



BRIEFING SHEET

THE DRAFT COOPERATIVE BILL, 2021



Overview

The draft Cooperative Bill of 2021 addresses the promotion, constitution, registration, and regulation of cooperatives; provides for inter-governmental cooperative relations; and creates cooperative offices at the national and county levels. This document provides essential information about some of the notable provisions in the Bill and comments on whether or not those provisions are seen as enabling or disabling based on Kenyan experience along with evidence from cooperative laws in other countries.

KEY QUESTIONS TO CONSIDER IN ANALYSIS OF THE BILL:

- Is there an appropriate level of authority at the national and county level?
- Are there checks and balances among the authorities?
- Does the Bill allow for collaboration between the government and cooperatives?
- Are the registration requirements for cooperatives any more onerous than for those of other commercial businesses?
- Does the Bill allow appropriate ease of doing business for cooperatives?
- Does the Bill allow for appropriate investment by cooperatives?
- Does the government have power to dictate or supervise cooperative affairs including the conduct of general and special meetings?
- Does the Bill allow cooperative members to select the auditor of their choice?
- Do cooperatives have access to independent courts and existing tribunals to ensure their right to due process?
- Does the Bill require mandatory cooperative subscription to the Apex organization?

HIGHLIGHTS OF PROVISIONS THAT IMPROVE THE COOPERATIVE ENABLING ENVIRONMENT

<p>Protection of cooperative identity</p> <p>Sections 37, 38, 39</p>	<p>Only cooperatives registered under the Act shall be allowed to use the words Cooperative, COOP, SACCO, TRANS COOP, Savings and Investment Cooperative (SICO), etc. This is set to reduce abuse of the cooperative name where it is used to defraud unsuspecting members of the public.</p>
<p>Governance</p> <p>Sections 57 and 58</p>	<ul style="list-style-type: none"> • Term limits for board chair and the board of directors. • The Bill provides that a chairperson shall not serve for more than three consecutive terms of three years each. That person may become eligible for election as a chairperson after a break of a minimum of six years. • Members of the board of directors, other than the independent directors, shall be elected for a term of three years, and shall be eligible for re-election. • Age limit of board members set at 70 years (with an extension of up to 75 years if already in office). (This is included here as a fact of the Bill although not to recommend it as enabling.) • Two thirds gender rule to be observed in constituting a board. • Regional and vulnerable members’ representation to be observed in board formation. • Prohibition against being a board member in more than three primary cooperatives.
<p>Dispute Resolution</p> <p>Part XIV</p>	<p>The Bill provides for three avenues of dispute resolution in the cooperative sector:</p> <ul style="list-style-type: none"> • Cooperative Tribunal: <ul style="list-style-type: none"> ○ Has jurisdiction over disputes involving decisions made by government officers (such as Commissioner of Cooperatives, County Director of Cooperatives, SASRA) against cooperatives or cooperatives officers. ○ Has unlimited geographical and pecuniary jurisdiction in such matters of cooperative disputes. ○ Appeals from tribunal lie in the High Court. • Cooperative Courts: <ul style="list-style-type: none"> ○ Have jurisdiction over disputes relating to members and the cooperatives; members and cooperative officers; and members or cooperatives and third parties over cooperative issues. • Alternative Dispute Resolution: <ul style="list-style-type: none"> ○ Shall be voluntary and available at any stage of the dispute resolution process.
<p>Investment of Cooperative Funds</p> <p>Part X</p>	<ul style="list-style-type: none"> • The Bill has prescribed the various asset classes cooperatives can invest their funds. • The Bill has prescribed that members’ and Commissioner’s approval must be sought prior to any cooperative investing in a company or in acquiring a company. This may guard against unbridled investments that have led to liquidity issues for cooperatives. • The Bill provides for establishment of a platform for sale and purchase of cooperative members’ shares, and trading in cooperative capital instruments. This will go a long way in increasing liquidity of members’ shares in case they need to exit from a cooperative. It will also enable cooperatives to access wider

	sources of capital through capital raising instruments such as commercial papers.
Self-Regulation Part XVI, Section 157	The Apex cooperative, cooperative federations or secondary cooperatives may develop and implement: <ul style="list-style-type: none"> • a procedure and appropriate system or mechanism of exercising self-regulation over its members or affiliates; • a code of conduct for its members; • a procedure for alternative dispute resolution in cooperatives; • a mechanism for sector shared common services; • guidelines on provision of services through virtual platforms.
Credit information sharing Part XVI, Section 158	<ul style="list-style-type: none"> • Credit cooperatives will now have access to the credit sharing framework available in the country.
Inter-cooperative borrowing Part XVI, Section 159	<ul style="list-style-type: none"> • A cooperative may borrow or lend to another cooperative for purposes of covering temporary liquidity short falls or for on lending to its own members
Establishment of the Cooperative Development Fund Part XVI, Section 162	<ul style="list-style-type: none"> • The purpose of the Fund is the promotion of education; training; research; innovation, emerging technology and other related activities in the cooperative sector in Kenya. • The Fund will be managed by the Apex cooperative. • However, it is not clear whether the contributions by cooperatives are mandatory and whether the contributions to the cooperative are part of the subscriptions or it is an additional levy.

PROVISIONS THAT HAVE THE EFFECT OF DISABLING COOPERATIVE DEVELOPMENT

Concentration of Power and Discretion in the Office of the Commissioner Part II, Sections 12, 14 and 7.1	<ul style="list-style-type: none"> • The established Office of the Commissioner consolidates power by requiring the approval of the Commissioner at multiple stages and issues. • A number of substantive provisions are not found in the Bill and thus the power to legislate such is delegated to the Commissioner of Cooperatives. • The requirement that the Apex body should prepare and submit a report to the Commissioner implies government control that is not in keeping with the Bill's push for self-regulation. • While Sections 12 to 14 concern the establishment of a platform for consultation between the Commissioner and the County Directors, the Bill lacks a similar platform between the Government and the Apex. It is true that Section 22.c provides that the Apex "shall lobby the government at national and county levels on cooperative matters", but it would be more effective to set up a more structured framework through which the government can support the Apex. <p>Potential repercussions: This Bill creates an opportunity for future legislation and regulations to be passed with minimal scrutiny. This could lead to abuse of power, reservation of too much discretion in the Office of the Commissioner, inefficiencies and bureaucratic processes.</p>
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	<p>One of the fundamental missions of the government should be to empower the Apex in order to make it autonomous and capable of supporting the cooperative enabling environment to be more efficient. Without a clear framework for coordination and without policies to strengthen the Apex, this government mission will not be fulfilled.</p>
<p>Government Control and Interference with Autonomous and Private Business Entities</p> <p>Part II, Section 7.1</p>	<ul style="list-style-type: none"> • Despite the recognition of International Cooperative Alliance (ICA) Principles in the Bill (Section 4), the Bill contains many provisions that imply interference by the Government in the life of cooperatives. • The County Director of Cooperatives and the Commissioner are granted significant influence and participation in the affairs of the cooperatives. Cooperatives are private businesses just as companies; there is no justification for high government involvement in matters such as: <ul style="list-style-type: none"> ○ Supervision and presiding over cooperative meetings; ○ Calling for cooperative meetings; ○ Approving or disapproving investment decisions of cooperatives; ○ Approving credit and borrowing terms of cooperatives and inter-cooperative borrowing; ○ Approving investment terms of cooperatives. • The government should empower the Apex and the sector for self-regulation and make the Apex independent. This will help avoid conflict of interest and interference by government in private enterprise. • The following functions currently assigned to the government both at national and county level should be reassigned as functions of the Apex body: <ul style="list-style-type: none"> ○ Conducting investigations and inspections. The role of the Office of the Commissioner should be limited to supervising the implementation of the recommendations of the Apex body and to act as the adjudicators or prosecute the offences at the Cooperative Tribunal or Court. As it is in this Bill, the government is acting as the investigator, party, prosecutor, enforcer, and judge. ○ Making and approving economic viability appraisals of cooperatives. ○ Enforcement of good governance and ethics. ○ Presiding over pre-cooperative meetings. ○ Formulation and regulation of cooperative education and training. ○ Maintaining a cooperative innovation, research and information centre. <p>Potential repercussions:</p> <p>If these provisions are maintained, cooperatives may have public interferences in their affairs that affect their ability to operate enterprises.</p> <p>Developing this capacity within the Apex organization is important in order for the Kenya cooperative sector to fully develop and reach its potential. Transitional mechanisms should be established that allow the Commissioner to “let go” functions after capacity milestones have been achieved by the Apex.</p>
<p>Complex Formation & Registration Processes</p> <p>Part IV</p>	<ul style="list-style-type: none"> • The requirement of formation of a cooperative by a minimum of 10 persons representing at least 25 prospective members is limiting. <ul style="list-style-type: none"> ○ Legislation should allow specialized cooperatives to form with a minimum of 3 members, particularly to create an enabling environment for worker cooperatives, investment cooperatives, health cooperatives, and others. ○ The law should also not prescribe the maximum number of members in a cooperative.

	<ul style="list-style-type: none"> ○ Cooperatives should be able to determine the size of membership through their respective by-laws, as guided by the principle of democratic control. • Prohibition against multiple objects and purposes is disabling. Cooperatives should have the freedom to have multiple objects and purposes insofar as they benefit the members. It's recommended to remove this restriction and enable diversification of cooperatives, enabling multi sectoral cooperatives and enabling cooperatives to form with the objective of vertical integration along value chains. • Qualification for membership of primary cooperatives has been restricted to individuals only. This is limiting. Membership should be open to all, including incorporated and unincorporated bodies. The law should allow for a cooperative formed by companies or associations in addition to individuals. • The provision to have a person reside within, or occupy land within, the cooperative's area of operation is disabling. This would only make sense for agricultural cooperatives and would not be applicable to SACCOs, nor health or investment cooperatives. In this age where migration and movement due to work is common and frequent, it would be limiting and have the effect of excluding many members. • There is no functionality of having to outline specific cooperative types as it is not possible to provide an exhaustive list. Cooperatives can operate in all sectors of human activity, and the limits should be the same as those in place for private companies. • Restriction of registration of cooperatives within the same common bond would have the effect of creating monopolies and restrictive trade practices and is not in keeping with the principle of open and democratic membership. <p>Potential repercussions:</p> <p>Limits to cooperative membership sizes are disabling and do not recognize the fact that cooperatives do not constitute a form of wealth concentration.</p> <p>Establishment of high minimum membership sizes (anything above 3 or 5 members for primary cooperatives) is an impediment for the creation and resiliency of cooperatives, particularly for worker or producer cooperatives in economic activities such as industry and services.</p>
<p>Breach of Cooperative Principles</p> <p>Part III, Section 20 and Part VII, Section 57</p>	<ul style="list-style-type: none"> • Voluntary Membership <ul style="list-style-type: none"> ○ Mandatory subscription to the Apex organization goes against the principle of open and voluntary membership because cooperatives are autonomous and independent entities which ought not to be compelled. The Apex organization should create value for its membership so as to attract new subscriptions. • Corporatization/Companization of Cooperatives <ul style="list-style-type: none"> ○ Independent Directors: The concept of independent directors is borrowed from company law. Cooperatives should be member controlled and retain their autonomy and full control by members only. ○ The Bill provides that the Cabinet Secretary shall by regulations prescribe the cooperatives in respect of which it shall be mandatory to have independent directors. There is need for more information as to the criteria for the types of cooperatives that require independent directors. ○ The discretion of the Cabinet Secretary making the regulations in this case would need to be checked as this provision undermines the principle of democratic member control.

	<p>Potential repercussion: Provision(s) that establish the corporatization/companization of cooperatives will undermine cooperative identity and weaken the sector, since there will be little difference between cooperatives and conventional companies.</p>
<p>Auditors Part VI, Section 51</p>	<ul style="list-style-type: none"> • Audit mentioned is only a financial audit. In general, the cooperative audit should be twofold, both organizational and financial. • To ensure democratic member control, the members of a cooperative should have the right to select their qualified auditor of choice. The responsibility of maintaining a pre-approved list of Auditors should be a function of the Apex body and not of the Commissioner or the County Director of Cooperatives. • Training for cooperative auditors is best handled by universities, training institutions and professional bodies, such as the Institute of Certified Public Accountants of Kenya (ICPAK) and the Kenya Accountants and Secretaries National Examinations Board (KASNEB). • Certain operations are entrusted to the Commissioner, such as the conduct of inquiries and inspections. These operations can be carried out by the auditors and independent inspectors trained for this purpose. • The Bill does not sufficiently link the role of the auditor and inspector to the collaboration between the cooperative sector and the Government. In principle, in its oversight role, decisions made and sanctions imposed by the Commissioner should be based on the auditors' reports. (The same applies to tax treatment.) <p>Potential repercussions: Limiting audits to only financial issues and not including organizational issues will result in lack of oversight of the dual character of cooperatives as businesses and associations. This will result in lack of protection for members from abuse of power by cooperative leaders and/or management.</p> <p>Allowing the Commissioner to conduct inquiries and inspections, and to make decisions afterwards, may create a potential conflict of interest.</p> <p>Not having auditors conduct both the inspection and audit will prevent needed coordination of the two reports and the collective decision that follows. It will also significantly increase the costs for cooperatives since they would have to meet both the costs of an auditor on one side and also a separate independent inspector on the other.</p> <p>The selection of a panel of auditors by Commissioner and having cooperatives only select from this panel dilutes the independence of auditors as they will have an incentive to please the Commissioner so as to be retained on the panel. The Apex should be best placed to maintain such a list.</p>
<p>Investment of cooperative funds Part X, Sections 80, 81 and 82</p>	<ul style="list-style-type: none"> • The law should not stipulate how or where cooperatives are to invest or deposit their funds, as cooperatives should be allowed to run their businesses just like other body corporates. At the same time, the law should protect cooperatives' reserve funds. Cooperatives must manage their patrimony/capital in a way that is consistent with cooperative principles, particularly the International Cooperative Alliance Principle 3 of "economic participation by members". Consequently, cooperatives' reserve funds must be at least partly indivisible/locked-in. • The cooperative should be allowed to invest in non-speculative activities, particularly in its core business, as well as in other business activities that serve to address members' needs and to expand for the benefit of its members.

	<ul style="list-style-type: none"> • There should be a prohibition of holding the reserve fund in investment asset classes that are risky, illiquid and speculative. <p>Potential repercussion: Limits to investments by cooperatives will negatively impact their capacity to serve their members needs and adapt to market changes.</p> <p>At the same time, if cooperatives are not mandated to have some part of their reserve funds in the form of indivisible reserves (i.e., reserves jointly owned by all cooperative members), then cooperatives are vulnerable to demutualization and are in a disadvantageous position for accessing finance, thus diminishing their economic stability and resilience.</p>
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OUR RECOMMENDED PROVISIONS THAT ARE NOT INCLUDED

Role of CECM and Chief Officer in the Counties	<ul style="list-style-type: none"> • The Bill does not give due recognition to the office of the County Executive Committee Member (CECM) and the Chief Officer, who is an accounting officer. This may present implementation challenges in that the CECM and Chief Officer need to approve some of the functions and duties of the County Director of Cooperatives. The Director of Cooperatives reports to the Chief Officer, who reports to the County Executive Committee Member.
Inter-governmental Cooperatives Relations Technical Forum	<ul style="list-style-type: none"> • The sector should be represented by the Apex members. CECMs and Chief Officers should also be members.
Registration	<ul style="list-style-type: none"> • Registration of primary cooperatives should provide a one stop step and do away with multiple offices. • Where the cooperative is not registered within the prescribed timeline and the delay in registration is no fault of the cooperative, the Bill should provide for automatic/default registration.
Audits	<ul style="list-style-type: none"> • The cooperative audit should be both financial and organizational. • In addition to the financial audit, there should be prescription of audits that provide assurance on adherence to cooperative principles, objectives of the cooperative & its bylaws, cooperative governance, ethics and sustainability of the cooperative.
Maintenance of a Reserve Fund	<ul style="list-style-type: none"> • Prescribe a minimum reserve fund, e.g., 10%. • Provide for various reserve funds as are common in many countries, including the general reserve fund, education & training reserve fund, and legal reserve fund. • Prohibit using reserve funds for investments as the reserve fund is established to support the cooperative in case of financial difficulties and should not be subject to risk.
Inquiry and Inspections by the Commissioner	<ul style="list-style-type: none"> • Best practice is to confer the conduct of inquiries, inspections and audits to independent actors, trained and recognized as such. • The inspection should be paid by the person demanding it. • After an investigation, inquiry or inspection there should be a requirement that inspection reports shall be presented to a joint meeting of the cooperative board of directors or general meeting for deliberation and implementation.

<p>Dissolution and Cancellation of Registration</p>	<ul style="list-style-type: none"> • To reduce abuse of discretion by the Commissioner for Cooperatives in dissolution or cancellation of certificates, it is recommended that the Bill provides for circumstances that may warrant dissolution or cancellation as follows; <ul style="list-style-type: none"> ○ Failure to hold annual general meetings for 3 consecutive years as evidenced by the auditor’s report; ○ Failure to produce documents at the request of the auditor for two consecutive years; ○ Failure to operate for 2 or 3 consecutive years, etc. ○ Failure to file annual returns as evidenced by the auditor’s report. • The Bill provides that the Commissioner may cancel the registration of a cooperative for failure to undertake the objects and purposes for which it was registered for twelve consecutive months. This duration should be reviewed from twelve months to twenty-four months. • Proof that a cooperative has deviated from undertaking the core mandate or business for which it was registered should be based on the auditor’s report.
<p>Inter-cooperative borrowing</p>	<ul style="list-style-type: none"> • The Apex cooperative should approve the terms and conditions of the borrowing or lending, not the Commissioner or the Sacco Authority.