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THE CURRENT STATE AND PROSPECTS FOR DEVELOPMENT OF THE POLISH COOPERATIVE LAW

INTRODUCTION

The fundamental normative act determining the legal status of Polish co-operatives is the act of 16 September 1982 – Cooperative Law.1 Due to the time when the law was adopted, it was not fully compatible with the contemporary constitutional framework, laid down, among others, by art. 20 of the Constitution of the Republic of Poland of 2 April 1997,2 which provides that "a social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland." The irrelevance of the existing legal solutions for the challenges posed by modern social market economy is a barrier to the development of Polish co-operatives, and in some measure they are the reason why Polish co-operatives have not been developing so dynamically as other sectors of the Polish economy.

The presented article constitutes an individual and critical appraisal of the current legislation and demonstrates potential threats which may appear if attempts are made at enacting a new cooperative law. The study, albeit on a limited scale, formulates some legislative proposals. It may then be regarded as an attempted con-

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[1] Journal of Laws No. 2016, item 21 as amended [hereafter CL].

[2] Journal of Laws No. 78, item 483 as amended. [henceforth referred to as the Constitution].

tribution to considerations of the final form of the Polish cooperative law manifested recently by the literature.[3]

1. THE CURRENT STATE OF COOPERATIVE LAW

We have already mentioned that the current state of the Polish cooperative law is far from satisfactory. This situation is due to several factors, which will be addressed below. First and foremost, the structure of the act of 16 September 1982 (Cooperative Law) is wrong. The law features Division 7 entitled "Economy of Co-operatives" and Division 13 entitled "Bankruptcy of a Co-operative." The first division must be regarded as a kind of reference to Chapter 7 entitled "Accounting" contained in the Act on Co-operatives of 29 October 1920,[4] which was essentially the first historical cooperative act enacted in the Republic of Poland. At present, this division is irrelevant due to the existence of the Accounting Act of 29 September 1994,[5] which comprehensively regulates issues related to financial reporting (art. 87 and 88a CL), while the remainder of the provisions collected in this division are related to property rights of co-operative members, therefore *de lege ferenda* they should be moved to a different place in this normative act (art. 75–78, art. 82 CL).

Likewise, the second division concerning co-operative bankruptcy is redundant. It also invokes the Act on Co-operatives (1920), specifically its provisions on members' extended liability for cooperative losses (art. 58 AC). If this extended liability for the co-operative's losses occurs (which was catered for in the form of extra contributions made by the members), then the definition of cooperative insolvency changes; so does the criterion for bankruptcy, therefore special provisions on bankruptcy are used in the Act (art. 85–106 AC). Leaving one exception aside, that is art. 26 of the act on cooperative savings and loan associations of 5 November 2009,[6] now co-operative members do not incur personal liability for a co-operative's losses,

[3] See, among others, A. Jedliński, "Perspektywy rozwoju prawa spółdzielczego," *Zeszyty Senackie* 22 (2014): 9; M. Wrzołek-Romańczuk, "Przyszłość prawa spółdzielczego w Polsce," in *Prawo spółdzielcze. Zagadnienia materialno-prawne i procesowe*, ed. A. Herbet, J. Misztal-Konecka, and P. Zakrzewski (Lublin: Wydawnictwo KUL, 2017), 17–51; P. Zakrzewski, "Fundusze własne spółdzielni de lege ferenda," *Przegląd Prawa Handlowego* 292, no. 12 (2016): 16–21; Idem, "Projekt w sprawie modelu Europejskiego Przedsiębiorstwa Spółdzielczego zgłoszony w ramach europejskiej inicjatywy obywatelskiej," *Teka Komisji Prawniczej*. *Polska Akademia Nauk Oddział w Lublinie* 8 (2015): 129ff.

[4] Journal of Laws No. 111, item 733 as amended [hereafter AC].

[5] Journal of Laws No. 2016, item 1047 as amended.

[6] Act of 5 November 2009 on cooperative savings and loan associations and, Journal of Laws No. 2016, item 1910 as amended [hereafter ACSLA].

a fact which justifies the Author's view on the redundancy of art. 130–137 CL presented in the introduction.

Title 2 of Division 1 of the Cooperative Law of 16 September 1982 is concerned with agricultural production co-operatives, whose purpose is to run a farm shared by all farmer members (art. 138ff. CL). Meanwhile, art. 23 of the Constitution provides that "the basis of the agricultural system of the State shall be the family farm." In this context, it seems seriously doubtful whether the invoked statutory regulation is properly correlated with art. 23 of the Constitution. The doubts are even more noticeable if we realise that in the legal systems of the member states of the so-called Old European Union the purpose of a co-operative is to support individual farms economically, not to run a shared farm based on the assets contributed by the co-operative members.[7]

It should be noted that the best Polish agricultural co-operatives are dairy co-operatives, but they do not operate on the basis of art. 138ff. CL, that is they do not run a shared dairy farm based on members' contributions. On the contrary, the economic activity of a dairy co-operative is characterised by subsidiarity with respect to its members. To elucidate the idea of the said key characteristic of the co-operative, we need to see that by collecting the milk its members produce – since they happen to be both suppliers and cooperative stakeholders – and marketing the processed milk, a co-operative supports the economic development of individual farms, stimulating profits from the agricultural economic activity pursued directly at a member's farm.

We can ask why – since dairy co-operatives, characterised by their subsidiarity towards their members, have become so successful – no similar cereal co-operatives have emerged to handle pasta production based on member-supplied cereals[8] or meat co-operatives based on the same principle? In this case, the long tradition of the dairy co-operative movement is not without significance because it created favourable conditions for dairy producers to organise themselves; yet, we need to point out that the unfavourable legal environment has also acted adversely. Why, then, should we gladly welcome the early draft of the law on agricultural co-operatives? The ample art. 6 of the draft law implies that the agricultural co-operative shall be characterised by subsidiarity with respect to a member's farm. Unfortunately, the bill is not free from flaws, such as a poor correlation with the Cooperative

[7] For more on the status of agricultural co-operatives in the legal orders of Western Europe, see A. Suchoń, *Prawna koncepcja spółdzielni rolniczych* (Poznań: Wydawnictwo Naukowe UAM, 2016), 54–82.

[8] For an example of American co-operatives, see A.M. Andrews, *Analiza kapitału spółdzielczego*, report no. 1 (2015), supplement for *Pieniądze i Więź* quarterly, 28–29.

Law of 16 September 1982, visible in an unnecessary repetition of the existing provisions and an unsatisfactory treatment of the issue of creating co-operatives' own funds – which can be its fundamental weakness. It may turn out, then, that apart from the accurate, albeit overly extensive in terms of legislative methodology, object of this type of co-operative, the law will not have a significant normative value. It is to be hoped though that the said flaws will be eliminated in the course of further legislative work.

Another reason for the unsatisfactory state of the Polish cooperative law is the obsolescence and rudimentary character of many legal institutions laid down by the Cooperative Law of 1982. Articles 6, 7 and 11 CL regarding the establishment and registration of co-operatives are based on art. 3 AC, in particular art. 4–6 and 8 of the act on co-operatives and their unions.[9] The current regulation of co-operatives in the process of formation is obsolete, especially when compared with that of capital companies in organisation (art. 11–13 of the Polish Commercial Companies Code). The same can be said about the provisions on lustration (art. 91–93a CL), and art. 3 CL which furnishes a proposition which is internally contradictory from the legal perspective, namely that "the property of a co-operative is the private property of its members." This antinomy comes as no surprise if we recall that a provision like that alludes to Marxist stratification of ownership.

The purpose of a co-operative, defined as a pursuit of a joint economic activity on behalf of the members, does not reflect the specific nature of a co-operative and does not enable a precise distinction between a co-operative and a commercial company. It merely states the obvious in respect of every corporation formed under private law which has economic goals, namely the fact that it cannot operate in the interest of other people but of its members (art. 1 §1 CL). The regulation of contributions and shares does not permit the so-called balance share to be identified, which, on the one hand, is an instrument for the building of co-operative equity capitals and, on the other, the creation of the asset value of a co-operative member. The manner in which a balance surplus can be accumulated in shares is more complicated because the surplus can be added only to incomplete shares. Shares cannot be disposed of, though their conditional inheritance is possible (art. 16a, art. 19 §1, art. 20 §1, art. 77 §3, art. 78 §1 point 1 CL).

The institution of contributions under art. 20 §2 CL is debatable. Initially, they were designed to be an instrument of the so-called socialisation of private property contributed to a co-operative by its members to become the co-operative's property or for its use. The purpose and function of contributions are not clear although they

[9] Journal of Laws No. 12, item 61 as amended.

are used in practice in many co-operatives, while the so-called interest on monetary contributions constitutes a tax-deductible expense for a co-operative, which pays off in terms of taxes.

Regulations concerning the liquidation of a co-operative are internally inconsistent. Also, we notice a lack of adequate correlation between the Civil Code and the Cooperative Act or 16 September 1982, which is demonstrated by the fact that under art. 43^1 of the Civil Code it is not certain whether a co-operative is an entrepreneur conducting business under a firm.

In the act of 16 September 1982 (Cooperative Law), managerial competences are transferred from the management board to the supervisory board (art. 45 §1 point 1, points 3–5 CL) and the general meeting.[10] As regards "the enrichment" of the competences of the general meeting, this solution remains in conjunction with art. 36 §1 of the Cooperative Law providing that "The General Meeting is the highest authority of a co-operative." According to M. Gersdorf, this provision makes it possible to extend the competences of the general meeting to be able to pass resolutions in matters reserved by the statute for other bodies, including the management board. This author believes that this is based on, amongst others, "the essential idea of a co-operative, where the will of all members seen as co-administrators of collective property must be a will similar to that of co-owners of a thing."[11] Legal solutions which imply the conferral of certain managerial competences to the supervisory board and the general meeting appeared for the first time by way of the act of 17 February 1961 on co-operatives and their unions; the solutions were retained in the currently operative Cooperative Law of 16 September 1982. In contrast, the act of 29 October 1920 on co-operatives was founded on a different premise, namely a strict division of managerial, control-supervisory and resolution-making competences among the bodies of a co-operative (art. 33, art. 41, art. 46 AC). This radical "mixture" of competences of co-operative governing bodies seen today is not provided for by the legislation of other countries. Likewise, it is not encountered in the case of a joint stock company (art. 382 §2, art. 384 of the Polish Commercial Companies Code).

[10] M. Gersdorf, "Komentarz do art. 38 i 46," in *Prawo spółdzielcze*. *Komentarz*, by Mirosław Gersdorf and Jerzy Ignatowicz (Warsaw: Wydawnictwo Prawnicze. Wydawnictwo Spółdzielcze, 1985), 97, 127–28.

[11] Idem, "Komentarz do art. 34," in *Prawo spółdzielcze*. *Komentarz*, by Mirosław Gersdorf and Jerzy Ignatowicz (Warsaw: Wydawnictwo Prawnicze, 1966), 89.

2. THREATS INVOLVED IN THE REFORM OF THE POLISH COOPERATIVE LAW

Despite the high defectiveness of the Polish cooperative law, the enactment of the new law on co-operatives may not bring the expected results. This will happen in two cases: either when it turns out that the new cooperative law is no other but an amended version of the current law of 16 September 1982, or when a wrong legislative model is adopted for co-operatives.

The first danger will occur if the majority of the current regulations are now superseded with a slight adjustment in respect of the wording, adding some hereto unknown legal solutions, such as the marketability of a share or a facultative supervisory board of the so-called small co-operatives. That the above-mentioned threat is real is proved by the content of the bills submitted in the 7th Sejm, that is a parliamentary draft cooperative law,[12] a parliamentary draft cooperative law[13] and a parliamentary draft law on co-operatives.[14]

While asking the fundamental question about the future shape of the Polish cooperative law, we are inevitably faced with another question concerning the idea and status of co-operatives in social market economy. There seem to be two answers to that question. According to the first view, the co-operative is a commercial legal entity established under private law, having special goals, especially the one of providing its members with services and products on a fee basis but without charging a profit margin since the co-operative members are both shareholders and recipients of the services. Leaving aside the different wording of the goal of the co-operative, we can say – from the legislative (constitutional and statutory) perspective – that a co-operative does not differ from a commercial company. An undertaking run by a co-operative, tied with the members' households, farms or their small businesses, is to directly support these enterprises, for example by providing cheap loans, housing or residential services, by collecting milk produced and delivered to the co-operative by the members – all of that being cost-effective, in this way reducing expenses borne by, for example, a member's household or farm. The adoption of this model of the co-operative for future normative acts, a model which in fact is used now (e.g. housing or dairy co-operatives, or cooperative savings and loan associations), will mean that those legal solutions which boost the economic viability of co-operatives will have to be in focus, especially those concerning the

[12] Sejm paper No. 1005, 7th Sejm.
[13] Sejm paper No. 980, 7th Sejm.
[14] Sejm paper No. 515, 7th Sejm.

collection and maintenance of own funds or those enhancing the managerial capacity of co-operatives.

Another view is that the co-operative and the undertaking it operates are seen not (only) as a special type of legal person, whose role is to earn profits for its members, but also an entity whose role is to satisfy social or cultural needs of its members and their families (see art. 1 §2 CL). Co-operatives are becoming part of the so-called third sector of the economy, besides the private and state sectors. It seems that the definition of a co-operative is based on that premise since according to the International Co-operative Alliance a co-operative is an autonomous association of people who have united voluntarily to cater for common economic, social and cultural needs and aspirations by means of a jointly owned and democratically managed undertaking.[15] Art. 1 para. 2 of the draft law on co-operatives also made reference to this definition, saying that "the purpose of a co-operative is to try to raise the living standard of its members and their families by pursuing economic activity with personal or property involvement of its members. The business activity of a co-operative can be profit-making or not-for-profit.[16]

Approval for this co-operative model reflected in the future normative act will result in vigorous attempts to pack it with solutions which differ from those used in the Polish Commercial Companies Code. They would demonstrate different economic and social functions of co-operatives. This would be manifested by opposition to adopt solutions used for "companization", such as the marketability of shares, fixed minimal share capital, a ban on (problematic) transformations of co-operatives into commercial companies, and different nomenclature of legal institutions which is currently in use, for example "share surplus" instead of "profit", "co-operative share fund" instead of "share capital", etc. The above-mentioned economic and social character of such a co-operative also implies an expectation that this legal form should enjoy preferential treatment in terms of legislation, such as allowances and tax reliefs.

Traditionally, the first co-operative model was typical for German law, and the second one was common in French and European law.[17] However, co-operatives functioning in these two legal orders have been subjected to "companization", that is they have been fed with solutions that are typical for commercial companies.

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[15] See P. Zakrzewski, "Zasady Międzynarodowego Związku Spółdzielczego," *Kwartalnik Prawa Prywatnego* 14, no. 1 (2005), 291–92.

[16] Sejm paper No. 515, 7th Sejm.

[17] Council Regulation (EC) No. 1435/2003 of 22 July 2003 on the statute for a European Cooperative Society, Official Journal L 207, 18.08.2003, 1.

By contrast, it has become typical for German co-operatives, under the influence of European law, to support not only the profit-oriented operation of co-operative members or their farms (as previously was the case) but also their social or cultural needs (§1 GCA[18]). Finally, the unique purpose of co-operatives provides arguments for a different treatment in terms of tax law. The legislative concepts related to co-operatives presented above compete with each other also under the current Polish legislation. As a result, it is hard to draw distinct lines between them, but it seems that the second model of co-operatives involves larger government spending on the cooperative movement. At the same time, we can suppose that no sufficient public funding will be available for Polish co-operatives. The first model seems more economically effective than the other; incidentally (indirectly), it also carries out significant public tasks such as counteracting monopolies or the increase in prices for services and products in the absence of public spending on them. These benefits are clearly underrated in the literature and by the legislator. Another social aspect of co-operatives has been pointed out in the literature, namely that the realisation of the open doors principle leads to the socialisation of economic performance of an undertaking which can be of use by all potentially interested parties.[19]

The considerations presented above make a strong case for the first model of the co-operative *de lege ferenda*. This is the perspective adopted by the Author for the legislative proposals formulated below.

3. THE SCOPE OF THE FUTURE LAW AND STATUTORY FREEDOM

A preliminary question concerning the future cooperative law is the choice of an optimal legislative model, which in the Polish reality boils down to the adoption of either one cooperative law with a general part addressed to all types of co-operatives, and a specific part addressing all individual types of co-operatives, for example worker, social or housing co-operatives, cooperative banks, cooperative savings and loan associations, agricultural production co-operatives, or one master cooperative law and a number of specific acts regulating individual types of co-operatives. The choice of the first model would better prevent repetitions in the

[18] German Co-operatives Act in the version published on 16 October 2006 (Bundesgezetzblatt/ Federal Law Gazette I S. 2230) as amended by the act of 15 July 2013 (Bundesgezetzblatt I S. 2379) with later amendments of 19 July 2013.

[19] A. Fici, "An introduction to Cooperative Law," in *International Handbook of Cooperative Law*, ed. D. Cracogna, A. Fici, and H. Hagen (Heidelberg: Springer Verlag, 2013), 33.

regulations governing specific types of co-operatives which we have today, but in terms of the legislative process that would be much harder to achieve.

The scope and character of regulations is a different matter, the question being whether regulations should govern all aspects of cooperative operation by means of mandatory norms, or on the contrary they should govern co-operatives to a limited extent and leave their members with substantial statutory freedom in this respect. The question has also been addressed by jurisprudence in other countries.[20] It seems that the acceptance of the model of co-operative conceived as an economic legal entity based on private law and possessing specific characteristics should give rise to a wider statutory latitude – the view endorsed by the Author.

We also need to point out another aspect of the presence of non-mandatory provisions in the future cooperative law. The resultant latitude will allow co-operative members to establish the so-called mixed form of a co-operative with capital elements that are typical for a commercial company. This will be a natural departure from the classic model of co-operative but a step towards mixed legal entities, which occur frequently, for example, in the Commercial Companies Code. Co-operatives will inevitably share this fate.

4. THE PURPOSE OF CO-OPERATIVES *DE LEGE FERENDA*

Another major challenge is how to draft the definition of a co-operative, especially its purpose – which in the circle of the German legal culture is attributed special importance – as the main characteristic distinguishing a co-operative from a commercial company or a society.[21] According to the classic definition of a German co-operative, its purpose is to support the profit-making activity of its members or their household by means of a joint enterprise, and at present also to support their social and cultural needs (§1 para. 1 GCA).

Such a definition of co-operative assumes the existence of subsidiarity (the concept was mentioned earlier) characterising an undertaking run by a co-operative with respect to the economic activity of its members or their households. Essentially, this is an economic purpose, realised by means of an undertaking but simultaneously this goal is not profit-making, understood as a commitment to making profits and their redistribution among the co-operative members.

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[20] See A. Piechowski, "Spółdzielczość w krajach Unii Europejskiej potencjał i regulacje prawne," *Społeczeństwo Obywatelskie* 3, nos. 3–4 (2016): 36–37.

[21] H. Paulinck, *Die eingetragene Genossenschaft als Beispiel gesetzlicher Typenbeschränkung zugleich ein Beitrag zur Typenlehre im gesselschaftsrecht* (Tübingen: J.C.B. Mohr, 1954), 14ff.

Due to the nature of the members, their interests and relations with co-operatives, A. Fici proposed three types of co-operatives: consumer, producer and worker co-operatives. Co-operatives of the first type focus on (independent) collection or acquisition of specific goods or services, and transferring them to the members who act as members-consumers. This group encompasses housing co-operatives, cooperative savings and loan associations, consumer co-operatives and cooperative banks as long as the members are their clients, which is not a rule in light of Polish law, as well as co-operatives of machinery rings cultural services), and to some extent also agricultural production co-operatives (art. 138, art. 178 §1, art. 180 §1 CL). The second type of a co-operative is focused on the acquisition of goods or services from its members in order to process them in its own undertaking and sell afterwards, for example collect milk from the members to produce cheese to be sold. Examples of such co-operatives are dairy, apicultural and other agricultural co-operatives (see art. 6 §1 points 2 and 4 of the draft law on agricultural co-operatives). The members act as members-suppliers. The last type of co-operatives is made up of natural persons who are interested in providing work and committed to employment of their members in an undertaking which can operate in virtually every economic area. Naturally, a co-operative can choose to pursue more than one mode of operation.[22]

However, contrary to the view presented by Fici,[23] this classification of co-operatives has a minimal legislative impact. The above-mentioned German definition of a co-operative encompasses all these types of co-operatives, and the difference among them being limited to the way a co-operative member is supported – information which will be specified in the charter. More importantly, the juridical difference among these types of co-operatives lies in a different type of the agreement (a different act at law) underpinning mutual commercial relations between a co-operative and its members. This will be, for example, a sales agreement (consumer co-operatives), a contract for services, for example, a loan or credit (a cooperative savings and loan association) or a special corporate legal relationship, that is a contract for the building of a residential unit, an agreement for the establishment of a cooperative tenancy right to a residential unit (art. 9 and 10 AHC).[24] We clearly see that this last type of legal relationship is regulated by Polish law in a detailed manner. As regards producers co-operatives, the relationship between them and their members can also be based on a sales agreement but a member will act as a sup-

[22] A. Fici, "An introduction to Cooperative Law," 24.

[23] Ibid.

[24] Act of 15 December 2000 on housing co-operatives, Journal of Laws No. 2013, item 1222 as amended [hereafter AHC].

plier, for example of milk, while the co-operative will act as a buyer. However, there is nothing to prevent a supply contract from forming the basis of this relationship (art. 605 of the Civil Code), similarly the charter and the associated executory agreement. In the case of worker co-operatives, disabled and blind worker co-operatives and social co-operatives, this would be an employment contract (art. 182 §3 CL, art. 12 para. 1 ASC[25]).

The above suggests that a precise distinction between co-operatives and commercial companies presents no difficulty from the legislative perspective. Some Polish co-operatives, such as consumer co-operatives, cooperative banks, have abandoned the classically interpreted cooperative purpose by offering their services and products to parties who are not their members. As a result, such a co-operative conducts economic activity but the fundamental difference in relation to a commercial company is lost. The occurrence of such co-operatives constitutes a significant legislative challenge because, on the one hand, it calls for such a definition of co-operative which would distinguish it from a commercial company yet flexible enough to embrace profit-making co-operatives, too. Under the law of Germany, the problem stated above is solved by means of an extended interpretation of the term "profit-making activity" (Germ. *Erwerbs*). Although it is emphasised that a co-operative cannot become the so-called dividend co-operative because this is what company legal forms are for, co-operatives are allowed to generate and distribute profits with a proviso that they should use the obtained profits in a manner that offers the best possible support for the economic activity of their members or their households.[26]

How has the said legislative challenge – which in fact is indirectly related to the economic purpose of some types of Polish co-operatives – been addressed by the draft legislation so far? The parliamentary draft of cooperative law stated in art. 1 para. 2 that "The purpose of a co-operative is the satisfaction of the needs of its members and their families, as well as their economic, social and cultural aspirations by means of a jointly owned and democratically managed undertaking. The business activity of a co-operative can be not-for-profit."[27] In contrast, the parliamentary draft law on co-operatives provided in art. 1 para. 1 that "the purpose of a co-operative is an aspiration to raise the living standard of its members and their families by pursuing economic activity with personal or property involvement of

[25] Act of 26 April 2006 on social co-operatives, Journal of Laws No. 94, item 651 as amended [hereafter ASC].

[26] V. Beuthien, "Kommentar zu § 1," in *Genossenschaftsgesetz mit Umwandlungsrecht*, by Ernst H. Meyer, Gottfried Meulenbergh, Volker Beuthien (Munich: C.H. Beck Verlag, 2000), 11.

[27] Sejm paper No. 980, 7th Sejm.

its members. The economic activity of a co-operative can be either profit-making or not-for-profit."[28]

It can be seen that both draft laws address the question raised above but both offer solutions that are not fully satisfactory. It is true that they emphasise the fact that a co-operative can achieve its profit-making or non-profit goals by pursuing economic activity; however, the draft laws do not make it clear what the specific non-profit economic activity of a co-operative involves. Since according to both of these proposals a co-operative can carry out profit-making or non-profit economic activity, in fact it does not differ from a capital-based commercial company, which after all can pursue any kind of business. Given this definition of the purpose of a co-operative, we are unable to single out a co-operative as a special type of an business legal entity. The proposed definitions do not match the above-mentioned classic definition of a co-operative used in Germany in terms of their legislative level.

Since the existing legislative attempts are not sufficient, it seems legitimate to provide a proposal for the purpose of a co-operative on the basis of art. 2 para. 1 of the Finnish cooperative law.[29] As a result, we would assume that the purpose of a co-operative would be to promote the economic and business activities of its members by running an undertaking whereby the members would make use of the services provided by the co-operative or services that co-operative arranges for, directly, indirectly or otherwise." Such treatment of the goal not only defines the specific purpose of a co-operative, that is supporting undefined hence wide-ranging economic or professional interests of its members, but also the typical cooperative manner of achieving that, that is through the use of services provided by the co-operative's undertaking. This definition, however, does not provide a closed catalogue of means to do that, which makes it flexible and wide-ranging. I believe that the purpose formulated in this way would incorporate all types of co-operatives, including those designed in practice to generate profits, and simultaneously such a definition of the purpose does not ignore the specific character of a co-operative.

5. LIMITED PARTICIPATION OF A CO-OPERATIVE IN COMMERCIAL COMPANIES AS A PARTNER

The special purpose of a co-operative, which under German law is to support the economic activity of its members or their households by means of jointly managed

[28] Sejm paper No. 515, 7th Sejm.
[29] Finnish Co-operatives Act (1488/2001).

undertaking, begs another question, namely whether a co-operative with such a purpose can act as a partner in a commercial company whose goals are typically profit-making. In this context we are talking about, for example, a housing co-operative participating in a joint stock company with the status of a bank.

The German cooperative law permits such participation in a limited degree, for example when it serves the co-operative purpose (§1 para. 2 GCA). If this restriction is violated, that is a co-operative participates in a commercial company only to gain profit, the participation does not invalidate this act at law, giving rise only to the board's liability for damages.[30]

The existing Polish acts concerning cooperative law do not provide for a similar restriction. The law of 16 September 1982 (Cooperative Law) addresses the subject of co-operatives participating in another entity merely indirectly, a situation requiring an approval of the general meeting (art. 38 §1 point 6 CL). On the other hand, art. 4 §1 point 5 of the Polish Commercial Companies Code provides a definition of an affiliated company interpreted as a capital company in which another commercial company or a co-operative controls at least 20% of the votes at the general meeting. These provisions attest to the unlimited permissibility of the participation of Polish co-operatives in commercial companies and other entities.

Hence the question arises whether the future cooperative law should change the current state in this regard. The proposed provision could have the following wording: "A co-operative may participate directly or indirectly in another entrepreneur or other legal entity, acquire directly or indirectly membership if this serves its purpose and is expressly permitted by the co-operative's charter.

For example, this provision entitles a housing co-operative to contribute an immovable property to a commercial company as long as the latter's economic activity will bring the shareholder (the housing co-operative) closer to its objective, which is the satisfaction of accommodation needs of its members. This will happen, for instance, when this company pursues economic activity involving the production of bricks necessary for the construction works executed by the co-operative. It is a different matter if a company pursues a profit-making activity while a housing co-operative is intent on joining the former to gain a share of its profits.

Nonetheless, this example of illicit participation of a co-operative in a commercial company can be viewed differently, in which case we will ask whether a housing co-operative using the profit it has received from the company to the maintenance of the

[30] P. Pöhlmann, "Kommentar zu § 1," in *Genossenschaftsgesetz. Kommentar zu dem Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften und zu umwandlungsrechtlichen Vorschriften für Genossenschaften* by E. Hettrich et al. (Munich: C.H. Beck Verlag, 2001), 16.

housing assets of its members will be able to participate in the said company without prejudice to the above-mentioned provision. After all, such a profit would support the realisation of the purpose of housing co-operatives interpreted as the satisfaction of housing needs of its members (see art. 5 para. 2 AHC). In the case of SPOŁEM consumer cooperatives, similarly to other co-operatives carrying out profit-making activity, the outlined provision would not hinder the subscription of shares or stocks in a commercial company doing business.

In comparison with the existing solutions, changes induced by the proposed provision would on the one hand lead to a restricted participation of the co-operative in commercial companies since this would call for the realisation of the co-operative's purpose and the consent of the members incorporated in the charter, while on the other hand to an extension of this participation in the case of co-operatives with a purpose defined by statute, for example housing co-operatives, cooperative savings and loan associations, or worker co-operatives. Cooperatives could use their whole undertaking as a contribution in kind, a manoeuvre which is ruled out under the present regulations and in light of the controversial ruling of the Supreme Court.[31] In fact, the Supreme Court inferred from the entirety of relevant provisions a norm which was similar to the one mentioned above but its purpose was to prevent cases of contributions made into a commercial company with a co-operative undertaking.

The said legislative proposal gives rise to the most reservations. They result mainly from the fact that the Polish cooperative law – as opposed to German law – does not limit the purpose of a co-operative to the support offered to its members carrying out profit-making activities or their households by means of an undertaking (art. 1 §1 CL), with which the said solution is functionally connected. For this reason, the practical significance of this provision would be little and restricted merely to several co-operatives with a statutory purpose, for example housing co-operatives or cooperative savings and loan associations (art. 1 para. 1 AHC and art. 3 para. 1 ACSLA). Another substantial doubt emerges regarding the legitimacy of such a provision, stemming from reference made to German legislative solutions, for they imply a view about the permissibility of making profits by co-operatives also pursuant to §1 para. 1 GCA providing that they will be used to improve the so-called direct assistance offered by co-operatives to their members. Likewise, it is permissible to use the co-operative's profit received from the commercial company in which the co-operative participates. This sort of interpretation implies in turn that the barrier presented by §1 para. 2 GCA loses its practical importance and becomes

[31] Judgement of the Supreme Court dated June 20, 2007, file ref. no. V CSK 196/07, OSNC-ZD 2008 no. 2, item 39.

redundant because co-operatives can freely participate in commercial companies as their shareholders.

6. THE CAPITALS OF CO-OPERATIVES *DE LEGE FERENDA*

A. Fici underscores that the capital of a co-operative differs from that of a joint stock company, and although both are split into shares, they are subject to completely different regimes. Fici highlights three differences: the volatility of the co-operative market, the lack of a cooperative minimum capital (with exceptions to this rule, e.g. in German law – §8a GCA, the so-called minimum share capital), and the lack of correlation between the capital a member contributes to a co-operative, that is the amount of the share, and transactions occurring between him or her and the co-operative. The positive effect of the said distinction is that capital does not dominate co-operatives, the negative outcome being that cooperative members are discouraged from taking up new shares in a co-operative.[32]

This in turn begs the question whether the regulation of cooperative capitals should follow the model used in capital-based commercial companies, for example full the marketability of shares, the existence of minimum share capital and external capital contributed by member investors.

The question whether co-operatives should be open to the so-called member investors, who are not interested in using the services or goods offered by the cooperative undertaking, but only want to participate in the distribution of the balance surplus of the co-operative, is hard to answer. This solution remains at odds with the cooperative rule that cooperative members are both shareholders and recipients of goods and services of the cooperative undertaking. For this reason, many (albeit not all) European regulations, including the Polish one concerning the European co-operative,[33] reject those solutions. These are accepted, for example, by Finnish, French and German respective laws.[34] In this case member investors have a limited vote in the co-operative, while enjoying a privileged position regarding the distribution of its profits.[35] Fici argues that although in his view this solution poses a threat to cooperative identity, he emphasises the view of European scholars who deal with cooperative movement that the restrictive approach to cooperative business

[32] A. Fici, "An introduction to Cooperative Law," 36–38.
[33] See act of 22 July 2006 on European cooperative societies, Journal of Laws of 2016, item 7.
[34] See, for example, Wrzołek-Romańczuk, "Przyszłość prawa spółdzielczego," 35.
[35] A. Fici, "An introduction to Cooperative Law," 47–48.

should be loosened and differences between co-operatives and commercial companies should be levelled down. Fici is more careful in this context and he draws our attention to the fact that cooperative law should be focused on the financial needs of co-operatives in order not only to preserve their identity but also strengthen them. This is why he is in favour of seeking such financial instruments.[36]

Fici, however, does not formulate any concrete proposals. Assuming that they will both strengthen the personal (non-capital) character of co-operatives and promote the building of cooperative own capitals, their submission seems unrealistic. Beuthien's proposals, formulated in the German literature, deviated from the path postulated by Fici. Beuthien proposed solutions which proved interesting to the Polish legislator. He proposed, among others, changes in the organisational structure of co-operatives, in shares and capital structure:

1) similarly to the European cooperative society, the so-called member investors, who are not interested in the services and products of a co-operative but rather in participation in the distribution of balance surplus in accordance with the contributed capital, should be allowed;

2) statutory freedom should be increased;

3) the meeting of representatives should not entirely replace the general meeting, especially an amendment to the charter and other key decisions should always be reserved to the GM;

4) small co-operatives (uniting up to 20 members) should be able to give up the appointment of a supervisory board;

5) the charter should make it possible for persons with certain qualifications but not members of a co-operative to form a third of the supervisory board;

6) the charter should allow the correlation between a member's voting rights at a GM and his or her shares; however, any delay in paying a share should result in a suspension of voting rights;

7) it should be possible to include in the charter the so-called special rights given to the members of the supervisory board, for example a member who is particularly committed to the co-operative's business could be given priority in his submission of a proposal;

8) restrictions in respect of granting a proxy to appear at general meetings should be cancelled;

9) the number of members permitted to demand a general meeting should be reduced;

10) not only monetary contributions but also payments in kind should be allowed;

[36] Ibid., 48.

11) a minimum, non-returnable capital should be introduced;

12) the character of a cooperative share should be changed by making such a share synonymous to member rights and duties;

13) a share should have unlimited marketability;

14) apart from share capital and reserve capitals, an additional stock capital should be permitted, shared among the members;

15) the members should have the right to review the post-inspection report;

16) the obligation of inspection should be abolished or restricted, which in the opinion of the cited author is a very debatable postulate.[37]

Bearing in mind these differing views of Fici and Beuthien regarding co-operative capital, not only do I believe that in order to retain the identity of co-operatives in future regulations the latter should be formulated in such a way that cooperative members enjoy freedom enshrined in the charter to decide whether their co-operative will fully retain its cooperative identity or whether it will be somewhat eroded through the adoption of solutions associated with the building of equity, just like in commercial companies. The introduction of the latter solutions to the co-operative's charter should be, however, conditional on the majority of votes, at least two thirds.

Among the proposed changes, we should mention the marketability of shares, which can be purchased by a person who is not a cooperative member. If the person does not acquire the membership within one year, the share will be transformed into a disbursement claim. The liquidity of shares can be low, so their marketability will by only illusory. Therefore it is appropriate to postulate the creation of internet platforms for share trading, special investment funds which will buy and sell members' shares or even stock quotations of shares.[38]

Another interesting solution which could be successfully implemented consists in the allocation of new shares to the members of a co-operative from the balance surplus for a particular year without having to modify the charter. This would involve the introduction of the principle whereby cooperative members could freely take up an unlimited number of shares. I also propose that a facultative minimum share fund be established, which would prevent the payment of a member's share should he or she leave the co-operative if the share fund were to shrink below the statutory minimum.

Members do not contribute to the growth of the co-operative's assets. Upon leaving it, they are not entitled to any assets other than those recognised in the share

[37] V. Beuthien, *Genossenschaftsgesetz mit Umwandlungs- und Kartellrecht sowie Statut der Europäischen Genossenschaft*, XLVI–XLVII (Munich: C.H. Beck Verlag, 2004).

[38] Andrews, *Analiza kapitału spółdzielczego*, 19.

fund. This naturally protects the assets of the co-operative from being divided but simultaneously discourages the current members from "investing" further own assets in the share fund. With this in mind, Beuthien proposed that all members have their claim acknowledged by means of a tradable and heritable security which can serve as a collateral, allowing its holder to claim part of the assets remaining after the co-operative has been liquidated.[39] Should this happen, all of the co-operative's current and former members as well as their heirs could participate in the redistribution of the liquidated co-operative's assets. This is a novel proposal yet not without its weaknesses since we are talking about a future and conditional claim acknowledged by a security.[40] Random individuals can be entitled – buyers and heirs who come into possession of a security substantiating this claim. This undermines the original idea of this proposal. For this reason, trading in securities should be restricted to the co-operative's member's family. On the other hand, such a proposal prevents cooperative assets from being seized by narrow circles of members. For the same reasons we need to consider whether or not former members should take part in the conversion of the co-operative into a commercial company (art. 203e–203x CL).

7. THE NUMBER OF VOTES AND AN IMPERFECT CO-OPERATIVE

A co-operative is characterised by the preponderance of the personal component over the capital one, therefore co-operatives of the basic tier, among others, use the "one member, one vote" strategy. We may wonder whether in the case of agricultural production co-operatives the number of votes should not be correlated with, for example, the trading volume between a member and the co-operative. It seems that the voting power of members who own 20 cows and those who own 100 can be different. Such a solution is not envisaged by the draft law on agricultural co-operatives. Its emergence confirms the introduction of company mechanisms into co-operatives which give precedence to individualism, weakening cooperative solidarism. However, this solution would promote active members bringing benefits to all.

The last question is connected with tax issues. A co-operative is an association of people, not capitals. Seen in this light, it resembles partnerships whose profits are not subject to corporate income tax, whereas only the dividends disbursed to the partners are taxed. In principle, the same can be said about co-operatives, but

[39] Beuthien, *Genossenschaftsgesetz mit Umwandlungs- und Kartellrecht*, XLVI–XLVII.

[40] *Conditio iuris* in the form of liquidation of a co-operative and redistribution of its assets among its members.

corporate income tax is associated with the attribute of legal personality rather than the capital character of a legal entity. In view of the above, either a tax relief should be postulated for those co-operatives which provide their services or supply their goods only to their members, or a subtype of co-operative should be introduced – a co-operative without legal personality but with legal capacity (art. 33^1 of the Civil Code), relieving it of corporate income tax.[41]

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[41] Zakrzewski, "Fundusze własne," 20.

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THE CURRENT STATUS AND PROSPECTS FOR THE DEVELOPMENT OF POLISH COOPERATIVE LAW

Summary

The article discusses the current state, legislative threats connected with the preparation of the Polish cooperative act and selected legislative proposals. The legal status of Polish cooperatives is unsatisfactory. The basic assumptions, structure and content of the regulations, which are of archaic and residual nature, are defective.A new cooperative law will not solve the problem if the existing legislation is merely amended. Another danger may stem from the defective definition of the essence and status of co-operatives in social market economy.

The forthcoming cooperative law should be limited to general issues which apply tom co-operatives. Specific acts should govern individual co-operatives, e.g. credit cooperatives. The law should guarantee a broad statutory freedom.

It is very important to have a precise yet a comprehensive definition of the purpose of the co-operative. The Finnish cooperative law provides a good example in this regard: "The purpose of a co-operative shall be to promote the economic and business activities of its members by means of the pursuit of economic activity where the members make use of the services provided by the co-operative or services that co-operative arranges for, directly, indirectly or otherwise." Any future regulation should not limit the possibility of co-operatives becoming members of commercial companies.Differences between legal entities are becoming blurred, and this also applies o co-operatives. Therefore, co-operatives should take over some solutions from typical commercial companies, such as the marketability of shares.

Key words: co-operative; cooperative law reform; cooperative purpose; cooperative participation in the company; agricultural co-operatives; co-operative capital.

Translated by Tomasz Pałkowski

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