



Imagine there's no reliable 'new' cooperativism without respect for 'old' cooperatives

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Abstract

The article tries to discuss the need and necessity for the legal protection of reserves of 'old' cooperatives. This capital seems to constitute some kind of a 'social' dimension within cooperatives that exist longer than the members, who have created the cooperative, belong to their cooperative ('old' cooperative). With this perspective every merger or transformation of a cooperative contradicts its constitution. However, the legal reality moves cooperatives into the direction of corporations although their constitution can also be helpful to argue for states without deficit spending.

Keywords: cooperative capital, legal protection, reserves, Austria, Germany

Introduction

The cooperative appears as a legal and organizational form. This form is also chosen today for company start-ups worldwide. So, there might be some kind of continuous or 'new' cooperativism ^[1]. More than 150 years ago, agricultural, consumer, credit and housing cooperatives were newly created in European countries – in some cases even before a cooperative law has been introduced.

Entry and – subject to a period of notice – exit as owner (member) of a cooperative are possible at any time (1st ICA-Cooperative Principle: Voluntary and Open Membership) ^[2]. Therefore the entry of many members is not only possible when the company is created, but can also be easily realized over time ^[3].

Everything is different in the beginning

In the period of creating a cooperative, optimism, enthusiasm, personal awareness and the desire of the (first) members to pursue a common goal prevail. Nobody would like to imagine that in a growing group of members, conflicting interests increase, the commitment decreases or the board could pursue interests other than the members.

As an example, the new credit cooperatives in Germany (Prussia) in the middle of the 19th century have protected their members financially from an existential emergency by offering cheaper or even access to means of credit. At their beginning cooperatives did not have any reserves. Many of the members did not have the money to pay in the member's share completely and to pay an additional entry fee. This led to the rule, which is still valid today, that a member's share needs not to be paid in completely (Art. 7 No. 1 German Cooperative Act (Genossenschaftsgesetz, GenG)). Later profits were credited to members' shares until the member's share, i. e. the agreed maximum financial participation, was reached (Art. 19 (1) GenG). The more the cooperative is successful, the more the individually defined financial participation of each member grows, represented by the amount paid in on each member's share.

Extended asset participation

Also historically, the cooperative practice in Prussia provided an additional financial participation for members leaving the cooperative. But this practice changed when the

group of members became larger and more anonymous and the reserves had increased so much that leaving with an extended participation in the reserves would have jeopardized the continued existence of the cooperative.

Before the (Prussian) Cooperative Act of 1867, mainly cooperative associations provided such an additional participation (property) right at the end of membership. Members of these associations participated in the reserves under certain conditions, but limited primarily to the death of members, so that their heiress benefited from the payment. This reflects a care that also demonstrates a sense of responsibility towards the continued existence of the cooperative, since an outflow of reserves, each time a member left, would have had a significantly greater impact on the equity capital. This form of design with a special purpose limitation has the character of a foundation and the features of a pension fund in the balance sheet and can be demonstrated by the example of the Prussian association in Luebben (Vorschuss-Verein zu Luebben) ^[4].

This practice, which was quite common at that time, served the legislature in 1867 as an opportunity of an extended participation to be included in the statute (Art. 38 GenG 1867 and Art. 39 GenG 1868), as it is still preserved today in the Austrian Cooperative Act (Art. 55, 79 öGenG). In the German GenG, this possibility ceased to exist in the course of the amendment of 1889, but was still used in practice.

Clarification by the amendment in 1973

Art. 73 (3) GenG has limited the possibility of participation to a profit reserve formed specifically for this purpose ("andere Ergebnisrücklage"). The amendment to the GenG removed legal uncertainties, but also reduced the earlier leeway ^[5]: At the end of a membership, there is usually a direct dissolution between member and cooperative. Thereafter, members (or their heiress) receive the amount paid in on member's share(s). Subject to Art. 73 (3), "the member has no claim to the reserves and other assets of the Cooperative" (Art. 73 (2) GenG). According to Art. 73 (3) GenG, the statute can grant "members, who have completely paid in their member's share(s), a right to payment of a portion of a profit reserve to be formed for this purpose from the annual surplus at the end of the membership." The statute of the cooperative can include further requirements.

Legal protection standard for the preservation of the cooperative's reserves

Art. 73 GenG on dissolution between member and cooperative is a protective norm in general. The protection applies to the equity capital of the cooperative as a unit, which shows the social dimension.

If the regulations of inheritance law are transferred to membership of a cooperative, then the inheritance disposition for the member of a cooperative is that the profit which is earned during its membership and not attributed or reimbursed as dividends, remains, beyond the individual membership, within the cooperative.

If the cooperative builds up and expands its capital in this way, the question arises of what happens in the event of the cooperative's inheritance, i.e. its own dissolution. Over the time the cooperative builds up a considerable large capital. In practice, a credit cooperative is likely to go into its own dissolution (liquidation) less often, but rather merges with another – sometimes due to restructuring. Then all assets are transferred to the receiving cooperative.

Conclusion

As long as the cooperative orientation and legal form are retained and the generation of the creators of the cooperative is living and completely represented in the cooperative, e.g. a merger is unproblematic in terms of property law, but above all in terms of subsidies. If there is a change in legal form or a merger with superordinate cooperative banks in the legal form of a corporation within a multi-level cooperative system, for example with institutes at regional level up to the national – possibly listed – top of this cooperative organization, then this will relocate the cooperative capital which has build up by generations' waiver. The equity capital would be individualized and tradable and would thus have been made available for sale on the capital market.

In the language of inheritance law, today's decision-makers would have contributed to investors in the capital market inheriting members who have waived for generations. The members would have been 'disinherited' to a large extent and in part – without their knowledge and consent – of the social functioning of the cooperative in the present and for the future. The same applies if the possibilities of a merger or a conversion into the corporation were used in this direction, since even possible asset compensation would only benefit the members who are living today.

But this may not have been intended by the creators of the cooperative. Unfortunately, they did not leave a will, but, like all subsequent generations, they trusted in good faith in the continued existence of their cooperative and the validity of the designated protection standard. It is important to maintain or restore this trust, also with the support of national and e.g. European legislators. Even today it is all too easy to be forgotten in the initial mood of optimism when founding a new cooperative and is seldom made up for later.

References

1. Ref. e.g. to the special issue (New Cooperativism) of Journal of Co-operative Studies, New Cooperativism – Special issue, 2022, 55(3).
2. Ref. to <https://www.ica.coop/en/cooperatives/cooperative-identity#voluntary-and-open-membership>.

3. See also Blisse H.; *“Vermögenssicherung in der (Kredit-) Genossenschaft – Schon bei der Gründung ein mögliches Ende mit denken!”*; Bank intern, Volume 25/ Issue 25 (Spezial, 20.06.)/ 2022 and e.g. Blisse H.; *“The case for the legal protection of cooperative reserves in ‘old’ cooperatives in Germany and Austria”*; International Journal of Cooperative Law (forthcoming).
4. Richter J.; *“Zur Vervollständigung des Aufsatzes ‚Noch einmal der Reservefonds‘ von Moritz Wiggers”*. Blätter fuer Genossenschaftswesen, Volume 13/ Issue 38/ 1866, 151-152.
5. Bauer H.; *“Genossenschafts-Handbuch – Kommentar zum Genossenschaftsgesetz”*, Volume 2, Erich Schmidt Verlag (Publ.), 2000/1973, 6.