperative friendliness” of the national legislation; and (iii) to provide recommendations for eventual renewal of the legal frameworks in place.

1.2 About the Author

This report has been prepared by Mr. Siphon Innocent Dlamini, who works in the Department of Cooperative Development under the Ministry of Commerce, Industry and Trade. He holds a Bachelor of Laws Degree (LLB) and is a lecturer in law at the Cooperative College of Eswatini. He is also an admitted attorney to practice as such in the courts of Eswatini and a member of the Law Society of Eswatini. Mr. Dlamini has vast knowledge

and experience in cooperative law since he is also a Legal Advisor for cooperatives. Nationally, he has been involved in the review of the Cooperatives Societies Act, 2003 and the National Cooperative Development Policy, 2000. In addition, Mr. Dlamini has chaired two Commissions of Enquiry into the affairs of two cooperatives. Moreover, he is an Ex-officio member of the newly established National Cooperatives Federation of Eswatini. Finally, Mr. Dlamini is a secretary to the Cooperative Tribunal of Eswatini.

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2.0 NATIONAL COOPERATIVE LAW: ESWATINI

2.1 General Context

Eswatini is a landlocked Southern African country led by the Monarch. Eswatini shares borders with the Republic of South Africa (90%) and Mozambique (10%). It is a very small country with a size 17,200 square kilometers¹ and boast of a population of 1.170 433. The total population is equivalent to 0.01% of the total world population.² The country is classified as a lower middle-income country but faces economic challenges and high level of poverty rate. The poverty rate is 63%, extreme food poverty at 37%, unemployment rate is 28.1% and the economic growth is 1.9%.³

The history of cooperatives in the country dates back to the colonial regime. The first cooperative society was registered in 1931, thirty-seven years before the country gained its independence in 1968. Cooperatives were introduced by the British to whom we were a protectorate state. The British were trading Tobacco with South Africa. The indigenous farmers/people were not very much participating in the process. In 1964, the Cooperative Societies Proclamation No. 28⁴ was promulgated and since then the cooperative movement started to emerge.

¹ <https://www.worldometer.info/swaziland-demographics> (accessed 5 May 2021)

² *Supra* note 1. (Accessed 5 May 2021)

³ *Ibid*

⁴ Proclamation No. 28

In 1968 after the country gained its independence, the Cooperative Proclamation was changed to Cooperative Societies Act, 1964. As the years progressed, with the development of cooperatives in the country, the 1964 Act was repealed in 2003 by the enactment of the Cooperative Societies Act, No. 5 of 2003 (Cooperatives Act).⁵ This is the current Act which same is under review by the Cooperatives Societies Amendment Bill No.1 of 2021. All Cooperatives in the country are registered and operating under the Cooperative Societies Act, 2003 and Cooperative Societies Regulations 2005. In addition, there is the National Cooperative Development Policy, 2017,⁶ which is a strategic road map for the development of cooperatives in the country. The Policy clearly outlines the roles to be played by all relevant stakeholders, government inclusive in the development of cooperatives in Eswatini.

It is paramount to mention that, in 2010 the country took another dimension in as far as regulation of SACCOs is concerned. The country enacted the Financial Services Regulatory Authority Act, 2010 (FSRA Act),⁷ which established the Financial Services Regulatory Authority (FSRA). The FSRA took over the regulation of SACCOs which was a prerogative of the Department of Cooperative Development and the Central Bank of Eswatini. This state of affairs led to a conflicting legal framework in the country which resulted to overlapping of the mandates of the FSRA and the Department of Cooperative Development. The table below shows a breakdown of all the relevant laws in cooperatives in the country.

⁵ Act No.5 of 2003

⁶ Ministry of Commerce Industry and Trade, National Co-operative Development Policy 2017.

⁷ Act No.2 of 2010

Table 1: EXISTING REGULATIONS

REGULATION	SECTOR	PARTICULAR ELEMENTS TO NOTE
1. Cooperative Societies Act, 2003	Applies to all cooperatives.	There is a Bill in place amending this Act
2. Cooperative Societies Regulations, 2005	Applies to all cooperatives.	Regulations in conjunction with the Cooperative Societies Act, 2003
3. The Financial Services Regulatory Authority Act, 2010	Financial services including those offered by SACCOS.	This Act in section 83 (1) ousts the Department of Cooperative Development's mandate in regulating financial aspects of SACCOS
4. Guidelines for Savings and Credit Cooperatives: issued under the FSRA Act 2010.	Financial services offered by SACCOS.	These are the guidelines which FSRA uses to regulate SACCOS
5. The Consumer Credit Act, 2016	Ministry of Finance	This is an Act to provide for the regulation of consumer credit in the country
6. The Revenue Authority Act, 2008	Ministry of Finance	This is an Act to regulate revenue/tax collection in general
7. Income Tax Order, 1975	Ministry of Finance	This is an Act to regulate revenue/tax collection in general
8. The Competition Act	Ministry of Commerce, Industry and Trade	This is an Act to aims to ensure fair competition in the economy by controlling anti-competitive

		trade practices, mergers and acquisitions
9. The Competition Commission Regulations, 2010	Ministry of Commerce, Industry and Trade	Regulations for implementing fair competition legislation in the country
10. National Co-operatives Development Guidelines and Directives, July 2019.	Ministry of Commerce Industry and Trade	Guidelines and Directives issued by the Commissioner for Co-operative Development in terms of regulation 72 of the Co-operative Societies Act, 2003

2.2 Specific Elements of the Cooperative Law

2.2.1 Definition and Objectives of Cooperatives

According to the Cooperatives Act, (Cooperatives Act), a cooperative is:

“an association of people duly registered, who have voluntarily come together to achieve a common end through the formation of a democratically controlled organization, making equitable contributions to the capital required and accepting a fair share of the risks and benefits of the undertaking in which the members actively participate.”⁸

The above definition slightly differs from the ICA one, which defines a cooperative as “an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically controlled enterprise”⁹. It should be noted that the Cooperative Societies Act, 2003, is under review and that the Bill prepared to amend it contains the ICA definition of a cooperative. In addition, the National Cooperative Development Policy, 2017¹⁰, defines a cooperative the same way as in the ICA Statement on the Cooperative Identity.

⁸ *Supra* note 5, section 3

⁹ Dr Chiyoge Buchekabiri Sifa, *Essentials of a Co-operative Enterprise: A Practical Guide to starting and Managing a Co-operative Business*, 2014, p. 10.

¹⁰ *Supra* note 6 p. 4.

The objectives of cooperatives are not clearly spelt out in the Cooperatives Act, however, the same are found in the by-laws of each cooperative and further drawn from the seven cooperative principles as propounded by the ICA, namely; voluntary and open membership; democratic member control; member economic participation; autonomy and independence; education, training and information; cooperation among cooperatives; and concern for community.¹¹ According to the law, cooperatives are allowed to freely engage in other activities for the purpose of fulfilling their members' aspirations. In other words, cooperatives are allowed to pursue other objectives as long as it is in the best interest and benefit of its members.

2.2.2 Establishment, cooperative membership and governance

The Cooperatives Act and its regulations clearly outline how cooperatives are established, registered and managed in the country. A cooperative is formed by at least seven people who are at least 18 years old. Persons wishing to be registered as a cooperative are required to submit to the Commissioner of Cooperative Development (Commissioner) through their Chairperson, an application for registration together with the following:¹²

- (i) Three copies of proposed by-laws;
- (ii) A copy of the minutes of the first general meeting;
- (iii) Application for registration form duly completed;
- (iv) Business plan and cash flow;
- (v) Financial statement;
- (vi) Economic survey form;
- (vii) Application letter; and
- (viii) Evidence of payment of the prescribed registration fee

Once a cooperative is registered, it is issued with a registration certificate. The registration of a cooperative renders it a body corporate under the name by which it is registered, with perpetual succession and with power to hold movable and immovable property, to enter into contracts, and to institute and defend suits.

¹¹ *Supra* note 9 p. 60.

¹² *Supra* note 5 section 8.

Admission of new members is regulated by both the Act and by-laws of a cooperative. A person wishing to become a member of a cooperative is required to submit an application to the Management Committee for admission and agree to be bound by the cooperative's by-laws and must have paid up a minimum share capital necessary to be paid for admission according to the by-laws of the cooperative¹³.

The Cooperatives Act and by-laws of cooperatives adhere to the principle of open and voluntary membership and therefore, members are free to leave their cooperative at any given time but subject to prescribed conditions and procedures. However, the law provides for a three-month waiting period before payment of benefits is done¹⁴. Under the Cooperatives Act, the Commissioner has the power to dissolve a cooperative where the membership is reduced to less than the minimum requirement.

Cooperatives are organized in an upside-down triangle format, whereby, there is the General membership on top, followed by the Management Committee (Board of Directors) and lastly the employees. The main internal administration body is the Management Committee (Board of Directors), which is responsible for convening meetings, ensuring accounts are kept accurate and correct; presenting to the Annual General Meeting (AGM) a management report and work plan; and safeguarding funds, assets, stocks and property. The general meeting of all members is the highest decision-making organ in a cooperative. This is in fulfillment of the second cooperatives principle namely democratic member control. The Management Committee is required implement all decisions taken by the general meeting.

The Cooperative Societies Regulations of 2005,¹⁵ regulate voting powers in that, no member of any registered society shall have more than one vote in the conduct of the affairs of the society regardless of the capital invested in the cooperative.

The law provides that in the conduct of the affairs of a cooperative, members of the Management Committee shall exercise the prudence and diligence of ordinary business

¹³ Supra note 5.

¹⁴ *Ibid.*

¹⁵ Regulations, 2005, regulation 25.

person, therefore, shall be jointly and severally liable for any losses sustained through any of their actions which are contrary to the law.

2.2.3 Cooperative financial structure and taxation

The cooperative financial structure depends on the share capital. The share capital is determined by the general meeting in accordance with the objectives of the cooperative. The law provides for diverse contributions to the cooperative capital in that a member shall not hold more than one-fifth of the share capital of the cooperative, this means that the share capital may not be equal but there is a restriction to that effect. The law allows shares to be paid in installments. Where a member exits from a cooperative, the law provides for the return of capital to the member, however, where a cooperative is dissolved and goes under the process of liquidation, it depends on whether there is available capital to be returned to members or not.

Profits are allocated in equal percentage in proportion to a member's contribution. The law provides for distribution of profits annually and the same is declared in an AGM that is held after the auditing of the cooperative books of accounts to determine whether the cooperative did make profit or not. It must be noted that in the case of SACCOs, distribution of profit requires the approval of the regulator which is the FSRA¹⁶. According to the law, after the distribution to the reserve fund has been made, the remainder of the surplus resulting from operations of a cooperative during the financial year may be utilized for the payment of dividends on share capital among other things.

There is a need for distinguishing transactions between members and non- members for the proper distribution of patronage refund and issues of paying taxes. There is a distinction between patronage refund and dividends. Patronage refunds is made to only members who used the cooperative services and differs from one member to the other, whereas dividends are paid to all members of the cooperative in equal percentage.

¹⁶ *Supra* note 7

Taxation of cooperatives is governed by The Revenue Authority Act, 2008.¹⁷ According to this law, cooperatives are no exception but they are subject to the general tax regime applicable to all other business organizations. It must be noted that SACCOs are “exempted” from paying tax but on application made to the Commissioner of Taxes¹⁸. Interest to individual members’ savings which is less than E 20 000.00 is tax free but if it exceeds E 20 000.00 it is taxed at a rate of 10%. However, cooperatives which are engaged in any production or other forms of activities are taxed like other forms of business. Cooperatives like any other business are required to submit income tax returns to the Commissioner of Taxes by the 30th June up to 31st October of every year.

2.2.4 Other specific features

Cooperatives are established under the seven cooperative principles as provided by the ICA one of which is autonomy and independence. In this regard, the government’s oversight role over cooperatives through the Department of Cooperative Development has to be played without affecting, in any way the right of cooperatives to develop as autonomous, self-reliant enterprises.¹⁹ Cooperatives are registered by the Commissioner who heads the Cooperative Development Department under the Ministry of Commerce Industry and Trade. After registration, the Commissioner issues a certificate of registration to the registered cooperative. The Co-operatives Act, empowers the Commissioner to conduct inspection of any books, papers, minutes, cash in hand and securities of a cooperative.²⁰ A cooperative is under an obligation to submit to the Commissioner, before holding an AGM, an annual report on its activities during the year.²¹

As alluded to earlier on, SACCOs are also controlled by a public authority which is the FSRA as regulator of non-bank financial services. The FSRA is responsible for administration of financial services laws, licensing, regulating, monitoring and supervising the conduct of the business of financial services providers.²² In as much as the autonomy

¹⁷ Act, 2008.

¹⁸ Income Tax order, 1975 sections 12 and 14.

¹⁹ *Supra* note 5, section 6.

²⁰ *Ibid* section 72.

²¹ *Ibid* section 71.

²² *Supra* note 7, section 5.

and independence of cooperatives is concerned, cooperatives do not have absolute independence but are subject to limitations by law.

The structure of cooperatives is meant to ensure cooperation among cooperatives. Cooperatives are classified in three clusters, namely; multipurpose cooperatives, SACCOs and youth cooperatives. Cooperatives are organized into primary cooperatives, Apex organizations and National Cooperative Federation. There are three different registered Apex organizations for the different types of primary cooperatives in the country. The registered Apex organizations are; Eswatini Savings and Credit Cooperative Societies (ESASCCO) which is for SACCOs, Eswatini Farmers Cooperatives Union (ESWAFCU) which is for all multi-purpose cooperatives, and Eswatini National Youth Cooperatives Alliance (ESNYCA) which is for youth cooperatives. There is also the newly established National Cooperatives Federation of Eswatini (established on 12th October 2020) which is made up of the three Apex bodies.

3.0 DEGREE OF “COOPERATIVE FRIENDLINESS” OF THE NATIONAL LEGISLATION

The government has played a pivotal role by putting in place mechanisms that ensure a conducive environment for the development of cooperatives. Both the legal and institutional frameworks enable cooperatives to operate freely and effectively. The Government has established cooperative offices in all the four regions (Hhohho, Manzini, Shiselweni and Lubombo) of the country in fulfillment of the decentralization policy. The offices assist cooperatives to easily get assistance without travelling a long distance. The regional offices assist groups to form and register as cooperatives by providing cooperative member education, assisting in the formulation of by-laws and business plans. All these services are provided by government freely.

The Cooperatives Act, is the principal national legislation when it comes to establishment, registration and regulation of cooperatives.²³ The Act creates a conducive environment for the development of cooperatives in the country. Besides, the National Cooperative Development Policy, 2017, recognizes cooperatives as instruments for social-economic development which focuses on associative economic strategy as a key factor for enabling more people to participate in creation, expansion and operation of viable and sustainable enterprises.²⁴ However, there is an un-denied fact of over regulation of cooperatives in the country, in particular SACCOs. This places the friendliness of the cooperative legislation wanting. For instance, the Financial Services Regulatory Authority Act, 2010 is one of those unfriendly pieces of legislation and has become a major stumbling block in the development of cooperatives in the country. The FSRA Act provides as follows;

“The Authority shall have such powers as are necessary to enable it to effectively discharge its functions and may, in particular:

- (a) Formulate policy and make rules for the effective implementation of the object of this Act;*
- (b) Issue guidelines and codes of practice for the proper conduct of business in the financial service sector;*
- (c) Set up such technical committees as it deems fit to examine and report on any matter in relation to the administration of any financial services law referred to them by the Board or the Chief Executive Officer;*
- (d) Give directives to a financial service provider, including directives to observe any guideline or code of practice; or,*
- (e) Revoke any license issued under any financial services law”²⁵*

In addition, the FSRA charges levies in terms of section 22 of the Act. The levies are very high because they are charged on 0.01% of the total savings per annum. The income tax law is another law that is unfriendly in cooperative development because it treats

²³ *Supra* note 5 section 9.

²⁴ *Supra* note 6 p. 1

²⁵ *Supra* note 7 section 6.

cooperatives like any other form of business in as far as taxation is concerned. The Revenue Authority Act, 2008, provides as follows:

*“The Authority shall be responsible for the assessment and collection of all revenue on behalf of the government”*²⁶

Furthermore, the Cooperatives Act, provides for transfer and mergers of cooperatives, however, this is hampered by the provisions of the Competition Act, 2007 which provides as follows:

“A merger shall not be carried out without the authorization of the Commission and a person who, in the absence of authority from the Commission whether as a principal or agent and whether by himself/herself or his/her agent, participate in effecting –

a) a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar goods or providing substantially similar services;

(b) a takeover of one or more such enterprises by another enterprise, or by a person who controls another such enterprise, commits an offence and shall, on conviction, be liable to a fine not exceeding two hundred and fifty thousand Malawian Kwacha or to imprisonment to a term not exceeding five years or to both.

(2) A merger or takeover made in contravention of subsection (1) shall not have any legal effect and no rights or obligations imposed on the participating parties, by any agreement in respect of the merger or takeover, shall be legally enforceable unless an application for condonation has been made to and granted by the Commission.

(3) The Commission shall, within a reasonable time after the receipt of an application or the date on which the applicants provide the information sought by the

²⁶ The Revenue Authority Act, 2008 section 4.

*Commission if the date is later, make an order concerning an application for authorisation of a merger or takeover.*²⁷

The Competition Commission charges 0.1 % of the total assets of those entities who want to merge.²⁸ Considering the asset value of cooperatives in general, this is too much especially because cooperatives' money belongs to the members, therefore paying such money just as a notification fee only, is really unfair and has a negative impact in the development of cooperatives in the country.

The Cooperatives Act is a well-articulated piece of legislation which covers almost every ground in promoting cooperatives development in the country. The Act provides for best practices such as, registration, provisional registration in case a group is not ready to be fully registered, formulation of by-laws with the assistance of department officers, restricting shares from attachment or sale, establishment of both Apex organizations and National Cooperative Federation, provision of education and training, audit services provided by the department of Cooperatives to newly registered cooperatives, settlement of disputes, amalgamation, transfer, division and conversion of cooperatives. Promotion of cooperatives is a shared mandate among government, Apex bodies and the Federation. The Cooperatives Act is more cooperative friendly than not. However, as mentioned earlier, application of other laws which are outside the framework of cooperative legislation has posed a challenge to the autonomy and independence of cooperatives and thus contributing to the unfriendliness of the overall legal framework governing cooperatives, particularly SACCOS.

4.0 RECOMMENDATIONS FOR THE IMPROVEMENT OF THE NATIONAL LEGAL FRAMEWORK

The national legal framework is well-crafted even though there are some challenges still in place. In order for the national legislation to be more adequate for the development of cooperatives, reforms are needed to:

²⁷ Competition Act, 2007 section 35.

²⁸ Competition Regulations, regulation 11.

- (i) Establish a mechanism (e.g. a specific fund) for assisting newly registered cooperatives to access startup capital;
- (ii) Address the issue of high levies on SACCOS charged by the FSRA;
- (iii) Harmonize the roles of the Cooperative Development Department and the FSRA with regard to regulation of SACCOS;
- (iv) Address issues of mismanagement of funds in cooperatives which is a chronic challenge facing cooperatives across the country; and
- (v) Review the term of office for Management Committee (Board of Directors) in order to ensure efficiency and effective leadership succession in cooperatives

5.0 CONCLUSIONS

Cooperatives receive the necessary support from the government and operate in compliance with the governing legislation, cooperative principles and values. The government recognizes the potential of cooperatives to operate in various sectors of the economy throughout the country and made an undertaking to ensure the legal framework on formation of cooperatives in various sectors of the economy is in place. This is demonstrated by the ongoing review of the Cooperative Societies Act, 2003, currently at the stage of a Bill which has been tabled for debate in Parliament. It is envisaged that, before the end of 2021, a new act on cooperatives will be in place and is expected to enhance efficiency and effectiveness in regulation and management of cooperatives in the country.

The legal frameworks analysis is a tool developed under the ICA-EU Partnership #coops4dev. It is an overview of the national legal frameworks at the time of writing. The views expressed within this report are not necessarily those of the ICA, nor does a reference to any specific content constitute an explicit endorsement or recommendation by the ICA.

6.0 REFERENCES

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