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Na okładce obraz Władimira Makowskiego (1846–1920), *Wyjazd na polowanie*

Autor był malarzem rosyjskim, profesorem Akademii Sztuk Pięknych w Petersburgu.

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Status and Development of Non-Profit Corporate Entities in Russian's Market Economy

Disclosed experience shows that Russia's cooperative consumer system is composed of unique forms of management within a non-profit corporate organization. An analysis of the activities of the organizations proved the need for RF Tsentrosoyuz to expand and improve upon many factors of its system's development, which would serve as a form of evolutionary transformation of capital and become the basis for the creation of new economic relations.

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The formation and development of the cooperative system of organization of the social economy have gone through a difficult historical path. In the public consciousness, cooperation is associated with the complexity of this phenomenon, which is manifested in economic practice by various aspects: the form of labor, the business enterprise, and the social movement. The stages of the development of society translate major changes in the principles of cooperative interaction: the stock; collectivism and self-government, aimed at preserving the reproduction of the established world order in the evolution of the mode of economic existence; and the reduction of social tension, provision of social

guarantees and joint responsibility for the population in the modern conditions of the global market economy.

Russian consumer cooperation was formed from a voluntary and social connection of the property of small producers and consumers to the creation of powerful and independent regional and sector associations of cooperatives. The system provides social protection of the population in the sphere of consumption and can be defined as the targeted social self-help of shareholders.

Among all existing organizational and legal forms, the consumer cooperative[1] occupies an intermediate position between commercial (entrepreneurial) and non-commercial (public) structures, possessing the properties of both. In accordance with the amendments to the Civil Code of the Russian Federation[2], the consumer cooperative is recognized as a membership-based voluntary association of citizens or citizens and legal entities in order to meet their material and other needs carried out by combining property contributions by its members. In turn, by the decision of its members, an association can be transformed into a non-profit corporate organization of members (for example, an association or union) with the right to its own funds and a property complex formed by a mutual fund (an improper cooperative fund owned by the shareholders). The cooperative also creates its own development and mutual aid funds through the irretrievable regular membership dues of shareholders. The main governing bodies of the cooperative are the supreme (general meeting of shareholders with one vote for each), the representative (board approving target expenses), the control (audit commission), and the executive (board or chairman of the board). The state cannot interfere in the cooperative's on-farm activities; it is also inaccessible to creditors and bailiffs. Cooperative areas that can create a consumer cooperative throughout the country do not need state registration. The organizers of a cooperative (corporations of member-shareholders), which fully control its activities, must conscientiously, without violating the rights of shareholders, take care of their consumer benefits while increasing surpluses for themselves

1 It operates in accord with the Civil Code of the Russian Federation and the Federal Law of June 19, 1992 No. 3085-1 „On Consumer Cooperatives (Consumer Societies, their Unions) in the Russian Federation" (Federal Law 3085-1). This corresponds to the cooperative principles of the International Cooperative Alliance (ICA).

2 Article 123.2 „Basic Provisions on Consumer Cooperative" of the Civil Code of the Russian Federation as amended by Federal Law of May 23, 2016 N 146 and Article 123.1. „The main provisions on non-profit corporate organizations" in the wording of the Federal Law of 07.02.2017 N 12-FZ.

and their shareholders, observing the international cooperative moral foundations of economic activity: honesty, openness, and social responsibility.

Modern Russia's consumer cooperation as an independent socio-economic and political phenomenon has obvious features: it is united by the system of the Central European Union of the Russian Federation; is a regional phenomenon; it focuses on supporting national traditions and preserving the traditions of identity; it exists as an exclusive diversified structure; it provides training for the system through its own higher and secondary specialized educational institutions; it has the economic effect of activities with a pronounced social significance; it has significant unclaimed innovation potential; and it is used as a basis for informal business. In contrast to global trends, as practice shows, it is able to maintain its position in a period of an unstable economic and socio-political situation.

Cooperative property is in constant development, it reacts flexibly to changes in the system of economic relations, allows overcoming the differences in the interests of employees and owners, has the potential to create new jobs and protect productive employment. On a democratic basis, the Central European Union unites 2,300 consumer societies and 1.7 million shareholders in 70 regions of the Russian Federation. The activities of cooperation organizations are concentrated mainly in rural areas, which are actively involved in the formation of social infrastructure and the livelihood of the residents of 89,000 settlements.

Consumer cooperation organizations employ 130,000 people across the country. The Tsentrosoyuz system includes more than 4,600 production shops, 38,300 retail outlets, 4,700 catering establishments and 10,521 receiving and procurement centers. The total volume of activities of the Tsentrosoyuz organizations for 2017 exceeded 217 billion rubles (the turnover of wholesale and retail trade is more than 145 billion rubles)[3].

An analysis of the total volume of the consumer cooperation's activity over the past 9 years (2008-2017) suggests that it has a constant slight upward trend and averaged 1.0% per year with an overall slow improvement in the quality of the business environment in the Russian Federation (GDP growth rates of 5.2% and 1.5% in 2008 and 2017, respectively. Note that the growth rate of gross domestic product in 2018 rose to 2.3%)[4].

In the system of consumer cooperation, tendencies to increase the level of activity concentration with its predominance in the European part of the Russian Federation have been outlined. More than half of consumer

3 The official site of the Central European Union of the Russian Federation, <http://rus.coop/ru/articles/potrebkooperatsiya-spasaet-ot-bednosti/>, [accessed: 21.06.2019].

4 The official site of World Finance, <http://global-finances.ru/vvp-rossii-po-godam/>, [accessed: 21.06.2019].

cooperation enterprises are concentrated in three federal districts of the Russian Federation: the Volga, Central, and North-Western. In the aggregate amount of activity, they accounted for 66.1%. Districts vary greatly in the proportion of people employed in the enterprises of the system; while in the Volga Federal District 36.8% of all the employed work in consumer cooperation, in the Far East, it is several times less at 3.3% (Table 1).

Table 1. Consumers activity indicators for the Federal districts of Russia in the overall performance of the Tsentrosoyuz system of the Russian Federation for 2008-2017 (%)

Consumers	Tsentrosoyuz	Share of consumer unions of the Federal district[5] in the activities of the Tsentrosoyuz system of the Russian Federation							
		1	2	3	4	5	6	7	8
Number of shareholders in thousands of people.	**4154/ 1700**	**(by Tsentrosoyuz 2.5 times)**							
2008	100	27.6	13.9	11.2	30.9		4.9	9.6	1.8
2017	100	**20.7**	9.5	10.0	4.6	**37.4**	5.7	5.1	2.3
Total volume of activity in billions of rubles	**203.4/ 217.2**	**(by Tsentrosoyuz annual ↑ at 1%)**							
2008	100	32.1	17.9	16.8	9.5		6.2	12.5	3.7
2017	100	**36.8**	15.7	13.6	4.4	1.4	5.9	11.2	3.4
Number of employees in thousands of people	**272.3/ 130.0**	**(by Tsentrosoyuz ↓ 2.0 times)**							
2008	100	31.9	17.1	14.1	11.9		5.8	13.3	3.5
2017	100	**30.3**	14.3	12.2	5.3	3.0	6.0	12.6	3.3

Such a distribution of the number of enterprises as a whole fits into the overall picture of Russia's population distribution and its economy according to objective reasons: the initial difference in the resource and entrepreneurial

5 Federal district: (1) Volga (FD), (2) Central (FD), (3) North-West (North Caucasus Federal district), (4) the South (SFD), (5) North Caucasus (North Caucasus Federal district), (6) Ural (UFD), (7) the Siberian (Sibfo) and (8) far East (Dalfo).

potentials of the regions, due to the regional and sector specialization of the economy; regional policies to achieve self-sufficiency; the specifics of the formation of effective demand and the state of the internal regional market.

Consumer groups of the Central European Union of the Russian Federation according to the average total volume of activities for 2008-2017 are presented in Table 2.

The task of the rational grouping of organizations in the Tsentrosoyuz system of the Russian Federation was solved by the method of clustering objects, which most clearly reflects the features of multidimensional analysis in terms of their classification and was confirmed by the grouping of objects according to aggregate activity. The analysis of the group socio-economic indicators of the development of the Russian Federation's Tsentrosoyuz system led to the conclusion about the correctness of the resulting groups, since the average values for the analyzed aggregate's amount of activity increases from group to group: large – from 3.5 billion rubles and more; average – from 1.0 to 3.5 billion rubles; small – less than 1.0 billion rubles.

Table 2. Groups of consumers of the Central European Union and the Russian Federation according to the average total activity for 2008-2017.

The group interval of the shops of Tsentrosoyuz in Russia by the total volume of activity, millions	The average for the group		Tempo changes 2017/2008, %	
	number of consumer unions	total volume of activity, millions	number of consumer unions	the total volume of activities
3500.1-и выше				
2008	22	5926.6		
2017	24	**7117.5**	109.0	120.1
1000.1-3500.0				
2008	30	2008.8		
2017	22	1899.1	73.3	94.5
100.0- 1000.0				
2008	17	441.7		
2017	18	516.9	105.9	117.0
Tsentrosoyuz RF				
2008	69	2863.1		
2017	64	**3752.9**	92.8	131.0

Table 3. Average cumulative turnover of the activity of large consumer unions in Federal Districts in the overall performance of the Tsentrosoyuz system of the Russian Federation for 2010-2017

Number of large consumer unions in the Tsentrosoyuz system of the Russian Federation, including:	от 3.5 billion rubles	Tsentro-soyuz of Russia	Indicators by the Federal districts							
			PFD	CFD	SZFO	SFD	SKFO	UrFO	SibFO	DalFO
2010										
- number of organizations	ед.	22	**7**	6	5	1	-	1	2	-
- scope of major activities	billion rubles	147.8	**60.0**	28.7	32.7	6.7	-	5.8	14.2	-
- the share of large unions in the volume of activity of the district	%	65.0	**80.0**	67.9	85.8	45.4	-	42.4	50.0	-
- average turnover of large unions	million	**6718.2**	**8571.4**	4783.3	6540.0	6700.0		5800.0	7100.0	
2017										
- number of organizations	ед.	24	**8**	7	4	1	-	2	2	-
- scope of major activities	billion rubles	170.8	**81.3**	34.2	26.1	6.3	-	9.4	13.5	-
- the share of large unions in the volume of activity of the district	%	71.1	**86.4**	83.2	77.2	54.0	-	59.7	60.5	-
- average turnover of large unions	million	**7117.5**	**10157.8**	4887.1	6534.0	6312.0	-	4713.0	6737.5	-
Dynamics of the total turnover of activities for 2010-2017	%	115.6	**117.2**	119.1	79.8	94.0	-	162.1	95.1	-
Dynamics of the average turnover of large unions for 2010-2017	%	106.0	**135.0**	102.2	100.0	94.2	-	81.3	94.9	-

Table 4. Average indicators of the structure of the total volume of activity for the corresponding group of consumer unions for 2008 and 2017, %

Interval of the group of consumer unions of the Russian Federation's Tsentrosoyuz on the total volume of activity, millions of rubles (number of consumer unions per group in 2008, 2017)	Average indicators of the structure of the total volume of activity for the corresponding group of consumer unions by year																	
	Retail trade turnover, %			The turnover of public catering, %			Wholesale turnover, %			Purchase of agricultural products and raw materials, %			The volume of industrial production, %			Paid services to the population and other activities, %		
	2008	2017	deviations (+,-)	2008	2016	deviations (+,-)	2008	2017	deviations (+,-)	2008	2017	deviations (+,-)	2008	2017	deviations (+,-)	2008	2017	deviations (+,-)
1	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**	**12**	**13**	**14**	**15**	**16**	**17**	**18**	**19**
3500.1- and above (22; 24)	**71.9**	**66.5**	**-5.4**	6.1	6.1	-	4.9	**5.4**	+0.5	7.7	**8.7**	**+1.0**	8.5	9.2	+0.7	0.9	**4.08**	+3.18
1000.1-3500.0 (30; 22)	67.7	64.7	-3.0	6.0	6.4	+0.4	3.4	2.84	-0.56	9.9	9.54	-0.36	11.1	9.97	- 1.13	1.9	**6.64**	+4.74
100.0-1000.0 (17; 15)	65.1	63.56	-1.54	**4.5**	**5.7**	**+1.2**	5.3	4.82	-0.48	**12.3**	**12.3**	-	11.4	8.72	- 2.68	2.4	**12.81**	+10.41
Average of the Russian Federation's Tsentrosoyuz (69; 64)	**69.3**	**63.9**	**-5.4**	**6.1**	**6.3**	**+0.2**	**4.7**	**4.54**	**-0.16**	**8.4**	**10.6**	**+2.2**	**9.5**	**9.5**	-	**1.9**	**5.28**	**+3.38**

The number of large consumer unions in the Tsentrosoyuz system of the Russian Federation with a total income of over 3.5 billion rubles reached 24 units in 2017. Moreover, in the Volga Federal District, they accounted for 86% of the total volume of consumer cooperation activities; in the Central Federal District – 83%; in the North-West Federal District – 77% (Table 3). It is obvious that the processes of concentrating the activities of consumer cooperation organizations are growing in the Volga Federal District. The average aggregate turnover of the organizations of the Volga Federal District amounted to more than 10.0 billion rubles (5.0% of the annual growth over the last 7 years). A separate assessment of the activities of these organizations is required in terms of regional and system-wide development.

Table 4 presents the average structure of the total volume of activity or industry diversification of activities according to groups of consumer unions in the years 2008-2017. Obviously, the general development trends within the types of services provided are generally preserved, although structural specifics are noticeable in large and small consumer unions: wholesale turnover is growing dynamically in consumer unions with a volume of activity starting at 5 billion rubles; the diversity and increase in the volume of sales of paid services to the population falls on small consumer unions.

Diversification of the system is one of the most complex and promising forms of concentration development. Diversification is estimated by economists as a new evolutionary form of capital development, which arises with the aim of obtaining additional advantages in comparison with the capabilities of individual enterprises operating independently. Diversified capital is a new complex system that has specific properties, such as high turnover and mobility.

The main type of diversification, which is currently being actively implemented in the consumer cooperation system of the Russian Federation, is either conglomerate or unrelated diversification, which consists in joining new industries and activities that have high profitability: tourism, agriculture, hotel business, construction, hunting, fishing, and fish processing, etc.

New strategic interests and innovations in the development of the cooperative sector can be considered to be:

– meeting new needs, including individual ones;
– the emergence of new motives for joint activities in the field of personal relationships;
– protection, restoration, and transformation of the environment;
– the emergence of new high-precision small-sized equipment;
– the general trend to downsize giant enterprises, creating hundreds of small cooperative and individual production units around the main enterprise;

– the rational use of hired labor in agricultural cooperation and an increase in the share of expenditures on housing, energy, equipment in credit cooperatives, etc.

The difference in the steadily growing and falling positions in the areas of diversified activity as a percentage of the total volume of activity by consumer unions in the Russian Federation's Tsentrosoyuz is presented in table 5.

Diversification is the most effective way to develop the economy of consumer cooperation in modern conditions, and it involves the integration of diversified enterprises and the creation of integrated complexes.

Table 5. Comparative characteristics of indicators of the diversified activity of consumers with average values by the Russian Federation's Tsentrosoyuz system for 2013 and 2016

Name of consumer unions with indicators significantly higher than the average for the Tsentrosoyuz system of the Russian Federation (deviations)	The average percentage of diversified activities of the Tsentrosoyuz of the Russian Federation for 2013 and for 2016 (in % of the total volume of activities)	The name of the Potrebsoyuza with rates significantly below the average for the system of the Tsentrosoyuz of the Russian Federation (deviations)
Adygei 87.8 (20.6) The Kalmyk of 95.8 (28.6) Sverdlovsk 83.2 (16.0) Magadan is 94.5% (27.3)	**Retail trade turnover** **67.2** **63.9**	Astrakhan is 41.5 (-25.7) Dagestan 32.7 (-34.5) Kabardino-Balkar 43.6 (23.6) North Ossetian 47.4 (-19.8) Tatarsky 48.3 (-18.9) Tomsk 49.9 (-17.3) Seaside fisherman 48.4 (-18.8) Penza 50.7 (-16.5)
Belgorod 11.7 (5.5) Murmansk 12.0 (5.8) Mari 11.7 (5.5)	**The turnover of public catering** **6.2** **6.3**	Kabardino-Balkar 2.3 (-3.9) North Ossetian 1.0 (-5.2) Seaside 2.5 (-3.7) Kamchatka 0.8 (-5.4)
Pskov 15.21 (10.98) Dagestan 16.66 (12.42) Udmurt 15.77 (11.54) Tyumen North 12.54 (8.30) Amur 14.87 (10.64)	**Wholesale turnover** **4.23** **4.5**	Ivanovsky 0.08 (-4.16) Karelian 0.13 (-4.10) Tomsk 0.16 (-4.08)

Astrakhan is 21.7 (12.3) Kabardino-Balkar 43.3 (33.9) Karachay-Cherkess 36.0 (26.6) North Ossetian 31.0 (21.5) Tatar of 33.1 (23.7 per) Penza 19.6 (10.2) Saratov 18.4 (9.0)	**Purchase of agricultural products and raw materials** **9.4** **10.6**	Tula 2.1 (-7.3) Yakut 1.9 (-7.5) 1.1 Kamchatka (-8.3) Karelian 2.4 (-7.0) Adygei 2.4 (-7.0) Russian 2.4 GHz (-7.0) Amur 2.4 (-7.0)
Krasnodar 16.0 (7.7) Volgograd 18.1 (9.8) Penza 21.0 (12.7) Seaside fisherman 15.5 (7.2) Kamchatka 17.4 (9.1)	**The volume of industrial production** **8.3** **9.5**	Yaroslavsky 2.6 (-5.7) Stavropol 2.3 (-6.0)
Dagestan 19.17 (17.25 in) Tuvan 15.39 (13.47) Kamchatka 11.08 (9.16) Republic Of Altai 5.96 (4.05) Murmansk 5.74 (3.82) Astrakhan 5.34 (3.43) Stavropol 4.97 (3.05)	**Paid services to the population** **1.92** **5.3**	Orlovsky 0.26 (-1.65) Yaroslavsky 0.28 (-1.63) Penza 0.24 (-1.68) The North of Tyumen 0.05 (-1.87) Khabarovsk 0.12 (-1.80) Sverdlovsk 0.32 (-1.60) Zabaikalsky 0.26 (-1.66)

In the areas of socio-economic development of consumer cooperation, formulated according to the concept of the development of the system of consumer cooperation for 2017-2021, the sector education system is being updated due to its new role and importance. According to the data of the International Cooperative Alliance, no other country in the world has anything analogous to the educational system operating in the Russian consumer cooperatives. Established at the beginning of the 20th century, it provides training at various levels for approximately 10,000 organizations combining different branches of activity for enterprises, resulting in a synergistic effect that extends not only to the system's economic but also social activity. The conceptual directions of the socio-economic development of consumer cooperation include those defined in the concept of development of the system of consumer cooperation for 2017–2021 (approved by the Decree of the Council of the Central European Union of the Russian Federation on September 14, 2016).

The cooperative sector of the Russian Federation is stepping up work to create its own common scientific and technological space based on the generation of knowledge (commonality and complementarity of scientific schools and research organizations); innovative infrastructure; financial support to determine the desired state of the system through the use of innovative potential; identifying potential consumers of innovative products; coordinating the strategic interests of science, education, business and the

local community; linking the innovative development program of the cooperative sector with the regional strategy of small and medium-sized businesses in the overwhelming number of Russian regions. Today in the system of cooperative education there are two network universities: the Russian University of Cooperation (Mytishchi, Moscow Region), and the Siberian University of Consumer Cooperation (Novosibirsk) with a branch network. There are also 48 branch educational organizations for secondary vocational education. The corps of students is nearly 60,000; the number of full-time teachers is about 6000, among whom over 200 are doctors of science and more than 1200 are candidates of science.

The goals and objectives of the educational system of consumer cooperation include:

– developing and replicating competitive programs and services in the education network for the staffing of small and medium-sized businesses, including consumer cooperation;
– developing an optimal infrastructure, an ecosystem for creating cooperative entrepreneurship;
– ensuring leaders access to the cooperative movement, personnel reserve and personnel for creating the latest competitive competence development programs;
– expanding the scale of youth entrepreneurship in the form of a cooperative movement and an increase in the share of graduates in the status of an entrepreneur or the organizer of a cooperative;
– ensuring the effectiveness and sustainability of educational organizations of the Central European Union system of the Russian Federation through integration and participation in the implementation of government programs.

A special place is occupied by the problem of developing one's own fundamental science, which is necessary for perceiving other people's discoveries, accumulating one's own reserves in relevant areas of knowledge, and creating human potential for applied research and development. All this favors the creation of a saturated methodical environment and the combination of foreign and domestic discoveries, which may be critical for the commercialization of the latter by giving them unique qualities. Having our own results in the field of research and development opens up the prospect of real technological cooperation with foreign companies, up to the joint commercialization of different parties, but with complementary discoveries.

It was revealed that to ensure the development of the economy as a whole, it is necessary that the level and quality of science and education of labor resources coincide with the social demands of the region's economy. In this connection, the Cooperative Education Model is being updated as the

„network multilevel educational complex," creating an innovative educational space in the regions where the system of consumer cooperation is looking for new formats for its own development.

The content of the priority tasks of the Roadmap for the implementation of the Concept of Educational Organizations of the System of the Central European Union of the Russian Federation are:

1. Modernization of sector secondary special and higher educational institutions in the interests of developing small, medium-sized and cooperative business organizations (forming the Strategic Development Team of University and Vocational Education of the Tsentrosoyuz of the Russian Federation and deploying expert-design works / R & D on priority areas; forming a public model of managing education for consumer cooperation; restoring the status of the „sector education system" in the documents of the Ministry of Science and Higher Education of Russia, Rosobrnadzor).

2. Improving the public quality and economic efficiency of sector education (managing the "bridging the gap in quality and efficiency levels" of educational organizations and introducing a program of sector monitoring of graduate quality and management efficiency of higher and secondary specialized educational institutions of consumer cooperation; demonstrating the results of implementing international standards for cooperative business in the International Cooperative Alliance, WSI Movement, and Centroso Partner Companies according the Russian Federation's law through the activities of educational organizations of consumer cooperation);

3. Development of the student cooperative entrepreneurial movement (forming the Roadmap of the youth investment policy of the Central European Union of the Russian Federation; improving the effectiveness of the industry youth championship-movement and managing the influx of talents into the system of cooperative education and cooperation; opening an acceleration platform for communication, investment support for youth initiatives for cooperation and the "Youth Forum of Youth Cooperative" movement involving Centrosoyuz Russian partners, the federal executive, the legislature, and the deployment of activities for the Central Council of Student teams).

An analysis of the realities of the economic state of the consumer cooperation system showed that the process of formation and development of market relations in the Russian Federation as a whole had a negative impact on its „tempo" indicators. Under these conditions, it seems necessary to develop an effective methodological approach to ensuring the economic security of the system of consumer cooperation through the reservation of resources to overcome the variability of the external environment. At the same time, by economic security, we understand the state of the system of consumer

cooperation able to guarantee its prospective competitiveness in the conditions of potential threats to the external environment.

Under modern resources, the creation of system sustainability is considered to be: the involvement of more and more broad layers of employees of the system itself, as well as residents of the service area, in creative activity through stimulating individualized requests; the virtualization of cooperative values in the Internet space; creating a unified information database (a system of indicators and threshold values) for monitoring threats and the damage caused to the system's economy; coordination and methodological management of the activities of consumers unions on issues related to crisis management; implementation of policies for the financial recovery of consumer economies; and creating developmental programs for problematic consumer societies, etc.

Conclusion

Thus, from the assertions made, it follows that the obstacles in the development of consumer cooperation have a complex, systemic nature, which complicates their elimination or the reduction of their influence and requires an adequate approach. It appears that in order to ensure the positive dynamics of the development of consumer cooperation in Russia, the Tsentrosoyuz system of the Russian Federation should expand and improve many factors for its development that would serve as an evolutionary form of capital transformation and as a basis for creating new economic relations.

The experience of the functioning of the system of consumer cooperation in Russia is appropriate to consider as a unique form of management, and positive developments are possible to apply in all types of business.

Tomasz Bąkowski

Cooperatives as Entities Performing Public Tasks with Particular Emphasis on Social and Energy Cooperatives

The implementation of public tasks is the ratio legis of various state structures, in particular public administration. However, today, entities outside the public administration system, including cooperatives, are increasingly involved in the implementation of public tasks. Cooperatives, as voluntary associations of persons, conducting economic activity in the interest of their members, due to a specific legal, organizational and functional structure, have the ability to "naturally" combine participation in business transactions with the implementation of public tasks. Cooperatives, in addition to traditional, complementary to business, social and educational-cultural activities conducted for the benefit of their members and their environment, support public administration in the implementation of other public tasks. The legislator introduces specific legal solutions, providing the basis for the creation and operation of cooperatives largely focused on the implementation of their organizational and statutory goals in a specific area of social and economic life, both through conducting business activity and, or even primarily to implement public tasks. Such particularly strong involvement in the implementation of public tasks illustrates the activities of social cooperatives and energy cooperatives. Currently, in the latter case, efficiency in the implementation of public tasks largely depends on making significant changes to the applicable legal order.

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Introduction

In the light of the current legal order and contemporary socio-economic conditions, the implementation of public tasks falls within the scope of various state structures. The tasks that are aimed at satisfying the current collective needs of society are entrusted for the implementation to the broadly understood public administration (government and self-government administration). Entities outside the public administration system can be also, and they actually are, involved in this activity. This is due to appropriate legal regulations supporting the process of building a civil society for 30 years

(not without difficulties[1]), but also results equally from the „economic calculation". Entities outside the public administration system that perform public tasks include primarily foundations and associations, in particular those with the status of public benefit organizations. Entrepreneurs also cooperate in the implementation of public tasks, using, among others, legal mechanisms for the privatization of municipal services, education or activities involving the construction and operation of infrastructure facilities.

Since many years a visible contribution to the implementation of these tasks has been also made by entities taking the legal form of a cooperative. The essence, organization and goals of cooperatives are reflected, inter alia, in the objective and subjective scope as well as methods of cooperative participation in the implementation of public tasks. This in turn is a derivative of the legal regulation of the organization and functioning of cooperatives.

Cooperatives operating on the basis of general provisions

The basic normative act regulating the organization and functioning of cooperatives, which is the Act of 16 September 1982 – Cooperative Law[2] (hereinafter: „cooperative law"), provides that cooperatives, in accordance with art. 1 § 1 of this act, are voluntary associations of an unlimited number of persons with variable personal composition and variable share fund, which conducts joint economic activity in the interest of their members. According to art. 1 § 2, in addition to economic activities, a cooperative may also conduct social, educational and cultural activities for the benefit of its members and their environment. Therefore, this very general legal basis provides all cooperatives, regardless of the subject of economic activity that is their obligatory element, with the possibility to undertake and conduct social, educational and cultural activities which from the perspective of the scope of activity of both central and local administration are undoubtedly included in public tasks.

From the perspective adopted in this study, special attention should be paid to labor cooperatives provided for in the cooperative law, including their special types such as the cooperatives of the disabled, the cooperatives of blind persons or the labor cooperatives of folk and artistic handicraft.

The whole category of labor cooperatives seems to be more or less different from other cooperative types due to the shift of focus from „conducting

1 M. Stec, M. Mączyński, *Wprowadzenie*, [in:] *Partycypacja obywateli i podmiotów obywatelskich w podejmowaniu rozstrzygnięć publicznych na poziomie lokalnym*, ed. M. Stec, M. Mączyński, Warszawa 2012, p. 13 and next.

2 Official Journal of Laws „Dziennik Ustaw" 2018, item 1285.

joint business activity" primarily focused on making profits[3] to providing workplaces for cooperative members[4]. Thus, as it is pointed out in the literature, in the latter case „profit is not the main, but a side goal of labor cooperatives"[5]. On the other hand, due to its strong axiological and anthropological background, work is perceived as one of the basic aspects of human existence[6] and has a significant impact on social life, which makes it the subject of public administration's interest. Care over work and its related phenomena, including broadly understood labor protection, becomes a public task in a way. The normative confirmation of this thesis in the legal system is the establishment of a separate department of government administration responsible for matters related to work[7]. On the other hand, the substantive perspective is regulated, among others, by the provisions of the Act of 20 April 2004 on employment promotion and labor market institutions[8]. This Act, in accordance with its art. 1 p. 1, defines the tasks of the state in the field of employment promotion, mitigating the effects of unemployment and professional activation[9].

3 Compare the decision of the Court of Appeal in Gdańsk of 22 October 2018 (case III AUa 283/2018), Lex nr 2609021, or the decision of the Court of Appeal in Białystok of 25 April 2018 (case III AUa 234/2018), Lex nr 2546194.

4 See: P. Zakrzewski, *Cel spółdzielni*, „Kwartalnik Prawa Prywatnego" No. 1, 2005, p. 79.

5 Ibidem.

6 See: Jan Paweł II, *Laborem exercens*, Warszawa 1982, p. 6.

7 See: Art. 5 p. 16 of the Act of 4 September 1997 on government administration departments (consolidated text: Official Journal of Laws „Dziennik Ustaw" 2018, item 762, with later amendments). In accordance with art. 21 p.1 of this act, the labor department is responsible of the following matters: 1) employment and preventing unemployment; 2) employment relations and working conditions; 3) employee remuneration and benefits; 4) collective labor relations and collective disputes; 5) trade unions and employers' organizations.

8 Consolidated text: Official Journal of Laws „Dziennik Ustaw" 2018, item 1265, with later amendments.

9 According to art. 1 p. 2 of the act on employment promotion and labor market institutions, the tasks of the state in the field of employment promotion, mitigating the effects of unemployment and professional activation are available through the labor market operating for the purpose of: 1) ensuring full and productive employment; 2) developing human resources; 3) achieving high quality work; 4) strengthening social integration and solidarity; 5) increasing mobility on the labor market.

Already in the light of the only initially indicated statutory solutions, there should be no doubt that labor cooperatives, in their various forms, participate in the implementation of public goals and tasks assigned to the department of government administration under the term „work" and they really support the tasks specified in the act on employment promotion and labor market institutions.

To an even greater extent and in additional dimensions, public tasks are carried out by the aforementioned special types of labor cooperatives, such as the cooperative of the disabled and the cooperatives of blind persons as well as the cooperatives of folk and artistic handicrafts. The cooperative of the disabled and the cooperative of blind persons are mainly involved in the professional and social rehabilitation of the disabled and blind persons through work in a jointly run enterprise, which directly results from art. 181a of the cooperative law. The same provision determines the goals of the cooperatives of folk and artistic handicrafts which are creating new and cultivating traditional values of material culture, as well as organizing and developing folk and artistic handicrafts, art and the artistic industry.

The fact that the cooperative formula, which assumes that the cooperative is not only an entrepreneur carrying out business activity but also an entity performing public tasks, has not been exhausted and has not purely historical dimension is proved by regulations introducing to the legal system new types of cooperatives, including those which objectives lead to the implementation of public tasks as in case of social and energy cooperatives.

Social cooperatives

Initially, the institution of social cooperatives was introduced to cooperative law by the provisions of the Act of 20 April 2004 on employment promotion and labor market institutions[10]. Then in 2006 it was regulated in a separate Act of 27 April 2006 on social cooperatives[11]. The reasons for the separate statutory regulation of the organization and functioning of social cooperatives include, inter alia, their purpose and tasks, as well as the need to support their activity with public funds[12].

In the literature it is often indicated that Polish legal regulations concerning the organization and functioning of social cooperatives are modeled on the solutions adopted in Italian law, in which these cooperatives constitute

10 Official Journal of Laws „Dziennik Ustaw", No. 99, item 1001.

11 Consolidated text: Official Journal of Laws „Dziennik Ustaw" 2018, item 1205.

12 Z. Niedbała, *Zakładanie i wspieranie spółdzielni socjalnych jako działania ograniczające bezrobocie*, [in:] *Bezrobocie i polityka zatrudnienia*, ed. Z. Góral, Warszawa 2013, pp. 251-252.

one of the forms of a social enterprise[13]. The social cooperatives, pursuant to art. 2 p. 1 of the above-mentioned act, run a joint enterprise based on the personal work of members and employees of the cooperative. It should be emphasized that the aim of work is not only to earn money, but also, pursuant to art. 2 p. 2, to satisfy other needs such as the social reintegration of the cooperative members and employees, who are often unemployed, jobseekers, disabled, trying to become independent (leaving a foster family, a family orphanage, a care and educational institution or a regional care and therapeutic institution). The act also provides for the possibility of working in a social cooperative by persons sentenced to restriction of liberty. Also in this case the work is primarily aimed at the social reintegration of convicts.

The term „social integration" shall be understood in this context as activities aimed at rebuilding and maintaining the people's ability to participate in the life of the local community and to perform social roles in the place of work, residence or stay. It should also be noted that the activities of the social cooperative for the benefit of these people are not carried out as part of its business activity. In addition, in accordance with art. 2 p. 3 of the act on social cooperatives, such cooperative may also conduct social, educational and cultural activities for the benefit of its members, employees and their local environment, as well as socially useful activities in the sphere of public tasks. In the latter case their activity is becoming similar to the activities of entities with the status of non-governmental organizations.

The activities of a social cooperative for the benefit of social and professional reintegration, as well as the activities specified in the above mentioned art. 2 p 3 of the act on social cooperatives, is not qualified under the applicable law as an economic activity. This, in addition, strengthens the status of social cooperatives as entities performing public tasks. On the other hand, in the financial dimension, the public nature of the tasks performed by social cooperatives is confirmed by the statutory possibility of supporting the activities of these cooperatives from the state budget or the budget of the local government unit, including subsidies, loans and others. An original example of supporting social cooperatives by local government authorities comes from Gdańsk. The Dalba Social Cooperative has been provided with a room in the building of the City of Gdańsk where the disabled cooperative members can run a bistro bar[14].

13 M. Gersdorf, *Spółdzielnie socjalne*, [in:] *Z zagadnień współczesnego prawa pracy. Księga jubileuszowa Profesora Henryka Lewandowskiego*, ed. Z. Góral, Warszawa 2009, p. 452.

14 *Niepełnosprawni uruchamiają bistro w Urzędzie Miasta Gdańska*, <https://www.pfron.org.pl/komunikaty-z-regionu/szczegoly-komunikatu/news/niepelnosprawni-uruchamiaja-bistro-w-urzedzie-miasta-gdanska/#content>, [accessed: 10.06.2019].

It should be noted that the doctrine of law also strongly emphasizes the non-commercial nature of social cooperatives, which makes this type of cooperative a special instrument for the implementation of public tasks. A social cooperative is rightly treated as an institution combining economic and social goals[15]. As pointed out by M. Gersdorf, the act on social cooperatives, „assumes the implementation of the principle <<work instead of allowance>> and thus falls under the policy of the state implementing the workfare doctrine"[16].

Energy cooperatives

Energy cooperatives are the second, relatively recently introduced to the Polish legal order, type of cooperatives clearly involved in the implementation of public tasks. The legal regulation of energy cooperatives was introduced into the Act of 20 February 2015 on renewable energy sources[17] by the provisions of the Act of 22 June 2016 amending the Act on renewable energy sources and certain other acts[18]. In the light of the cited provisions, the energy cooperative is a cooperative within the meaning of the cooperative law that is mainly involved in the production of: a) electricity in the installations of the renewable energy sources with a total electrical capacity of no more than 10 MW or b) biogas in the installations of the renewable energy sources with the annual capacity of no more than 40 million m3 or c) heat in the installations of the renewable energy sources with a total capacity not exceeding 30 MW – and keeping balance between the demand and the distribution or trading of electricity, biogas or heat for the own needs of the energy cooperative and its members, connected to the area-defined power distribution network with a voltage lower than 110 kV or gas distribution or heating network, in the area of rural or urban-rural communes within the meaning of the provisions on public statistics.

The above definition of an energy cooperative (which raises significant reservations that will be presented later in this study), and thus the determination of its subject and scope of activities, have been changed by the amendment of the act on the renewable energy sources of 2018[19]. Currently, an energy cooperative is a cooperative within the meaning of the act of 16

15 E. Staszewska, Środki prawne przeciwdziałania bezrobociu, Warszawa 2012, p. 248.

16 M. Gersdorf, *Spółdzielnie*…, op. cit., p. 450.

17 Consolidated text: Official Journal of Laws „Dziennik Ustaw" 2018, item 2389, with later amendments.

18 Official Journal of Laws „Dziennik Ustaw" 2016, item 925.

19 The Act of 8 June 2018 on the amendment of the act on the renewable energy sources and some other acts, Official Journal of Laws „Dziennik Ustaw" 2018, item 1276.

September 1982 – cooperative law which is mainly involved in the production of electricity, biogas or heat in the installations of the renewable energy sources and keeping balance between the demand for electricity, biogas or heat, solely for the own needs of the energy cooperative and its members, connected to the area-defined power distribution network with a voltage lower than 110 kV, gas distribution network, or a heating network. As indicated above, in the current legal system, the scope of operations of the energy cooperative has excluded the possibility, inter alia, of energy distribution or energy trade.

The amendment, by narrowing the subject of the cooperative activity to the production of electricity, biogas or heat, limited or (depending on the approach to the social importance of fuel and energy production) even excluded the possibility of the energy cooperation's participation in the implementation of public tasks. There is no doubt that in the current legal system the distribution of electricity is considered a public task. This is confirmed, among others, by art. 7 of the Act of 8 March 1990 on the commune self-government[20] that determines the commune's own tasks (which are essentially public tasks) including those aimed at satisfying the collective needs of the local community, as well as supplying electricity and heat to the commune's inhabitants.

As it has been already mentioned, the initial statutory definition of the energy cooperative and consequently its scope of activity, including distribution activities, could raise fundamental doubts. The legal definition of an energy cooperative has limited the scope of the potential recipients of the electricity, biogas or heat produced by the cooperative to the cooperative itself and its members. Both previous and current legal solutions in the discussed area give grounds for recognizing that a specific paradox has occurred as a result of the described legislative measures. This paradox is that the energy cooperatives, by acquiring their separate legal regulation and becoming a new specific type of a cooperative, lose to a large extent the distribution possibilities because of the liquidation of the market of external recipients, and in the current legal status they completely lose the possibility to distribute fuels and energy.

It should be explained that before the amendment of the act on renewable energy sources of 22 June 2016 introducing legal regulation of energy cooperatives, such cooperatives could operate and act on the basis of general provisions, so on the basis of the cooperative law. The first such cooperative in Poland was Spółdzielnia Nasza Energia established in the Zamość district in Lublin Province. An integrated agricultural biogas plant was built

20 Consolidated text: Official Journal of Laws „Dziennik Ustaw" 2019, item 506.

there using existing agrarian conditions[21]. In the cooperative law regime, the energy cooperative was not limited in the scope of energy and fuel recipients, and it should be remembered that both the production and transmission, storage and trade of fuels and energy was then and is currently a licensed activity, the rules and conditions of which are governed by the Act of 10 April 1997 – Energy Law[22]. There are also appropriate exemptions provided to the obligation to obtain licenses which relate, inter alia, to the production of electricity from agricultural biogas.

The current legal position of energy cooperatives makes us reflect on the need to reformulate them. Given the current trends to at least partially shift the economy to the use of energy from renewable sources and to use the legal form of an energy cooperative in order to produce and supply ecological fuels and energy, the postulates of changes in applicable law seem sufficiently justified. It is worth mentioning that, for example, in Germany in recent years there has been an intensive development of energy cooperatives, which total number at the end of 2013 was almost 900[23]. It should also be noted that German cooperatives not only produce, but also provide fuel and energy to consumers through their own networks[24].

Restoring the possibility of distribution fuels and energy to the scope of operation of energy cooperatives and enabling their acquisition by members of the local community who are not members of the cooperative (as it happens - maintaining the right proportions – f. ex. in case of distribution of dairy cooperative products) in many cases would create an opportunity to support the commune in the implementation of public tasks which include meeting the needs of the local community in the field of energy supply.

The postulated changes in the current legal order could not, of course, be limited only to the modification of the statutory definition of an energy cooperative. They should also refer to the conditions currently arising from the provisions of the energy law which regulate production and distribution

21 gramwzielone.pl, *Spółdzielnia Nasza Energia. Powstaje pierwsza w Polsce spółdzielnia energetyczna*!, <https://www.gramwzielone.pl/bioenergia/11409/spoldzielnia-nasza-energia-powstaje-pierwsza-w-polsce-spoldzielnia-energetyczna>, [accessed: 10.06.2019].

22 Consolidated text: Official Journal of Laws „Dziennik Ustaw" 2018, item 755, with later amendments.

23 Unia Producentów i Pracodawców Przemysłu Biogazowego, *Czy spółdzielnie energetyczne przyjmą się w Polsce*?, <https://www.cire.pl/pliki/2/upebi.pdf>, [accessed: 10.06.2019].

24 Z. Ginalski, *Spółdzielnie energetyczne*, <https://www.cdr.gov.pl/images/Radom/pliki/oze/spoldzielnie_energetyczne.pdf>, [accessed: 10.06.2019].

of fuels and energy in order to create a legal framework enabling energy cooperatives to operate in this area.

Conclusions

Due to the nature of this study and the place of its publication, the outline of key issues related to cooperatives as entities performing public tasks, presented above, was primarily aimed at confirming the belief that the issue indicated above deserves much more in-depth research. Thanks to them, it would be possible to answer the basic question about the organizational and functional phenomenon of the cooperative, which allows combining business activities with the implementation of public tasks. Combining these two areas of activity, which also deserves a deeper reflection, is possible even with such a distribution of emphasis, in which not business activities but the implementation of public tasks will have the priority.

Already on the basis of this synthetic study it can be argued that, in essence, cooperatives have this specific „something" that contributes positively to the performance of public tasks, in particular tasks in the field of administration's responsibility. It is also interesting that in the era of the dominance of the so-called third sector, which includes non-governmental organizations operating *pro publico bono,* such as foundations which are legal structures with ancient roots[25] that experience a peculiar renaissance at the moment, cooperatives, due to that phenomenon (still waiting for the in-depth analysis) are existing and developing. Cooperatives, which during the Polish People's Republic were perceived as a tolerated relic of capitalism[26], and after 1989 as an element of the bankrupt command and distribution economy being a legacy of the socialist system, today, as evidenced by the case of renewable energy sources, broaden their scope of activity by covering more and more new areas, in which they find not only new fields for conducting business activity but also opportunities to participate in the implementation of public tasks.

25 P. Suski, *Stowarzyszenia i fundacje*, Warszawa 2008, p. 317.

26 M. Gersdorf, *Spółdzielnie*…, op. cit., p. 451.

Dominik Bierecki

The *De Lege Ferenda* Propositions Regarding the Membership in the Cooperative in Poland

The article analysis the de lege ferenda propositions on membership in the cooperative in Poland. In this matter the article takes into account the Polish legal doctrine as well as foreign legal solutions. First, the article discuss cooperative member's rights. Secondly, the article contemplates the required by Polish law number of cooperative founders. Thirdly, the article considers the possibility of wide spreading the investing member category in Polish cooperative law. Fourthly, the article discusses the concept of the cooperative share and considers the character of shares transfer inter vivos. Finally, the article also postulates new regulations concerning the membership in credit unions, regarding the credit unions members common bond and submitting the membership declaration in electronic form.

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I. Introduction

The article contemplates the possibility of introduction into Polish law new solutions regarding the membership in the cooperative. The analysis carried out in the article, regarding the comparative study, shows the need for changes in the legal regulations of membership in the cooperative in Poland. The analysis is carried out also because in Polish legal practice membership in the cooperative is considered to be less legally and economically attractive then membership in other then cooperatives organizations that conduct business activity, i.e. commercial companies. The aim of the article is to propose new legal institutions and to contemplate the necessary changes in existing ones in order to

encourage the acquisition of membership in the cooperative and, consequently, influence the development of the cooperative movement in Poland by increasing the number of cooperatives and their members. In this regard the article firstly outlines the cooperative member legal situation as it introduces the rights that the member acquire with relation to the membership in the cooperative. Next, the article indicates propositions for new regulations that would lead to limiting the number of required cooperative founders. This propositions are introduced in the article with their reference to the open nature of cooperative membership.

Bearing in mind the importance of economic situation of cooperatives and their members, the article indicates propositions regarding the possibility of introducing into Polish cooperative law the regulation of investing members and also expanding Polish cooperative law regulation of transfer of cooperative shares *inter vivos*. The article explains the legal character of the investing member as well as members shares and their transfer and addresses issues concerning those legal institutions in reference to the nature of the cooperative.

Also, the article concerns membership in the credit union as increasing the number of credit unions members is crucial for their development. In the article the expansion of the scope of membership common bond is proposed as well as enabling membership in the credit unions of their members organizations and the possibility of submitting the membership declaration to the credit union in an electronic form.

II. Cooperative member's legal situation

Ex definitione cooperatives are corporate legal entities (art. 1 § 1 of 16th of September 1982 Polish Cooperative Act[1] – PCA)[2]. Due to the

1 Journal of Laws 2018 item 1285.

2 The corporate nature of a cooperative is adopted in legal systems around the world and is emphasized by the definition of the cooperative adopted by the International Cooperative Alliance (ICA). According to this definition, a cooperative is 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 (art. 5 of the International Cooperative Alliance Bylaws [http://ica.coop/en/basics/alliance-rules-and-laws, access 24.03.2019]. The corporate nature of the cooperative is also expressed by the Principles of European Cooperative Law, developed as a model of cooperative legislation and expressing the characteristics of cooperatives adopted in the International Cooperative Principles (see: A. Fici, [in:] *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge-Antwerp-Portland 2017, p. 19).

corporate character of the cooperative, the issue of membership in the cooperative is one of the central subjects of interest in the doctrine of cooperative law. In the doctrine, membership in a cooperative is understood in three different ways[3], as: the actual state of belonging to a cooperative, an abstract relationship of membership in a cooperative and a specific relationship of membership in a cooperative[4]. Also the civil legal nature of the membership in the cooperative is widely accepted[5]. Under Polish law membership in the

3 See: K. Pietrzykowski, *Powstanie i ustanie stosunku członkostwa w spółdzielni [Establishment and Termination of Membership in the Cooperative]*, Warsaw 1990, p. 71.

4 In Polish legal doctrine the notion of an abstract and a specific civil law relation is distinguished. See. A. Klein, *Elementy zobowiązaniowego stosunku prawnego [Elements of the Obligation Legal Relationship]*, „Zeszyty Naukowe Uniwersytetu Wrocławskiego, Prawo" XIV, 1980, p. 11-18. An abstract civil law relation is a general and legal model expressed by legal norms in which entities and parties to this relationship are not individualized, and the object and the content of this relationship is not specific. Due to the legal event described in the hypothesis of the legal norm that includes an abstract model of a civil law relationship, the abstract relation transforms into the specific civil legal relationship, the consequence of which is the individualization of civil law parties and entities and the substantiation of the object and the content of this relationship.

5 See: K. Pietrzykowski, *Powstanie i ustanie…*, op. cit., p. 98-99; A. Jedliński, *Członkostwo w spółdzielczej kasie oszczędnościowo – kredytowej [Membership in the Credit Union]*, Warsaw 2002, p. 170. The civil law approach on nature of the membership in the cooperative has gone through a complex genesis. Under the 29th of October 1920 Polish Cooperative Act the Polish Supreme Court supported the civil law nature of the membership in the cooperative (Supreme Court judgement of 2nd of March 1936, III OC 692 / 34, Orzecznictwo Sądów Polskich 1937, item 164). However after World War II it was even questioned if a contract may be the source of the membership in the cooperative. It was considered whether membership in a cooperative arises as a result of a unilateral act of a cooperative (see: W Jaśkiewicz, *Prawny stosunek pracy w polskich spółdzielniach pracy [Legal Employment Relationship in Polish Labor Cooperatives]*, Warsaw 1955, p. 106; H. Świątkowski, H. Skiba, *Podstawowe zagadnienia spółdzielczości w Polsce [Basic Issues of Cooperatives in Poland]*, Warsaw 1967, p. 18.; A. Stelmachowski, *Komentarz do orzeczenia Sądu Najwyższego z dnia 25 lipca 1968 r., III PRN 25/68 [Comment on Supreme Court Judgement of 25th of July 1968, III PRN 25/68]*, „Przegląd Spółdzielczego Instytutu Badawczego" 1968, point 1). Moreover

cooperative should be considered as a conglomerate of 3 different types of related subjective rights[6]. First of all as a right to membership itself, affiliation in a cooperative. Secondly as entitlements of a corporate nature, such as: the right to vote at the general assembly of the cooperative (art. 18 § 2 point 1 of PCA), active and passive electoral rights to the cooperative bodies (art. 18 § 2 point 2 of PCA) or the right to appeal to the general meeting against the decision of another cooperative body (art. 24 § 6 point 1 of PCA). Thirdly as pecuniary civil law rights related to membership, such as a claim *(Anspruch)*

a concept arisen presenting solutions of cooperative law in isolation from civil law constructions (see: B. Słotwiński, *Zagadnienia prawne samorządu spółdzielni [Legal Issues of the Cooperatives Self-Government]*, Warsaw 1973, *passim*; idem, *Z teoretycznych zagadnień prawa spółdzielczego [The Theoretical Issues of Cooperative Law]*, Warsaw 1973, passim). This concept was critisied by S. Grzybowski, *Prawo spółdzielcze w systemie porządku prawnego [Cooperative Law in the System of Law]*, Warsaw 1976, p. 99, and M. Gersdorf, *Prawne zagadnienia samorządności spółdzielni [Legal Issues of the Cooperatives Self-Government]*, „Spółdzielczy Kwartalnik Naukowy" No. 1, 1974, p 21. According to the other concept the cooperative and the member concluded a *sui generis* contract (see: R. Bierzanek, *Prawo spółdzielcze w zarysie [Outline of Cooperative Law]*, Warsaw 1984, p. 106). However, it has been pointed out in the literature that such a term does not explain what is the specific character of this contract that would distinguish it from other civil law contracts (see: B. Błażejczak, *Powstanie stosunku członkostwa w spółdzielniach budownictwa mieszkaniowego [Establishment of the Membership Relation in Housing Cooperatives]*, „Ruch Prawniczy Ekonomiczny i Socjologiczny" No. 2, 1975, p. 21).

6 The central issue of the Polish doctrine of civil law is the subjective right understood as the subjective possibility *(Gelegenheit)* of acting by the entitled in the manner defined in the content of this right, guaranteed by legal norms and protected by the state. See: A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej [Civil Law. Outline of the General Part]*, Warsaw 2001, p. 129, 371; M. Pyziak – Szafnicka, [in:] *System Prawa Prywatnego*, vol. I, *Prawo cywilne – część ogólna [Private Law System,* vol. I*, Civil law - General Part]*, ed. M. Safjan, Warsaw 2012, p. 780-817; M. Błachut, *Pojęcie prawa podmiotowego we współczesnej liberalnej filozofii prawa [The Concept of Subjective Right in the Contemporary Liberal Philosophy of Law]*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2002, p. 35-52.

for share's reimbursement or, in most cooperatives, the right to participate in the distribution of the balance surplus[7].

It should be noted that related with the membership in the housing cooperative can be an obligatory right, namely a cooperative's right to a premises. This right is of civil not corporate character as it is always associated with a specific claim, i.e. its element is always a claim possible to be implemented through a civil law process (art. 9 paragraph 6 of 15 of December 2000 Polish Housing Cooperatives Act[8] – PHCA)[9]. This right is so closely bonded to the membership in the cooperative that both of those rights cannot exist without each other (art. 11 point 1 of PHCA). Moreover the 2017 amendment to PHCA[10] bonded the existence of membership in the housing cooperative with acquisition of cooperative's right to the premises (art. 3 point 1 of PHCA)[11]. This right can be the already described right to the premises of obligatory character. In this case membership acquisition could be required before acquisition of the cooperative's right to a premises. Such situation occurs when cooperative's right to a premises is going to be established in a new housing cooperative's building. In this case acquisition of the membership in

7 See: D. Bierecki, *Spółdzielnia europejska w świetle prawa polskiego [European Cooperative Society in the Light of Polish Law]*, Sopot 2017, p. 254-255. The third category of civil rights related to the membership in the cooperative is often considered as rights which derivatives from the membership (see: A. Jedliński, *Członkostwo*…, op. cit., p. 186-191; K. Pietrzykowski, *Powstanie i ustanie*…, op. cit., p. 54; M. Gersdorf, [in:] *Prawo spółdzielcze. Komentarz [Cooperative Act. Commentary]*, Warsaw 1985, p. 83-84; J. Ignatowicz, *System ochrony praw członków spółdzielni [The System of Protection of the Rights of Members of the Cooperative]*, „Spółdzielczy Kwartalnik Naukowy" No. 2, 1987, p. 37; K. Stefaniuk, *Treść i charakter prawny spółdzielczego prawa do lokalu typu własnościowego [Content and Legal Character of the Cooperative Ownership Right to Premises]*, Warsaw 1978, p. 180.

8 Journal of Laws 2018, item 845 with further changes.

9 See: D. Bierecki, *Spółdzielnia europejska*…, op. cit., p. 254.

10 Act of 20th of July 2017 amending the Act on Housing Co-operatives, the Act – Code of Civil Procedure and the Cooperative Act, Journal of Laws 2017, item 1596.

11 On the other hand before the 2017 amendment to PHCA the reverse principle was in force which bonded the existence of cooperative right to premises with membership in the housing cooperative (see: K. Królikowska, *Zasada związania praw do lokalu z członkostwem w spółdzielni mieszkaniowej [Principle of Bonding the Existence of Cooperative Right to Premises with Membership in the Cooperative]*, Warsaw 2009, passim).

the housing cooperative requires at least the acquisition of the claim to establish by the housing cooperative the cooperative's right to a premises. This claim arises as a consequence of contract on construction of the premises (art. 10 point 1 and art. 3^2 point 1 of PHCA). Membership in the cooperative arises *ex lege* by conducting this contract with the housing cooperative. However there are also other rights to premises in the housing cooperative which burden housing cooperative premises as *iura in re aliena*. In case of acquiring such right membership in the housing cooperative arises *ex lege*. On the other hand transfer (e.g. sale) of this right results *ex lege* in loss of the membership in the housing cooperative.

III. Founding of the cooperative

Acquisition of the membership in the cooperative could be a result of different legal actions:

1. founding the cooperative *ab initio* (art. 17 § 1 of PCA),
2. acceptance of membership declaration by the cooperative (art. 16 § 1 and art. 17 § 1 of PCA),
3. merger of cooperatives *per incorporationem* (art. 96 of PCA and art. 19 (1) of SCER[12]) or *per unionem* (art. 19 (2) of SCER),
4. division of the cooperative (art. 108 § 1 of PCA),
5. conversion of the cooperative into an European Cooperative Society (*Societas Cooperativa Europeae* – SCE) (art. 2 point 1 (5) and art. 35 point 1 of SCER), and
6. conversion of a SCE into other kind of cooperative (art. 76 point 1 of SCER).

As a principle membership in the cooperative arises as a result of a contract. However in some cases membership can arise as a result if unilateral legal action (division of the cooperative, conversion of the cooperative into the SCE or conversion of the SCE into other kind of cooperative)[13]. The contractual nature of the membership in the cooperative leads to conclusion for the application of the general rules on concluding these bilateral legal acts (art. 66 – 72^1 of Polish Civil Code[14] – PCC). However, the mode of concluding an agreement on founding of the cooperative *ab initio*[15], an agreement

12 Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), Official Journal of the European Union of 18 August 2003, L 207/1.

13 See: D. Bierecki, *Spółdzielnia europejska…*, op. cit., p. 220-250, 327-335.

14 Act of 23rd of April 1964 – Civil Code, Journal of Laws of 2018, item 1025 with further changes.

15 The cooperative is formed as a result of the founder's agreement on the founding of a cooperative, concluded in a special procedure of art. 6

on admission to the cooperative or a contract for the merger of cooperatives (including the merger to establish the SCE) is regulated by separate provisions from the provisions of PCC (art. 6 § 1, art. 16 § 1, art. 17 § 1 – 4, art. 96 – 102 of PCA, and art. 19 – 34 of SCER). Also, art. 6 § 2 of PCA establish a *conditio iuris* for concluding an agreement on founding the cooperative *ab initio* by at least 10 natural persons or 3 legal persons. An exception from this rule is founding an agricultural production cooperative. Founding of this kind of cooperative requires concluding the agreement by at least 5 natural persons. The other exception is founding a cooperative by natural and legal persons who run a homestead in a manner understood by the Act of 15th of November 1984 on Agricultural Tax[16] or who conduct agricultural activity in the field of special departments of agricultural production. Also in those cases concluding the agreement on founding of the cooperative is required by at least 5 persons (art. 6 § 2a of PCA).

Bearing in mind the number of founders of the cooperative, Polish legal doctrine concludes that the agreement on founding of the cooperative is of multilateral nature[17]. In the case of such a contract, each founder of the

§ 1 of PCA, and the statute is part of it content (see: K. Pietrzykowski, *Powstanie i ustanie*…, op. cit., p. 95, 101; S. Szer, *Prawo cywilne. Część ogólna [Civil law. The General Part]*, Warsaw 1967, p. 262; S. Grzybowski, *Sytuacje prawne w toku tworzenia spółdzielni oraz odpowiedzialność założycieli [Legal Situations in the Course of Forming a Cooperative and Liability of the Founders]*, „Spółdzielczy Kwartalnik Naukowy" No. 2, 1987, p. 25; B. Błażejczak, *Lokatorskie prawo do spółdzielczego lokalu mieszkalnego [The Member's Right to the Cooperative Flat]*, Poznan 1979, p. 41; R. Longchamps de Berier, *Studya nad istotą osoby prawniczej [Study of the Essence of a Legal Personality]*, Lviv 1911, p. 187; M. Wrzołek-Romańczuk, *Rejestr spółdzielni. Zagadnienia materialnoprawne i procesowe [Register of Cooperatives. Substantive and Procedural Issues]*, Warsaw 1986, p. 91). However some authors qualify the agreement on the founding of a cooperative as a *sui generis* civil partnership contract (see: A. Miączyński, *Prawo spółdzielcze*, vol. I, *Zarys wykładu części ogólnej [Cooperative Law,* vol. I*, Outline of the General Part Lecture]*, Cracow 1981, p. 53; Z. Żabiński, *Charakter prawny statutu spółdzielni [Legal Character of the Cooperative Statute]*, „Spółdzielczy Kwartalnik Naukowy" No. 1, 1976, p. 80; R. Bierzanek, *Prawo spółdzielcze*…, op. cit., p. 68).

16 Journal of Laws 2017, item 1892 with further changes.

17 See: B. Błażejczak, *Lokatorskie prawo*…, op. cit., p. 39; A. Jedliński, *Członkostwo*…, op. cit., p. 95.

cooperative is the contract other party[18]. It should be noted, however, that in the literature there is also an opinion according to which the agreement on founding of the cooperative is of bilateral nature[19]. Each founder of the cooperative is the party to the contract in which all the other founders are on the contract other side.

In my opinion it should be concluded that the agreement on founding of the cooperative is of multilateral nature. However, the *ratio legis* of establishing the *conditio iuris* of required number of 10 or 5 founders of the cooperative should be reconsidered. It seems that this requirement is aimed to correspond with the legal nature of the cooperative as an association of an unlimited number of persons (art. 1 § 1 of PCA). It should be noted, however, that the open nature of membership in the cooperative does not result from a certain number of its founders. An example is Finnish cooperative law, recognized as the most modern in Europe, which allows the founding of the cooperative by only one person[20]. In Dutch law, cooperative can be founded

18 Polish legislator does not refer to the concept of the multilateral agree--ment. However, as already mentioned, this term is used in legal doctrine. By contrast, the notion of the multilateral agreement *(contratto plurilaterale)* is used by Italian legislator. According to Italian Civil Code *(Il Codice Civile)* the invalidity (art. 1420), annulment (art. 1446), nonperformance (art. 1459) or impossibility (art. 1466) of the obligation of one of the parties to the multilateral agreement does not affect the further binding of the other parties to the agreement, unless participation of the party which obligation is invalid or annulled is necessary or nonperformance or impossibility of the obligation of one of the parties is considered essential. This rules apply only to multilateral agreements formed by the parties to fulfill their common objective. They do not apply to multilateral agreements without the parties common objective. See: P. Polito, [in:] *La giurisprudenza sul codice civile. Coordinata con la dottrina*, vol. IV, *delle obbligazioni (art. 1425 – 1469-bis) [The Jurisprudence on the Civil Code. Coordinated with the Doctrine*, vol. IV, *of the Obligations (art. 1425 – 1469-bis)]*, ed. C. Ruperto, Milan 2011, p. 490, 562. It should be noted that under the Italian law the cooperative deed of incorporation should indicate the corporate objective (art. 2521 point 3 of Italian Civil Code [www.ricercagiuridica.com, access on 30.05.2019]).

19 K. Pietrzykowski, *Powstanie i ustanie…*, op. cit., p. 97. The author also indicates that the agreement on founding of the cooperative is always one, although different from the point of view of each of the founders.

20 H. Henrÿ, [in:] *Principles…*, op. cit., p. 148; A. Stawicka, [in:] *Ruch spółdzielczy w Europie i instrumenty wsparcia [Cooperative Movement in Europe and Support Instruments]*, Warsaw 2016, p. 23.

by at least two persons, but termination of membership by one of the founders, and thus leaving only one member in the cooperative, does not lead to the dissolution of the cooperative[21]. Also in Austrian law the cooperative can be founded by two persons[22]. In Spanish law founding of a second – tier cooperative[23] is possible by two founders, i.e. cooperatives (the participation of three founders is required in Spanish law for the foundation of a first – tier cooperative[24])[25]. In German law the cooperative can be founded by three persons. The number of founders of the cooperative was reduced in German law in 2006 from 7 to 3 in order to popularize the cooperatives as business entities[26]. In Russian law the required number of founders is five or three persons depending on the type of the cooperative. However it should be noted that founding of a housing cooperative under Russian law requires the participation of 50 founders[27]. In Italian law the cooperative can be founded by nine persons (art. 2522 of Italian Civil Code). On the other hand high number of founding members of the cooperative is required by law of developing countries. For example in India if the cooperative operating in several states is set up, at least 50 founding members from each of them are required[28].

Bearing in mind the solutions of foreign legal systems it seems that in the scope of the required number of cooperative founders, *de lege ferenda* one should postulate the reduction and unification of the required by Polish law number of founders of the cooperative to three persons (natural and legal). Such a conclusion should be derived, bearing in mind that the Polish legislator has established an agreement on the founding of the cooperative as a multilateral agreement and also due to the structure of organs of the cooperative in which the supervisory board of the cooperative should consist of at least three members who are members of the cooperative (art. 45 § 1 and

21 Ger J. H. van der Sangen, [in:] *International Handbook of Cooperative Law*, ed. D. Cracogna, A. Fici, H. Henrÿ, Berlin-Heidelberg 2013, p. 549.

22 G. Miribung, E. Reiners, [in:] *International…*, op. cit., p. 238.

23 *Cooperativa de segundo grado.*

24 *Cooperativa de primer grado.*

25 M. Supera – Markowska, *Zarys prawa hiszpańskiego i prawa polskiego. Esbozo del derecho español y del derecho polaco [Outline of Spanish Law and Polish Law. Esbozo del derecho español y del derecho polaco]*, Warsaw 2013, p. 85.

26 Hans-H. Münkner, [in:] *International…*, op. cit., p. 419.

27 N. de Luca, [in:] ibidem, p. 680.

28 Zob. G. Veerakumaran, [in:] *International…*, op. cit., p. 454.

§ 2 of PCA)[29]. It should be noted that also in German law, in which the cooperative can be founded by three persons, the structure of organs of the cooperative should consist the supervisory board and the minimum number of members of the supervisory board is three persons – § 36 of *Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften (Genossenschaftsgesetz)*[30].

IV. Investing member

In Polish cooperative law, there is a uniform understanding of the category of cooperative members. The only exception is the SCE. The interpretation of the SCER provisions leads to the conclusion that they distinguish three categories of members of the SCE. The SCER provisions provide for situations in which members of the SCE may be attributed the status of an investor (art. 14 point 1 (2) of SCER) or an user (art. 14 point 1 (2 and 3), art. 39 point 3, art. 42 point 2, art. 59 point 3, art. 61 point 3 (2) of SCER). However, it is also possible for the membership in the SCE to exist in a situation where there are no conditions for the member to be considered as investor or user. It should be also noted that membership of investors in the SCE cannot occur under Polish law. The SCER regulation makes the possibility of acquiring the status of the investing member *(investierende Mitglied)* dependent on the existence of such a legal institution in the law of the country's registered office of the SCE. Polish law does not know the category of the investing member, therefore, in the SCE with the registered office in Poland, this category of members cannot exist. However, the legal institution of the investing

29 The supervisory board of the cooperative should be appointed before submitting the application for registration of the cooperative to the court. If the supervisory board has less than three members, the registry court should refuse to register the cooperative. If, however, after the registration of the cooperative, the number of members of the supervisory board falls below three it cannot perform its statutory duties or take legally effective resolutions. (see: Resolution of the Composition of 7 judges of Supreme Court of November 17, 1987 - legal principle, III PZP 30/87, Orzecznictwo Sądu Najwyższego Izba Cywilna 1988, No. 5, item 57).

30 http://www.gesetze-im-internet.de/, [accessed: 06.01.2019].

member is widespread in foreign legal systems, for example in German[31], Austrian[32], French[33], English[34], Portuguese[35], Finnish[36] and Hungarian[37] law.

The investing member category is not distinguished *explicite* by Italian and Spanish law. However, these legal systems provide for the membership of persons who contribute to achieving the objectives of the cooperative only by money contributions, but not by working for the cooperative or concluding sales or service contracts with it[38]. In Spanish law such members are

31 See: Hans-H. Münkner, [in:] *Principles…*, op. cit., p. 268; R. Kober, *Das „investierende Mitglied" – Wer und vor allem was steckt dahinter? [The „Investing Member" – Who and, Above All, What is Behind it?]*, „Zeitschrift für das gesamte Genossenschaftswesen" vol. 60, No. 1, 2010, p. 37-49.

32 G. Miribung, E. Reiners, [in:] *International…,* op. cit., p. 239.

33 See: D. Hiez, [in:] *Principles…*, op. cit., p. 180-182; M. Wrzołek-Romańczuk, B. Zdziennicki, *Przyszłość prawa spółdzielczego w Polsce [The Future of Polish Cooperative Law],* [in:] *Prawo spółdzielcze. Zagadnienia materialnoprawne i procesowe [Cooperative Law. Substantive and Procedural Issues]*, ed. A. Herbet, J. Misztal-Konecka, P. Zakrzewski, Lublin 2017, p. 34.

34 See: I. Snaith, [in:] *Principles…*, op. cit., p. 686-687. The legal institution of cooperative investing members was introduced to English law following the example of the regulation of the SCE (SCER).

35 See: D. Meira, [in:] ibidem, p. 430. On Portuguese regulation of cooperative assets see: D. Meira, *The Most Relevant Trend Lines of Cooperative Share Capital Regime in the New Portuguese Cooperative Code*, „International Journal of Cooperative Law" No. 1, 2018, p. 15-28.

36 See: V. Pönkä, *Are Cooperative Societies Transforming into Cooperative Companies? Reflections on the Finnish Cooperatives Act*, „European Business Law Review" No. 1, 2019, p. 92. Finnish cooperative law also allows an acquisition of a share in the cooperative by a non-member. Such persons are entitled to participate in the division of the cooperative balance surplus. Also, cooperatives in Finland can issue shares of different categories. Shares may vary in granting different rights in the division of balance surplus and division of cooperative assets in the event of its liquidation. Also, according to the share category, cooperative member or non-member can be obligated to different amount of payment for cooperative due to share declaration (see: H. Henrÿ, [in:] *Principles…*, op. cit., p. 155).

37 See: M. Re´ti, [in:] *International…*, op. cit., p. 440.

38 See: G. Fajardo, [in:] *Principles…*, op. cit., p. 535; A. Fici, [in:] ibidem, p. 385.

called *socio colaborador*[39], and in Italian law *soci finanziatori*[40]. However, the existence of modern foreign cooperative law systems allowing membership in cooperatives only for persons using its activity or supplying to it or benefiting from it (users) should also be noted. Such regulation occurs in Japanese law[41].

It seems that introducing the category of the investing member to Polish cooperative law should be proposed, making the acquisition of such membership subject to the provisions of the cooperative's statute. The essence of such membership should be expressed in acquiring an investment share in exchange for transfer of property (money, generic goods or real estate accordingly with the cooperative statute) to the cooperative, as a result of which the investing member should acquire the right to participate in the balance surplus of the cooperative. Investment shares should be posted on the statutory fund established for this purpose. This fund should be indivisible in the time of cooperative's existence. Payment of the balance surplus to investing members should follow the same rules as for other members of the cooperative. The amount of investing member participation in the balance surplus should be determined by the provisions of the cooperative statute, for example accordingly to the value of contribution to the cooperative.

However, doubts arise as to whether the investing member should be entitled to corporate rights resulting from membership in the cooperative, which constitute the right to vote at the general assembly of the cooperative and the right to act as a member of the supervisory board of the cooperative. It should be considered whether this solution corresponds with the principle according to which membership, and thus the impact on the functioning of the cooperative, should only be granted to persons using the cooperative's activity or supplying it, or purchasing goods from it. The problem of corporate rights of the investing member is not uniformly settled in the legal systems of European countries. There are different systems of limiting the votes of investing members[42]. In Polish legal doctrine it was indicated that we are dealing here with the issue of choosing between maintaining a cooperative identity and violating it by admitting the membership of investors[43]. However, taking into account foreign experience in the form of a widespread category

39 See: G. Fajardo, [in:] ibidem, p. 535.

40 A. Fici, [in:] *International…*, op. cit., p. 447.

41 See: A. Kurimoto, [in:] ibidem, p. 515. On Japanese cooperative law see also: Idem, *Japanese Co-operative Legislation: Its Characteristics and Recent Legal Reform's Impact*, „International Journal of Cooperative Law" No. 1, 2018, p. 167-186.

42 See: A. Fici, [in:] *International…*, op. cit., p. 48.

43 See: P. Zakrzewski, *Stan aktualny i perspektywy rozwoju polskiego prawa spółdzielczego [Current State and Prospects for the Development of Polish*

of the investing member, it should be noted that cooperatives have departed from traditional solutions for solutions enabling raising capital by broadening the circle of people interested in participating in the cooperative activity, if only by investing in its assets. It should be noted that the issue of the possibility of finding alternative financing sources for cooperatives is widely discussed at the forum of the International Cooperative Alliance. The central issue of this discussion is finding sources of capital raising by cooperatives that do not involve the loss of members control (in economic not legal sense, i.e. control over the means of production of the cooperative) over the cooperative[44].

It should also be noted that the introduction of the category of the investing member to Polish law could contribute to an increase in the equity of financial cooperatives, such as cooperative banks. However, institution of the investing member would not find application in credit unions in Poland as their operate on not for profit bases and do not divide the balance surplus between members (art. 26 point 1 of 5th of November 2009 Polish Credit Unions Act[45] – PCUA)[46]. This institution could be useful only for the National Association of Cooperative Savings and Credit Unions (NACSCU) which could acquire shares in credit unions in order to ensure them financial stability and provide them with financial support. NACSCU is a second tier cooperative of only credit unions which is obligated to ensure credit union's financial stability and perform control over credit unions in order to ensure the security of the savings they accumulate and the compliance of their activity with legal provisions (art. 42 of PCUA).

Cooperative Law], „Rocznik Nauk Prawnych", vol. XXVII, No. 4, 2017, p. 103-104.

44 See: J. Bancel. [in:] *Guidance Notes to the Co – operative Principles*, Brussels 2015, s. 39-40; M. Hayes, *The Capital Finance of Co-operative and Community Benefit Societies*, Cambridge 2013, p. 32. This problem is also recognized in the United States of America (see: B. Hampel, *Co-operative Capital: A Necessary Evil. The Case of US Credit Unions*, [in:] *The Capital Conundrum for Co-operatives*, p. 65, <https://www.ica.coop/en/media/library/capital-conundrum>, [accessed: 07.04.2019].

45 Journal of Laws 2018, item 2386 with further changes.

46 See: A. Zalcewicz, *Unie kredytowe w państwach Unii Europejskiej jako wyraz funkcjonowania społeczeństwa obywatelskiego – kazus polski, czyli o spółdzielczych kasach oszczędnościowo-kredytowych w świetle konstytucyjnej zasady społeczeństwa obywatelskiego [Credit Unions in European Union Countries as an Expression of the Functioning of Civil Society – Polish Case, i.e. About Credit Unions in the Light of the Constitutional Principle of Civil Socjety]*, „Europejski Przegląd Prawa i Stosunków Międzynarodowych" No. 1-2, 2013, p. 35, 40, 41; A. Jedliński, *Członkostwo…*, op. cit., p. 39-42; D. Bierecki, *Spółdzielnia europejska*…, op. cit., p. 69.

V. Transfer of the share in the cooperative *inter vivos*

5.1. Concept of the cooperative share

The concept of the share in the cooperative is not uniformly understood in the Polish legal doctrine. Under the 29th of October 1920 Polish Cooperative Act[47] the share in the cooperative was understood as corporate rights of a member, containing all the rights and obligations of the member[48]. This assumption is not acceptable under the current legal state. Under PCA the rights and obligations of the member result from the membership relationship, which should be attributed the non-pecuniary nature. The obligation to declare the share is an element of a content of the membership relationship. This obligation derivatives as a consequence of the acquisition of membership in the cooperative.

Under the current legal state the Polish legal doctrine distinguishes four ways of understanding the share in the cooperative. First of all the share in the cooperative should be considered as member's debt to the cooperative[49]. The other three ways of understanding the share in the cooperative are based on an analysis of the creation and performance of a cooperative member's obligation. Therefore, there should be considered a distinction between a 1) declared share constituting an obligatory form of a member's commitment to the cooperative 2) payment for shares fulfilled by the member's performance for the cooperative, and 3) contributed share determined by the value of the member's participation in the cooperative fund[50]. On the other hand in German law the share *(Geschäftsanteil)* in the cooperative is considered as the legal and financial core of membership which matters in the distribution of profits and losses, settlements on reimbursement with the outgoing member and liquidation as well as organizational transformations of the

47 Journal of Laws of 1920, No. 111, item 733.

48 See: M. Gersdorf, [in:] *Ustawa o spółdzielniach i ich związkach. Komentarz [Act on Cooperatives and their Unions. Comment]*, Warsaw 1963, p. 50.

49 K. Pietrzykowski, *Spółdzielnia a spółka handlowa [Cooperative and Comercial Company]*, „Przegląd Ustawodawstwa Gospodarczego" No. 6, 1991, p. 70; idem, *Spółdzielnie mieszkaniowe. Komentarz [Housing Cooperatives. Commentary]*, Warsaw 2013, p. 332.

50 A. Herbet, [in:] *Spółdzielcze kasy oszczędnościowo – kredytowe. Komentarz [Credit Unions Act. Commentary]*, Warsaw 2014, p. 85; P. Zakrzewski, [in:] ibidem, p. 150-154; idem, *Majątek spółdzielni [Cooperative Capital]*, Warsaw 2003, p. 39-69.

cooperative[51]. Generally, it can be stated that also in Polish law the share in the cooperative plays a role in the settlements with the outgoing member, distribution of losses, liquidation and organizational transformations of cooperatives. The share can also matter in the case of distribution of profit (balance surplus) of the cooperative, if the statute of the cooperative makes the amount of the profit attributable to the member depended on the quantity of its shares (art. 77 § 2 of PCA). However it should be noted that the member's claim *(Anspruch)* for payment of cooperative profit is a derivative right from the membership in the cooperative but not the cooperative share. It should be also noted that in German law the concept of the contributed share also exists as it is indicated that regardless of the quantity of declared shares the contributed share should be considered as one[52].

5.2. Claim for share's reimbursement

The member is entitled to the claim for reimbursement of the share (redemption of share) in the event of termination of membership in the cooperative. This situation occurs in cooperatives around the world[53]. In Polish law the claim for shares reimbursement becomes due at the earliest after approval of the financial statements of the cooperative for the year in which membership ceased. The statute may specify a later due date (art. 21 of PCA)[54]. As mentioned, the claim for share's reimbursement arises as a consequence

51 H. Meyer, G. Meulenbergh, V. Beuthien, *Genossenschaftsgesetz mit Umwandlungsrecht [Cooperative and Conversion Law]*, Munich 2000, p. 128.

52 G. Schiemann, *Kündigung und* Übertragung *des Geschäftsanteils nach neuem Genossenschaftsrechts [Termination and Transfer of the Share According to the New Cooperative Law]*, „Zeitschrift für das gesamte Genossenschaftswesen" No. 1, 1976, p. 16, 29.

53 See: H. Henrÿ, *Guidelines for Cooperative Legislation*, Geneva 2012, p. 78; H.-H. Münkner, *Ten Lectures on Cooperative Law*, Zurich 2016, p. 100; A. M. Andrews, *Analiza kapitału spółdzielczego [Analysis of Cooperative Capital]*, Sopot 2015, p. 17; *The Process for the Redemption of Shares in Co-operative Banks in different EU Member States. A Comparative Overview*, Brussels 2012, passim; M. Lund, *Cooperative Equity and Ownership: An Introduction*, Madison (Wisconsin) 2013, p. 31-32.

54 K. Pietrzykowski, *Prawo spółdzielcze. Komentarz do zmienionych przepisów [Cooperative Law. Comment on the Amended Regulations]*, Warsaw 1995, p. 61. However in its decision of 26th of March 1998, I CKN 227/97 (Orzecznictwo Sądów Polskich 1998, No. 11, item 179) the Supreme Court adopted a different opinion indicating that the claim for share reimbursement is due on the day the membership in the cooperative ceases to exist.

of an event of termination of a membership in the cooperative or subsequent (not obligatory) shares (art. 21 of PCA)[55]. Termination of the membership or a subsequent share results in cessation of the share understood as a legal title of cooperative increment which results in arising the claim for reimbursement of payment made for the share. We are dealing here with a certain factual state, which consists of: 1) payment of the share, leading to the creation of the contributed share, possibly in the event of a lack of payment, deducting the member's part of the balance surplus of the cooperative on the declared share (art.77 § 3 of PCA), 2) followed by termination of membership or termination of the subsequent share. The constitution of this factual state, constituting a sequence of chronologically and logically related events, leads to arising the claim for share's reimbursement.

However it could be also argued whether before such a termination the member of the cooperative is entitled by a temporary claim (subjective temporary right[56]) which starts its existence in the event of member's payment to cover the share and transforms into a fully formed reimbursement claim in the event of considered termination[57]. This approach corresponds with an argument raised under the German cooperative law according to which the claim *(Anspruch)* for shares reimbursements arises as a conditionally suspended law in the event of payment for the share[58]. However, it should

55 See: R. Bierzanek, *Prawo spółdzielcze…*, op. cit., Warsaw 1984, p. 133; H. Cioch, *Zarys prawa spółdzielczego [Outline of Cooperative Law]*, Warsaw 2007, p. 50; M. Gersdorf, [in:] *Ustawa o spółdzielniach…,* op. cit., p. 51; idem, [in:] *Prawo spółdzielcze…*, op. cit., p. 78. Other Authors however consider arising the claim for reimbursement of the share already during the membership in the cooperative (see: L. Stecki, *Prawo spółdzielcze [Cooperative Law]*, Warsaw 1979, p. 49; K. Stefaniak, *Prawo spółdzielcze. Ustawa o spółdzielniach mieszkaniowych. Komentarz [Co-operative Law. Housing Cooperatives Act. Commentary]*, Warsaw 2014, p. 74-75).

56 A subjective temporary right occurs when the components of a complex factual state, from which - according to the hypothesis of a legal norm - the rising of subjective right depends, are realized successively, and with the elements already arisen, the legal system combines certain legal effects (see: K. Gandor, *Prawa podmiotowe tymczasowe (ekspektatywy) [Temporary Subjective Rights]*, Ossolineum 1968, p. 88).

57 P. Zakrzewski, *Majątek…*, op. cit., p. 196.

58 See: K. Müller, *Kommentar zum Gesetz betreffend die Erwerbs und Wirtschaftsgenossenschaften. Zweiter Band (§ 43 – 93) [Commentary on the Law on Acquisition and Economic Cooperatives. Second volume (§ 43 - 93)],* Bielefeld 1980, p. 646; H. Meyer, G. Meulenbergh, V. Beuthien, *Genossenschaftsgesetz…*, op. cit., p. 673-674; R. Schubert,

be noted that this approach does not argue that the share in the cooperative itself is a temporary subjective right.

5.3. Cooperative share as the member's subjective temporary right

The PCA regulation does not provide for the possibility of transferring (e.g. selling) shares in the cooperative *inter vivos*. In no sense does the share in the cooperative constitute in itself as a specific, transferable subjective right. Such a right is only the reimbursement claim arising as a result of termination of membership or subsequent shares. Transfer of this claim is effective since its maturity. Disposition of the claim due to a contract obligating to the claim transfer is effective at the time when the claim becomes due. However this is not a situation when the proprietary effect of concluding a contract is separated from its obligatory effect by provision of the act (art. 510 § 1 of PCC *in fine*). Due to concluding a contract for transfer of the claim for shares reimbursement an obligation arises that automatically results in proprietary effect of the claim transfer (art. 510 § 1 of PCC)[59]. However, the

H. K. Steder, *Genossenschaftshandbuch. Kommentar zum Genossenschaftsgesetz, den steuerlichen und wettbewerbsrechtlichen Regelungen sowie Sammlung einschlägiger Rechtsvorschriften [Cooperatives Handbook. Commentary on the Cooperative Law, the Tax and Competition Regulations as well as the Collection of Relevant Legislation]*, Berlin 1973, § 73, Nb. 10; P. Pöhlmann, [in:] *Genossenschaftsgesetz. Kommentar zu dem Gesetz betreffend die Erwerbs und Wirtschaftsgenossenschaften und zu umwandlungsrechtslichen Vorschriften für Genossenschaften [Cooperatives Act. Commentary on the Law on Acquisition and Economic Cooperatives and on Conversion Legislation for Cooperatives]*, Munich 2001, p. 348 (quotation after P. Zakrzewski, *Majątek…*, op. cit., p. 195, reference No. 79).

59 In Polish law the transfer of ownership rules were adopted from French civil law (on the influence of French civil law around the world see: X. Blanc-Jouvan, *Worldwide Influence of the French Civil Code of 1804, on the Occasion of its Bicentennial Celebration*, Cornell Law School Berger International Speaker Papers 2003, Paper 3, <http://scholarship.law.cornell.edu/biss_papers/3>, [accessed: 15.03.2019]. In both Polish and French legal systems the rule is that the transfer of ownership of is effective *solo consensu*. However transfer of generic goods and future goods requires *traditio corporalis* (see: L. van Vliet, [in:] *Comparative Property Law. Global Perspectives*, ed. M. Graziadei, L. Smith, Cheltenham, UK-Northampton, MA, USA 2017, p. 151-152, 156; G. Helleringer, *The Proprietary Effects of Contracts,* [in:] *The Code Napoléon Rewritten. French Contract Law after the 2016 Reforms,* ed. J. Cartwright, S. Whittaker, Oxford – Portland, Oregon 2017, p. 210-211; W. Borysiak, *Transfer of*

fulfillment of such a proprietary effect depends on the occurrence of a legal condition *(conditio iuris)* in the form of the maturity of the transferred claim. Yet in this case, after the maturity of the claim the parties do not need to conclude a separate contract performed *causa solvendi* which effect is a solely disposition (propertialy contract) but not creation of an obligation. The possibility of concluding a contract for transfer of future claim for share's reimbursement should also be noted, for example during the membership in the cooperative but before the claim for share's reimbursement arises. The effectiveness of such a contract will depend not only on the maturity of the claim, but also on the creation of such a claim.

Exceptionally Polish law allows the transfer of cooperative shares in the farmers' cooperative and the SCE. The transfer of the share in the farmers' cooperative is possible by the resigning member or person indicated by the deceased member to return the shares by the cooperative. Such a situation is possible before the return of shares due to termination of membership by notice or death. On the other hand the transfer of share in the SCE is possible to the member or a person acquiring the membership. Acquiring the share by a non-member results in rising a claim for acquiring the membership in the SCE. The shares in the farmers' cooperative and the SCE are subjective rights existing next to the membership in the cooperative. However, those rights are temporary, and the occurrence of a legal event in the form of termination of membership (in case of SCE) or approval of the financial statements for the year in which membership ceased (in case of farmers' cooperative) causes its transformation into the claim for share's reimbursement.

It seems that *ratio legis* of the principle of exclusion of the possibility of transferring cooperative shares provides for securing the assets of the cooperative from its transfer to third parties. This exclusion also results from the principle of indivisibility of the shares fund during the functioning of the cooperative[60]. This exclusion also applies prior to the approval of the financial statements of the cooperative for the year in which the member has requested the return of the share but after the membership ceases and the share's reimbursement claim arises (art. 21 and 27 § 1 of PCA). However, the discussed exclusion should be considered too strict, and it's *ratio legis* would be also possible to achieve in the event of allowing the transfer of cooperative shares within members of the cooperative, with the consent of the cooperative itself. *De lege ferenda* an introduction of the possibility of transferring shares to other members or persons joining the cooperative with the consent of the cooperative should be allowed under PCA. The possibility of transferring shares between members of cooperative is a principle in a number of foreign laws,

Property in Polish Law: Causality and Abstraction, „Studia Iuridica" vol. LVI, 2013, p. 65-68).

60 See: M. Gersdorf, [in:] *Ustawa o spółdzielniach*…, op. cit., p. 50.

including Austrian[61], German[62], French[63], Italian[64], Spanish[65] and Finnish[66] legislation[67]. Also, the transferability of cooperative shares does not violate the International Cooperative Principles[68].

De lege ferenda in Polish law the principle of transferability of cooperative shares should derive from shaping the share in the cooperative as a subjective temporary right as assigning the share the transferable character would implement another element of the factual state that leads to creation of the claim for share's reimbursement (see: 4.2.). The share transfer would be possible after the creation of the contributed share and before the creation of the share's reimbursement claim. Termination of membership in the cooperative or of the subsequent share would result in transformation of the temporary subjective right (cooperative share) into the share's reimbursement claim.

Also, *de lege ferenda* the contract of the share transfer (e.g. contract on sales) should be subject to the fulfillment of two legal conditions *(conditio iuris)*: the consent of the cooperative and the transfer of the share to another member. Until the consent of the cooperative the contract should be considered *negotium claudicans* (art. 63 § 1 of PCC). In the event of transfer of the share to the non-member the contract should be null and void due to contradiction with the act (art. 58 § 1 of PCC). However the possibility of

61 G. Miribung, E. Reiner, [in:] *International…*, op. cit., p. 241.

62 Hans-H. Münkner: [in:] *Principles…*, op. cit., p. 307.

63 D. Heiz: [in:] *International…*, op. cit., p. 402.

64 A. Fici: [in:] ibidem, p. 489.

65 G. Fajardo: [in:] ibidem, p. 711; *Spain Company Laws and Regulation Handbook*, Washington, D.C. 2012, p. 218-219.

66 The possibility of transferring shares was guaranteed by the 2001 Finnish Cooperative Act (see: *Prawo o spółdzielczości ogłoszone w Helsinkach 28 grudnia 2001 r. [Law on Cooperatives Published in Helsinki on December 28, 2001]*, Warsaw 2002, p. 62-63). Under the current legal state, i.e. the 2014 Finnish Cooperative Act shares are also transferrable (see: H. Henrÿ, [in:] *Principles…*, op. cit., p. 155). On evolution of Finnish cooperative law see: V. Pönkä, *Are Cooperative…*, op. cit., p. 81-84.

67 The possibility of transferring shares is also allowed by Portuguese law. However Portuguese cooperative law does not separate ownership of shares from the status as a cooperative member (see: D. Meira, [in:] *Principles…*, op. cit., p. 453, 470).

68 The transferability of a share in a cooperative is also allowed under Principles of European Cooperative Law. As mentioned these principles were developed as a model of cooperative legislation while they express the characteristics of cooperatives adopted in the International Cooperative Principles. See: G. Fajardo, D. Meira: [in:] *Principles…*, op. cit., p. 78.

transferring shares to a person acquiring the membership in the cooperative should also be considered. In this case the transfer of the share should be effective in the event of acceptance by the cooperative the membership declaration of the acquirer of the share[69]. In such case, the resolution on the acceptance of the member should also include a consent of the cooperative on the transfer of the share. *De lege ferenda* the PCA should provide for possibility of indicating in the statute of the cooperative the body (cooperative organ) competent to express at the same time the consent on the admission of the member to the cooperative and the acquisition of the share. Therefore introducing to PCA of the following provision should be considered: „Contributed shares can be transferred within the members with the consent of the cooperative. In the event of transfer of the share to a person acquiring the membership, the statute of the cooperative should indicate the competent body to express consent on the admission of the member to the cooperative and the acquisition of the share".

It should be noted that in case of introduction to Polish law the principle of shares transferability the disposition of all of the member's shares should lead to termination of the membership in the cooperative. Such a situation occurs under the SCE regulation (art. 15 point 1 of SCER). As the principle in Polish cooperative law should be accepted the regulation adopted by SCER which *de lege lata* provides the only case of membership termination due to consent of the third party (share acquirer) and the cooperative (SCE), which consent is required to the share transfer (art. 4 point 11 of SCER). Membership termination occurs *ex lege* as the consequence of transfer of all of the member's shares. The contract on shares transfer does not need to include a provision indicating such a legal consequence (membership termination)[70].

The considerations regarding the introduction of the possibility of transferring shares in the cooperative could also be referred to shares of investing members.

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69 See: A. Jedliński, *Perspektywy rozwoju prawa spółdzielczego [Prospects for the Development of Cooperative Law],* [in:] *Kierunki zmian prawa spółdzielczego w Polsce [Directions of Changes in Cooperative Law in Poland]*, „Zeszyty Senackie" No. 22, 2014, p. 12. This Author proposes the introduction of the possibility of transferring cooperative shares, including for the benefit of the non-member, who would obtain membership in the cooperative *ex lege* at the moment of share acquisition. However, there is a doubt as to whether in such a situation the nature of membership in the cooperative would not be expressed in binding of this right with the share in the cooperative. This would bring cooperatives closer to capital companies in terms of their legal structure.

70 See: D. Bierecki, *Spółdzielnia europejska*…, op. cit., p. 280-295.

VI. Membership in the credit union

6.1. Common bond

Article 2 of PCUA explicitly states that a credit union is a cooperative[71]. As in the case of other kinds of cooperatives, the membership relationship in the credit union is the civil law relationship (see: point I). However the membership in the credit union can be acquired only by a person connected with members of the credit union with a common bond (art. 10 paragraph 1 of PCUA). Polish legal doctrine indicates that it is a social (teleological) bond i.e. the social bond connecting the credit union members[72]. This social bond is a foundation of the membership in the credit union. The social bond between the members of the credit union should be of professional or organizational character. In particular, it could be the bond between workers employed in one or several work establishments or persons belonging to the same social or professional organization. The provisions of the credit union statue can, however, form the common bond between the members in a different scope than in the work establishment or social or professional organization.

The Polish regulation on social bond of credit unions members does not include the most natural bond i.e. the common bond formed due to place of residence of members. *De lege ferenda* the Polish legislator should introduce

71 In Polish legislation credit unions should not be mistaken as cooperatives banks. This two kinds of cooperatives derives from different models of credit cooperatives. For credit unions it is the Raiffeisen's model and for cooperative banks it is the Schultze-Delitzsch's model (see: J. Birchall, *The International Co – operative Movement*, Manchester-New York 1997, p. 11-14). Differences between credit unions and cooperative banks appear in the scope of recipients of credit unions and cooperative banks services and also in regard of balance surplus division. Credit unions can provide financial services only to their members and because credit unions operate on not for profit bases they cannot divide balance surplus between their members. On the other hand recipients of cooperative banks services may be their members and also third parties. Also cooperative bank's balance surplus can be divided between its members. Moreover, there are differences in the organization of credit unions' and cooperative banks' operations on the financial market in terms of their association in financial institutions. Credit unions should associate in National Association of Cooperative Savings and Credit Unions which is a second tier cooperative established directly by virtue of PCUA. On the other hand, a cooperative bank should associate in the associate's bank in the legal form of joint-stock company, unless cooperative bank's assets are over 5,000,000 Euro.

72 A. Jedliński, *Członkostwo…*, op. cit., p. 64-73.

the possibility of forming the credit union also on foundation of such a territorial social bond. Founding the credit union in Poland on the basis of territorial common bond has a tradition that goes back to the first credit unions founded by Franciszek Stefczyk in the 19th century[73]. It should be noted the founding the credit union on foundation of territorial common bond is possible in the United States of America, where credit unions constitute a significant part of the financial market[74]. Such a solution is also proposed in the template for the legislation of credit unions developed by the World Council of Credit Unions[75].

Also, the possibility of connecting members of the credit union with second – tier common bond (meta bond) should be noted. The meta bond exist when the credit union member is connected with a common bond not only with other credit union members but also with other then credit union organization[76]. PCUA exhaustively indicates legal forms of such organizations: 1) organizational units of churches and religious associations, both with legal personalities, 2) cooperatives (*lege non distinguente* also credit unions), 3) trade unions and housing communities, 4) non-governmental organizations within the meaning of art. 3 point 2 of 24th of April 2003 Act on public benefit and volunteer work[77].

Thus, the legislator allows membership in the credit unions of specific legal persons as well as organizational units, which the law grants legal capacity but not legal personality (art. 33^1 of PCC) i.e. housing communities. *De lege ferenda* membership of other kinds of such organizational units should be considered, i.e. membership of general partnerships *(Offene Handelsgesellschaft)*, professional partnerships *(Partnerschaftsgesellschaft)*, limited partnerships (*Kommanditgesellschaft)* and limited joint-stock partnerships

73 See: J. Ossowski, *Jałmużna i kredyt [Alms and Credit]*, Sopot 2005, p. 135.

74 See: W. R. Emmons, F. A. Schmid, *Credit Unions and the Common Bond*, „Federal Reserve Bank of St. Louis Review" vol. 81, No. 5, 1999, p. 41-64.

75 See: *Model Law for Credit Unions*, Washington, DC-Madison 2015, p. 23.

76 See: A. Jedliński, *Członkostwo…*, op. cit., p. 74–77; D. Bierecki, *Członkostwo w spółdzielczej kasie oszczędnościowo – kredytowej [Membership in the Credit Union]*, Sopot 2013, p. 38, 43-45; P. Zakrzewski, [in:] *Spółdzielcze…*, op. cit., p. 133-139.

77 Journal of Laws 2018, item 450 with further changes. The scope of these non-governmental organizations is very wide. On this matter see: D. Bierecki, *Członkostwo…*, op. cit., p. 29-33.

(*Kommanditgesellschaft auf Aktien*[78]). In Polish legal doctrine, the division of commercial companies into companies with predominant personal characteristics (partnerships) and capital characteristics (capital companies) is generally accepted. Also the similarity of partnerships to cooperatives is stressed[79]. It seems, therefore, that the nature of partnerships indicates that they should be allowed to acquire membership in the credit union as they can be included as organizations that can be connected with members of the credit union with a second – tier common bond.

6.2. Membership declaration

The emergence of the membership relationship in the credit union in the majority of cases is the consequence of concluding an agreement on admission to the credit union due to acceptance of membership declaration (art. 16 § 1, art. 17 § 1 of PCA and art. 2 of PCUA). The membership declaration should be made in writing *ad solemnitatem*. However, the credit union and its members can perform legal actions related to the implementation of the statutory purposes of credit unions in an electronic form (art. 3a point 1 of PCUA)[80]. The electronic form of credit unions legal actions should not be understood as the electronic form of legal action regulated by PCC. In the case of the electronic form of the credit union legal action, there is no requirement to submit a declaration of intent in electronic form bearing a qualified electronic signature (art. 78^1 § 2 of PCC). Preservation of the electronic form of credit unions legal actions results *ex lege* in fulfillment of the requirement of conducting a legal action, e.g. credit or loan agreement, in writing *ad solemnitatem* (art. 3a point 3 of PCUA)[81]. Due to such legal provision *de lege*

78 That in German law is a capital company *(Kapitalgesellschaft)*, not a legal partnership *(rechtsfähige Personengesellschaft)* as in Polish law.

79 See: A. Szumański, *Przekształcenie spółdzielni w spółkę prawa handlowego [Transformation of the Cooperative Into the Commercial Law Company]*, [in:] *Kierunki zmian…*, op. cit., p. 24.

80 According to art. 3 point 1 and 1a of PCAU the statutory purposes of credit unions are to gather cash deposits only of its members, grant them loans and credits, carry out financial settlements at their request and act as an intermediary in concluding insurance contracts. Credit unions can also intermediate the sale and repurchase of participation units in investment funds or participation titles of foreign funds and open investment funds based in countries belonging to the European Economic Area (EEA).

81 For more on the electronic form of credit unions legal actions see: D. Bierecki, *Forma elektroniczna czynności spółdzielczych kas oszczędnościowo-kredytowych [Electronic Form of Legal and Other Actions of Credit Unions]*, „Pieniądze i Więź" No. 2, 2018, p. 88-93.

ferenda introduction of possibility of submitting the membership declaration in credit union in electronic form should be introduced.

VII. Conclusions

The comparative interpretation of Polish cooperative law provides for several *de lege ferenda* propositions regarding the membership in the cooperative in Poland. These postulates also result from the needs to make the cooperatives more attractive as social and economic organizations. Bearing in mind the legislator's formation of the agreement on the founding of the cooperative as the multilateral agreement, it seems that fulfillment of such needs could be achieved by reducing the required number of cooperative founders to three persons (natural or legal), regardless of the type of the cooperative. Such a possibility is adopted in legislations of foreign European countries, where cooperatives can be established by at least two or three persons.

In current economic system financial issues seems to play an important role in functioning of the cooperatives. To compete economically with other types of legal entities, in particular with commercial companies, cooperatives need to find new sources of capital. In order to fulfill this objective the investing member category should be introduced to Polish cooperative law.

Also, the possibility of transferring cooperative shares should be considered. Currently, the share in the cooperative can be understood in several ways, but in none of them as a transferable subjective right. The introduction of possibility of transferring shares would shape the cooperative share as the subjective temporary right. It's creation would take place at the moment of the members payment for declared share. In the event of termination of membership or subsequent share this temporary right would transform into the claim for share reimbursement that has the transferable character.

Membership in the credit union plays an important role in Polish financial market[82]. To enable the further development of credit unions it is necessary to increase the number of people interested in their services. Taking into the account the current state of the financial market and the needs of its participants, credit unions should be able to reach a wider group of customers not only within the professional or organization common bond. The importance in this respect, similarly to the countries in which financial cooperatives constitute a significant part of the financial market in terms of the number of clients and the volume of accumulated capital, should be given to

82 Currently in Poland 34 credit unions operate and all of them are members of the second - tier cooperative that is the National Association of Cooperative Savings and Credit Unions, <https://www.knf.gov.pl/podmioty/Podmioty_sektora_kas_spoldzielczych>, accessed: 03.01.2019]. The total number of members of all credit unions in Poland is 1,670,000, <https://www.skok.pl/>, [accessed: 03.01.2019].

linking credit unions members with the territorial social bond. In addition, membership in credit unions of personal partnerships, which are a popular form of conducting business in Poland, should be admitted. Also the possibility of submitting the membership declaration in credit union in electronic form should be introduced.

Olga Cherkashina

Cooperation: The Russian and Soviet Experience

The article presents Russian experience on cooperatives in different stages of Russian history and development of Russian economic system. The analysis considers cooperatives development in pre-revolutionary Russia, in the Soviet period and in present times. The article explains the origins and the nature of Russian cooperatives.

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The cooperative movement throughout the world is the most numerous socio-economic movement of our times, because it brings together about 700 million cooperators. Its center is recognized by the International Cooperative Alliance (ICA), which includes 192 national cooperative unions from 76 countries. It can be stated that about 12% of the world's population is cooperative, and if we proceed from the average indicator that a family consists of four people, almost half of the world community in one way or another uses the services of cooperative enterprises, either business, informational, advertising or cultural-educational institutions.

What about Russia? The experience of cooperation in Russia is

as rich as it is ambiguous. Let us try to trace the process of Russia's accumulation of this experience at different stages of its historical development and different stages of the formation of its economic system: from pre-revolutionary Russia through the Soviet period of its history to the present state.

First of all, it is important to note that cooperation in Russia developed in its own way, different from that in Western European countries; its feature was that it was formed mainly in rural areas. In the literature devoted to the study of cooperation, one can find an indication of three „cooperative breakthroughs"[4]. The first identified breakthrough began with the abolition of serfdom, and it lasted until the revolution of 1917. The development of cooperatives during this period was closely connected with the agrarian reform of P. A. Stolypin, which was aimed at destroying the peasant community. It is characteristic that, at this stage of the formation of cooperation, small farms united into cooperatives at their own initiative, pursuing their own economic interests related to receiving and increasing income, increasing labor productivity, lowering production costs, expanding the market, etc.

Such an association incorporating the existing differences among household family labor enterprises contributed to the separation and development of various types of cooperatives within the framework of agricultural cooperation. Their specialization was determined by the objective needs of agriculture entering into commodity-money relations and its involvement in the system of the national market[5]. In pre-revolutionary Russia, the number of cooperatives increased at a rapid pace, and as to their number, this country came out in first place in the world. If at the beginning of 1901 there were 1625 cooperative associations, then as of January 1, 1917, their number increased to 47,187. According to economists, 14 million people participated in the cooperative movement, and 84 million with members of their families. Thus, it can be said that more than half of the country's population were members of various cooperatives.

Of course, the revolution that took place in October 1917 radically changed the course and development of social relations, which had to affect

4 G. Pavlova, *On modern agricultural cooperation*, „The Economist" No. 10, 2004, p. 76.

5 V. M. Volodin, *Production cooperation in agriculture (theory, methodology, experience)*: dissertation abstract for the degree of Doctor of Economic Sciences. (08.00.05), Moscow 2001.

3 Ibidem. p. 154.

4 Z. R. Kochkarova, *The historical experience of the development of cooperation in the 20–40s of the twentieth century,* „Vestnik VSU, Series: History. Political Science. Sociology" No. 1, 2008, p. 13.

5 V. I. Lenin, *Draft decree on consumer commune*, [in:] *Full composition of writings*, vol. XXXV.

their cooperation. It must be emphasized that in the first months after the revolution, the new leadership did not seek to destroy cooperation as a form of economic activity. This was determined by the fact that cooperatives were engaged in distribution, especially in villages, and small-scale commodity producers were in fact the only suppliers meeting the needs of the population, due to the fact that large-scale industry was mainly oriented towards the needs of the army. These circumstances caused authorities to undertake such actions which were aimed at the development of one type of consumer cooperation intended to become the main distribution mechanism of the new society. Yet the ideals of the Soviet government, according to which the new society should be socialized with no commodity, were incompatible with the principles on which cooperation is based. This contradiction had serious consequences, manifested in the fact that in the period from November 1918 to December 1920, the nationalization of cooperation occurred. During this time, the Soviet authorities actually began to fully dispose of the property of all types of cooperations and their employees.

In 1918, in the news of the CEC, the „Draft Decree on Consumer Communes" was issued, according to which the organization of socialist society was planned as a network of „consumer-production communes". According to this document, entry into the consumer society was a prerequisite for the country's entire adult population. Organization of the distribution and accounting of food in the area was carried out by a single cooperative, and in fact, until 1919, production agricultural communes were the main economic form of labor organization in agriculture[6]. It must be emphasized that this experiment did not give positive results, primarily because the land, all means of production, household utensils and even personal belongings in communes were socialized, and incomes were distributed equitably by the number of consumers. It seems quite obvious that the equalization system of distribution did not give incentives for the production initiative, and the elimination of personal subsidiary farming did not allow a peasant to satisfy his needs and produce a surplus.

However, in 1920, the decree „On the Unification of all Types of Cooperative Organizations" (dated January 27, 1920) was issued, according to which the entire population was obliged to become members of consumer cooperatives, and various types of cooperatives were to enter into one consumer cooperative and could not conduct independent activities. This actually meant the nationalization of cooperation. Such actions by the Soviet leadership were at odds with the basic principles of the cooperative movement: voluntary entry was replaced by mandatory membership, and all other cooperatives were subordinated to one type of consumer cooperation. Thus,

6 V. M. Volodin, *Production cooperation in agriculture*…, op. cit., p. 154.

consumer cooperation, which assumed the functions of uniting small producers, failed to cope with its tasks.

It is known that since March 1921, a new economic policy (NEP) began to be implemented, with which specialists associate the second „cooperative breakthrough," under which cooperation takes on great importance in the formation and development of industrial service industries. The Soviet leadership set a very important task before the co-operation, which was to assist in the restoration of the country's economy. During this period, its return to the basic democratic principles took place: voluntary membership in cooperatives, a voluntary order of creation, the practice of entrance fees and shares, and the free election of the boards of cooperative associations, meaning self-government. In 1921, the Soviet leadership separated the consumer from agricultural, trade and credit cooperation. This was manifested in complete independence and the right to create independent systems. In 1922, the Consumer Cooperatives Bank „Pokobank" was established in Moscow, which in 1923 was transformed into the All-Russian Cooperative Bank „Vsekobank".

It must be stated that the measures taken by the Soviet government during the years of the NEP had a positive effect on the activities of the cooperative in meeting the needs of the country's population. By the end of 1926, the cooperative sector prevailed in the Soviet state: cooperatives owned 52.2% of commodity turnover, consumer – 38%, agricultural – 11.6% and commercial – 2.6%[7]. The most widespread form of business associations was freed from state custody, having a wide scope for initiative and creative activity and consumer cooperation, as shown by the statistics. By the end of the NEP, it provided almost 70% of the country's trade and became the most powerful commodity channel[8]. At the same time, its activities differed in diversity and included: the purchase of surplus agricultural products from the population who had a subsidiary farm; the organization of purchases of agricultural products on collective and state farms; fattening animals on their farms; food production at industrial enterprises for consumer cooperation; and cooperative trading. Monofunctional agricultural partnerships (fishing, etc.) were mainly a primary network of cooperation. Agricultural cooperatives produced from 40 to 70% of the volume of the most important agricultural crops, and their share in the export of agricultural products was 60–80%[9].

What was the difference between the cooperative forms of management and collective farms („kolhoz"), which were the main form of management in the framework of Lenin's plan for the collectivization of agriculture?

7 Z. R. Kochkarova, *The historical experience…*, op. cit., p. 15.

8 Ibidem, p. 17.

9 I. Dakhov, *Opportunities for the revival of the cooperative sector of the economy*, „The Economist" No. 1, 2000, p. 94.

The main differences are in understanding the issues of ownership and self-government. After all, a cooperative meant voluntary cooperation (entering into a cooperative, each participant of a cooperative set as its goal the realization of their interests) among separate producers-owners, who, as a rule, avoided socialization. Each member of the cooperative joined in with his share and retained the right to get it back in case of withdrawal. Thus, property in the cooperative and with the collective form of its economic use by all members of the cooperative organization was of a private nature[10]. A collective farm that included the entire population of its members turned its property into a jointly indivisible form, since labor, land, and all means of production were socialized. Only residential buildings and subsistence farming remained as personal property. Thus, economic activity was carried out on the basis of state directive planning, and the collective farms could not independently make economic, managerial and other decisions.

In the late 1920s, there was a refusal to base power on the principles of the NEP, instead people wanted to form a mixed market economy. This, unfortunately, led to curtailing since the late 1920s many types of cooperation: during the collectivization in many regions of the country, the activities of suppliers and credit cooperatives were stopped; in 1935, consumer cooperation was liquidated in cities, and in the sphere of trade, there was a monopoly in serving the rural population. 26,138 retail outlets, 7,096 catering establishments, 255 mechanized bakeries, 1,139 bakeries and a number of other household facilities that belonged to the consumer cooperation network were actually nationalized[11].

The command and administrative system of production management and the domination of the state's form of ownership had a negative impact on cooperation. In agriculture, the replacement of peasant cooperatives by collective forms of farming, collective farms and state farms that had existed for 70 years did not ensure an increase in the efficiency of farming. Small types of farms, being self-governing enterprises, allow cooperatives to react more dynamically to changes in the economic life of society, whereas the cumbersome system of collective farms and the unconditional implementation of policy plans cannot ensure effective management of the economy. A. V. Chayanov wrote: „The very nature of agricultural enterprises sets the limits for its consolidation, due to which the quantitative expression of the advantages of large farms over small ones in agriculture can never be particularly large"[12]. In addition, material incentives for cooperative members, in contrast to general

10 I. Buzdalov, G. Shmelev, *Problems of development of agricultural cooperation in transitional conditions*, „Voprosyekonomiki" No. 1, 1995, p. 18.

11 Z. R. Kochkarova, *The historical experience*…, op. cit., p. 16.

12 O. V. Tarkhanov, *The essence of cooperation, according to A. V. Chayanov, and the present*, „Economic Journal" No. 21, 2011, p. 131.

collectivization, allow each member of a cooperative to be interested as a result of his work. The democratic principles of the organization of cooperation, especially cooperative self-government and material interest, cannot work under conditions of total control and planning on the part of the state.

The experts associate the third „cooperative breakthrough" with the beginning of the restructuring processes („perestroika") and the transition to market relations in the second half of the 1980s. Economists consider the following conditions for initiating a new stage of development of cooperation:

– the emerging processes of democratization and privatization of economic relations, which were expressed in the legalization of certain types of non-state activities;
– the presence of a shortage of various types of consumer goods, which required an increase in the production of consumer goods and services;
– the formation of the legal framework of the cooperative movement[13].

The new law „On Cooperation in the USSR" adopted in 1988 was very important for the revival of cooperation, since with its adoption, property transformation, privatization of the economy, development of real market relations and private entrepreneurship began. It was this law that determined the need for the development of cooperatives, which, above all, should have been oriented towards serving the population. Moreover, it is important to note that their activities spread to all areas in which it was profitable for cooperatives to work: the production of goods; catering; trade and procurement; construction; medical statistics and others. Statistics show the rapid growth of cooperation and its effectiveness: if on January 1, 1988, 13.9 thousand cooperatives operated in the USSR, then on January 1, 1990, their number increased to 193 thousand. During these two years, they increased from 156 thousand people to 4.9 million, excluding 2.9 million people working under contract. The volume of production on an annual basis as to prices during those years increased from 350 million to 40.4 billion rubles[14].

This, of course, proves that in the USSR, along with the public sector of the economy, a private sector emerged with great advantages. After all, state-owned enterprises had large material resources, but, unfortunately, they were not independent in their actions. Cooperatives, on the contrary, having small private resources, had complete freedom in economic activity. However, the cooperatives could not eliminate the shortage of goods, since the money issue and the growth of income were ahead of the flow of goods, and the supply of production cooperatives rested on government orders and

13 L. Nikiforov, T. Kuznetsova, *The Fate of Cooperation in Modern Russia*, „Questions of Economics" No. 1, 1995, p. 87.

14 E. G. Yasin, *Russian economy. Sources and panorama of market reforms*, Moscow 2002. p. 94.

limits. Due to this, in 1990, 80% of all cooperatives operated at state-owned enterprises and rented 60% of their fixed assets, acquiring 2/3 of consumed raw materials, and 70% of the products of cooperatives sold to state-owned enterprises[15].

Unfortunately, we have to admit that at the beginning of the 1990s, Russia began to curtail the cooperative movement. Analyzing the reasons for this, we can agree with the opinion of specialists dealing with cooperation issues who highlight a number of major problems and contradictions that led to this process:

– deformation of the new cooperation. The share of real cooperatives was small, mostly cooperative forms used by private enterprises;
– there were contradictions between the cooperatives and the population. They became competitors in the acquisition of many types of goods, which contributed to the increasing deficit. The contradictions included the workers of the cooperatives having high wages, and the population got used to the equalization distribution of income, which deepened the controversy;
– during the development of cooperation, market mechanisms began to deform, since the emerging market relations did not imply state regulation[16].

Modern literature presents the notion that the current state of cooperation indicates the fourth „cooperative breakthrough," since the process of development and dissemination of cooperation has moved to a new level[17].

Its characteristic feature is that cooperation has again become an integral part of the modern economic system. Of course, it is important to emphasize that this is facilitated by the activities of the Russian Federation's government, which is aimed at supporting and developing many types of cooperation. The division of cooperatives into species, practiced in the official statistics of a number of international organizations, makes it possible to single out consumer, credit, agricultural, multi-purpose, housing, production workers and handicraft, and fishing. The process of creating and developing various types of cooperatives is supported by the active legislative activity of the authorities in this area. During this period, a whole set of laws was adopted regulating the development of many types of cooperation, including: the Law of the Russian Federation "On Consumer Cooperatives (Consumer Societies, their Unions) in the Russian Federation" of June 19, 1992, the Federal Law "On Agricultural Cooperation" December 8, 1995, Federal Law

15 Ibidem, p. 52.

16 V. A. Kunakina, *Development of Cooperation in Russia*, „Young Scientist" No. 21, 2014, p. 324.

17 Ibidem.

"On Horticultural, Gardening and Dacha Non-Profit Associations of Citizens" dated April 15, 1998, Federal Law "On Credit Consumer Cooperatives of Citizens" dated August 7, 2001, and Federal Law "On Housing Cumulative Cooperatives Islands" from December 30, 2004.

The emergence of new types of cooperation, such as outsourcing, subcontracting, franchising, strategic alliances, consortia, and others contributed to the development of entrepreneurship. These forms of joint business can reduce production costs and transaction costs, increase competitiveness, and also make small firms profitable in the market. However, in recent years, despite all the accumulated experiences of cooperatives over the years, problems have clearly emerged that have not yet been resolved in the new framework of the revived cooperative movement:

– the imposition of a cooperation „top";
– the lack of knowledge about cooperation;
– the distribution of profits;
– the responsibility of the participants;
– control over the activity.

Thus, the accumulated experience of the cooperative movement in Russia contains four „cooperative breakthroughs": 1. from 1862 to the revolution of 1917; 2. the years of the NEP; 3. the second half of the 80s and early 90s of the twentieth century; 4. the end of the 1990s to present.

Concluding our brief excursion into the history of the cooperative movement in Russia, I would like to draw attention to what seems to be a very important point.

It seems quite obvious that throughout this long path of development, cooperation has been and remains an object of state policy. Analyzing the development of cooperation at different stages of the domestic historical process, it can be noted that the goal of state policy was to use a cooperative organization to smooth out acute social problems (for example, those caused by the active capitalization of the social economy) as a „transitional stage" to socialism, a means of reforming the economy (1988 and the law „On Cooperation in the USSR"). However, attempts to use cooperation in order to realize political ambitions, in an uncharacteristic quality for this organization, as we can see, were not productive. Perhaps in the near future, cooperation can become the basis of the social infrastructure of a Russian village, and in this case lead to a new flourishing of this interesting economic phenomenon that has existed in the world for almost 200 years.

Joanna Kruczalak-Jankowska, Grzegorz Sikorski

Evolution of the Legal Regulation of Cooperatives in Polish Law

The cooperative movement has a long history in Poland. Origins of the first Polish cooperatives date back to the 19th century. Since then cooperatives are present and deeply rooted in Polish law and economy. The article considers Polish cooperative legislature development and in consequence changes to legal solutions on cooperatives. Also, the article provides conclusions on further development of cooperatives which may be considered in further legislative work.

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1. Introduction

In the doctrine of Polish commercial law, not a lot of attention is paid to cooperatives today. This is due to the fact that the economic turnover has been dominated by trade companies, which seemed to be quite obvious after the experiences of the 1970s and 1980s, when state-owned enterprises and cooperatives were the dominant form of running a business. The assumptions of the state in the field of economic policy in regard to using particular forms of running a business have also changed. Nevertheless, while state-owned enterprises have almost disappeared, cooperatives occupy an important position. There is still quite a large number of cooperatives, which in particular perform

their tasks in regard to financial and housing activities. These are often entities with a significant assets (especially housing cooperatives) and financial position (cooperative banks, cooperative savings and credit unions) positions. Cooperatives also play an important role in the provision of work and professional activation (work and social cooperatives), as well as they perform agricultural activities. This form of running a business is also appreciated by the current Polish legislator. A cooperative is one of the three types of entities which according to law may carry out banking activities in Poland. Since the beginning of its existence, the form of a cooperative has been used by saving and credit financial institutions. Recently, it has been also a form of establishing social cooperatives and farmers' cooperatives.

2. The beginnings of cooperatives and the principles of cooperative law

Cooperatives have been developed by the marketing practice. The first entities of this kind appeared at the turn of the 18th and 19th century, mainly in England[1]. However, initially they were not regulated by law and the basic cooperative principles developed through practice. The cooperative in Rochdale, England, where the principles of the cooperative movement were first developed to define features distinguishing cooperatives from other forms of joint business activities is considered to be the prototype. These principles were then adopted by the International Cooperative Congress in Paris in 1937 and since then they have been widely implemented in national laws. They include: the principle of the availability of membership for all interested parties, the principle of acting on a democratic basis (one member - one vote), the principle of distribution of surplus in proportion to turnover, the principle of limited interest rate on shares, the principle of maintaining religious and political neutrality, the principle of conducting business activity as well as educational activities for members and the principle of the cooperation with other cooperative organizations[2]. The above principles of the cooperative movement were modified and their number was reduced by the International Cooperative Congress in Vienna in 1966. Three basic principles were maintained – the principle of voluntariness, the principle of accessibility and the principle of democratic management of the cooperative and the equal position of individual members, including equal participation in profits. A greater emphasis was also placed on two other principles – the principle of the additional cooperative activity carried out for its members and the principle of the cooperation between individual cooperative organizations[3].

1 R. Bierzanek, *Prawo spółdzielcze w zarysie,* Warszawa 1976, p. 7.

2 See: A. Witosz, *Prawo spółdzielcze. Zarys wykładu,* Katowice 1985, p. 7-8.

3 A. Witosz, *Prawo*…, op. cit., p. 8-9.

Today, nine principles expressed in Polish law are recognized as basic principles of cooperative law expressed in Polish law[4]. The first one is the principle of voluntariness, meaning the lack of coercion for establishing, liquidating and joining the cooperative. The second one is the principle of the self-governing of the cooperative, meaning that it is an independent entity, deciding on its matters through its organs. The third principle of a membership community requires that the cooperative members should personally exercise their rights and duties in the cooperative. Another principle concerns the cooperative's purpose to raise the cultural level of cooperative members. Today it is expressed in art. 1 p. 2 of the Act of 16 September 1982 Cooperative Law[5] (hereinafter, as „coop. law") in a less categorical manner than it used to be. However, it is a continuation of the basic assumption which has been guiding the cooperative movement from its beginnings, that is performing not only economic functions by the cooperative for its members, but also satisfying their other needs (f. ex. cultural, sporting, professional)[6]. The principle of democratic managements assumes the equality of all members of the cooperative in terms of influencing its affairs. Each cooperative member shall have one vote regardless of the shares held (art. 36 p. 2 of coop. law). Only in case of the cooperatives of legal persons, their statute may introduce other regulations in this regard. The "open door" principle prohibits creating barriers to joining the cooperative. Restrictions introduced in the cooperatives' statutes (exceptions to the „open door" principle) must be justified by the interests of the cooperative and its members. The principle of a changeable personal composition and a variable participation fund is a consequence of voluntariness and open door principles. Another principle of cooperative law was also the indivisibility of the participation fund, which in the event of the cooperative's liquidation was to be allocated to cooperative or social purposes, and not be shared among members. Currently, after the modification of art. 125 of coop. law this principle cannot be considered absolute. Finally, the last principle of cooperative law is the cooperation between domestic and foreign cooperative organizations.

Apart from international cooperatives' actions of organizing International Cooperative Congresses that adopted principles governing their functioning, also individual states have been regulating these entities since the second half of the nineteenth century. However, there were no specific legal

4 See: f. ex. K. Kruczalak, *Prawo handlowe. Zarys wykładu,* Warszawa 1998, p. 332-333; A. Kidyba *Prawo handlowe,* Warszawa 2017, p. 618 and following.

5 Official Journal of Laws „Dziennik Ustaw" 2018, item 1285.

6 Compare: K. Kruczalak, *Prawo*…, op. cit., p. 332.

provisions devoted to cooperatives at the very beginning[7]. Cooperatives were often treated as associations or as trade companies (f. ex. in France).

The first statutory regulation on cooperatives was adopted in Germany. It entered into force in 1867 in Prussia, and in 1871 it was binding in all German states. In 1898, the existing regulations were replaced by the new act on cooperatives which still has been in force in Germany. German regulations were based on the experiences of France and England where the cooperative movement began earlier and where the practice of applying legal solutions, including internal cooperative provisions (statutes), was richer and longer. Nevertheless, German solutions concerning cooperatives had specific features (distinguishing them from British, German and Latin type of cooperatives)[8]. It also resulted from the huge number of cooperatives that were operating in Germany (in 1931 there were over 52,000 of them, and they had over 10 million members)[9]. Following the German model, separate acts on cooperatives were also adopted in other countries in Europe (f. ex. Austria, the Netherlands, Italy, Denmark), South America and Asia[10]. In some countries, legal regulations relating to cooperatives were implemented to the commercial codes (f. ex. France and Belgium) and even civil codes (Switzerland).

3. Polish cooperative law before the Second World War

In Poland, the legal regulations of cooperatives appeared already during the partitions. In the German (Prussian) partition, such provisions were included in the Act of 1867 and then Act of 1898. The situation was similar in the Austrian Partition where the Act of 1873 was in force. In the Russian partition, there were no specific legal acts regulating cooperatives. However, the provisions of acts relating to other areas of economic activity (f. ex. credits, craft funds, associations) were applied to them respectively[11].

Such situation could not function after the First World War. In the process of unification of Polish law after regaining independence, the Polish legislator prioritized the cooperative law by adopting on 29 October 1920 the act on cooperatives[12] (hereinafter referred to as „the act of 1920"). It entered

7 See: L. Stecki, *Prawo spółdzielcze,* Warszawa 1987, p. 11-13.

8 See: R. Bierzanek, *Prawo*…, op. cit., p. 27-28.

9 Compare: S. Janczewski, *Prawo handlowe, wekslowe i czekowe,* Warszawa 1946, p. 257.

10 Compare f. ex. A. Witosz, *op. cit.,* p. 9-10; R. Bierzanek, *Prawo*..., op. cit., p. 19-27.

11 R. Bierzanek, *Prawo*…, op. cit., p. 28; A. Witosz, *Prawo*…, op. cit., p. 10.

12 Act of 29 October 1920 on cooperatives, Official Journal of Laws „Dziennik Ustaw", No. 111, item 733.

into force on 1 January 1921 in the entire Poland. This first Polish act on cooperatives was in force until 1961 and it was regarded as the most progressive and democratic act on cooperatives at the time. This was due to foreign and own legal solutions used by the authors of the act, as well as the experience of the Polish cooperative movement. Polish cooperative movement, which developed under specific conditions, was also important from the point of view of maintaining Polish identity. Cooperatives often referred to tradition and propagated patriotic values[13].

The act of 1920 defined a cooperative as an association of an unlimited number of people with variable capital and composition, aimed at raising earnings or economic strengthening of members by running a joint venture (art. 1). According to the pre-war regulations, cooperatives could also take activities aimed at the cultural development of its members.

Thus, in the light of the first Polish act, the cooperative was an entity established on a voluntary basis, with the unlimited number of members, which composition, and thus also capital (today we would say fund) could be changed. The cooperative was intended to run a joint business. It could be founded by natural and legal persons, and the liability for the cooperative's obligations was limited only to the declared shares. Until 1934, there was a freedom of associating in cooperatives. Then, the amendment of13 March 1934[14] introduced the obligation to obtain a statement on the purposefulness of establishing a new cooperative. Cooperatives were registered according to rules typical for commercial law companies (in cooperative register). They had the status of a merchant within the meaning of the Commercial Code (art. 4 of the act on cooperatives). The provisions of the Commercial Code were also applied to cooperatives in matters that were not regulated by the act of 1920.

In order to establish a cooperative, it was necessary to prepare its statute and collect signatures of at least ten natural persons. With regard to cooperatives of legal persons, the provisions also provided for a minimum number of members. There had to be at least three of them.

The cooperatives could also be used to create economic unions of cooperatives (headquarters)[15]. Their main task was to provide services to associated cooperative organizations. The headquarters were authorized to carry out reviews (today – lustrations) in associated cooperatives. They were also entitled to issue the above mentioned statements on the purposefulness of

13 See: W. Jastrzębski, *Prawo spółdzielcze. Zarys wykładu,* Warszawa 1986, p. 7.

14 Act of 13 March 1934 on the amendment of the act on cooperatives, Official Jurnal of Laws „Dziennik Ustaw" Nr 38, item 342.

15 Commercial law companies could also be used for this purpose.

establishing a new cooperative, to submit applications for deletion of cooperatives from the register and to appeal against resolutions of general meetings[16].

The act of 1920 also provided for the establishment of the Cooperative Council by the Minister of the Treasury, which was to exercise general supervision over the activities of cooperatives and their associations. It consisted of the representatives of revisional associations, the Minister of the Treasury and other Ministers. The provisions of the act also regulated other organizational matters related to the functioning of cooperatives. They contained solutions related to the company brand (name under which the cooperative acted), cooperative authorities (which included the management board, supervisory board, general meeting), control over the cooperative (revision and revisional associations), accounting, dissolution and liquidation of the cooperative, as well as its bankruptcy. The act devoted much space to acquiring and losing cooperative membership. This regulation was similar to the current one, because in this respect the act fully implemented the principles of voluntary association in the cooperative and the variable personal composition and share fund. The pre-war legislator also included criminal provisions in the act. Administrative penalties were to be imposed on the members of management board who did not fulfill their obligations under the Act (f. ex. regarding entries in the register, announcements). The offences included, among others, undertaking activities on behalf of the cooperative other than specified in the act and the statute, allowing the functioning of the cooperative for over three months without a supervisory board, lack of application for the declaration of bankruptcy of the cooperative, breach of confidentiality regarding contributions and savings deposits.

Before the amendment of 1934 the merger of cooperatives was regulated by a separate act of 7 April 1922 on the merger of cooperatives[17].

4. Polish cooperative law after the Second World War

The post-war times, until 1990, can be divided into three periods. The first one covers time before 1961, when the act of 17 February 1961 on cooperatives and their associations[18] (hereinafter referred to as the „act of 1961") was adopted. It was in force until the end of 1982. So the second period falls on the years 1961-1982. On 16 September 1982 the new cooperative law[19] was adopted (hereinafter referred to as the "act of 1982" or „coop. law") commencing the third period in regard to cooperative legal regulations.

16 See: W. Jastrzębski, *Prawo*…, op. cit., p. 7-8.

17 Official Journal of Laws „Dziennik Ustaw" No. 33, item 265.

18 Official Journal of Laws „Dziennik Ustaw" No. 12, item 61 with later amendments.

19 Official Journal of Laws „Dziennik Ustaw" No. 30, item 210.

In the first period before 1961, the Polish legislator made only a few modifications to the then in force act of 1920. They were related to the extension of the competences of revisional associations which were to carry out tasks provided for in specific provisions, as well as the introduction of the Central Cooperative Alliance[20], an obligatory association for all cooperative headquarters which competences encroached the independence of its central units, and thus the cooperatives associated in them. Its most far-reaching tool was the possibility to decide on the division and dissolution of the cooperative, which was a denial of the cooperative self-government principle. Cooperatives were also subordinated to the implementation of economic plans, which caused that the interests of cooperative members went to the background in their activities. At that time, the so-called exemplary cooperative statutes were established by the Central Cooperative Alliance in order to eliminate the influence of cooperative members on the determination of their rights and obligations.

The second period in the post-war regulations regarding cooperatives falls on the years 1961-1982. The legislative proceedings on the act of 1961 lasted several years (they began as early as in 1954, and the act was treated as a code regulating the issues of cooperatives and their associations as a whole[21]). In particular, the new provisions even more highlighted the changes introduced before to the Act of 1920. The definition of cooperatives was changed (art. 1). It emphasized the primacy of the public interest over the interest of cooperative members. According to new regulations, cooperatives should implement social rather than individual goals. A lot of emphasis in the definition of a cooperative was also put on its activities aimed at raising the material and cultural standards of living of cooperative members. In regard to the establishment of cooperatives some restrictions were also maintained. The statement on the purposefulness of establishing a cooperative was to be issued by the central association in consultation with the appropriate authority of state administration. Obtaining such statement by the cooperative was mandatory, and its lack resulted in the rejection of the application[22]. The cooperative's statute also had to comply with the principles established by the central association, which in practice, despite the lack of such legal provisions, meant the continuation of the obligatory implementation of model statutes.

The Act of 1961 in the second part (the first one was devoted to cooperatives themselves), regulated cooperative associations and the Supreme

20 Act of 21 May 1948 on the Central Cooperative Association and cooperative headquarters, Official Journal of Laws „Dziennik Ustaw" No. 65, item 524.

21 See f. ex.: A. Witosz, *Prawo*…, op. cit., p. 16-17, see also: R. Bierzanek, *Prawo*…, op. cit., p. 33.

22 A. Witosz, *Prawo*…, op. cit., p. 18.

Cooperative Council. This part of the Act contained the most changes in comparison to the previous regulation. The provisions endowed cooperative unions with broad competences directly affecting the management of cooperatives associated in them. The board of the central union had the power to repeal resolutions of the cooperative's assemblies, as well as to dismiss board members. The unions also set out guidelines for the cooperative's activities, including plans for current periods. The Central Cooperative Alliance was replaced by the Supreme Cooperative Council, which task was to represent the cooperative movement and watch over its development from the point of view of applicable regulations[23]. The existing cooperative headquarters have been replaced by central cooperative associations.

The Act also contained specific provisions relating to the types of cooperatives regulated therein. These were agricultural production cooperatives, labor cooperatives and housing cooperatives[24]. The labor cooperatives were related to the provisions on cooperative employment, and housing cooperatives to the provisions on cooperative member's right to premises. In addition to cooperatives directly mentioned in the act of 1961, also cooperative banks operated at that time, to which the provisions of the act were applied with some amendments resulting from the Act of 12 June 1975 on Banking Law[25], and the previous savings and loan cooperatives regulated by the provisions of the Act of 1961 and the Act of 13 April 1960 on banking law[26].

The third period of the development of legal provisions relating to cooperatives before 1990 started with the adoption of the Act of 16 September 1982 on Cooperative Law[27], which still has been in force. Also in case of this act, its adoption took quite long time as the legislative process was initiated by the Supreme Cooperative Council as early as in 1974[28].

In its original wording, the new act did not differ significantly from the previous regulation. However, some changes in this regard can be noticed. In the definition of the cooperative, the social interest was equated with the interest of cooperative members, while the previous act provided for the primacy of social interest. This solution and a few others increased the

23 Compare f. ex. W. Jastrzębski, *Prawo*…, op. cit., p. 12.

24 As part of the housing cooperatives, the following were distinguished: housing cooperatives, housing and buildings cooperatives, cooperative associations for building single-family houses (art. 135 of the Act of 1961).

25 Official Journal of Laws „Dziennik Ustaw" No. 20, item 108.

26 Ibidem No. 20, item 121.

27 Ibidem No. 30, item 210.

28 See: A. Witosz, *Prawo...*, op. cit., p. 20; W. Jastrzębski, *Prawo...*, op. cit., p. 13; R. Bierzanek, *Prawo...*, op. cit., p. 34.

cooperative's independence in relation to previously binding regulations[29]. Nevertheless, most powers of the central unions and the Supreme Cooperative Council were maintained.

The new law included provisions concerning cooperatives of agricultural clubs that provide agricultural services and other types of services resulting from the needs of the rural environment. Until today (as these provisions are still in force) such a cooperative can also deal with the production of means and materials for agriculture, agricultural processing and agricultural production (running a farm). The act also introduced specialized agricultural cooperatives devoted to economic agricultural activities such as running a team farm covering a specific type of production in connection with individual farms of their members and cooperating in the development of specialized agricultural production on these farms. The changes also concerned the scope of activity of housing cooperatives and cooperative members' right to premises.

In addition to cooperatives directly regulated in the cooperative law, also cooperative and state-cooperative banks existed in the legal system, to which the provisions of cooperative law were applied to an extent not regulated by the Act of 26 February 1982 on Banking Law[30] (such reference is also included in the current banking law, but apart from the cooperative law also the provisions of the act on the operation of cooperative banks, their affiliations and affiliating banks[31] shall be applied to banking cooperatives).

5. Polish cooperative law in the modern era – the shape of regulations

The Act of 1982 remains today the basic legal act regulating cooperatives in Poland. The current act has returned to the basic assumptions and ideas of the cooperative movement and provide their full guarantees. In the process of its adoption and the adoption of subsequent amendments after 1989, the achievements of the Polish cooperative movement were also taken into account[32].

29 Compare f. ex. W. Jastrzębski, *Prawo...*, op. cit., p. 13.

30 Official Journal of Laws „Dziennik Ustaw" No. 7, item 56.

31 See: art. 20 p. 1 of the Act of 29 August 1997 Banking Law (Official Journal of Laws „Dziennik Ustaw" 2018, item 2187 with later amendments) in relations to art. 2 p. 1 of the Act of 7 December 2000 on the operation of cooperative banks, their associations and associating banks (Official Journal of Laws „Dziennik Ustaw" 2018, item 613).

32 Compare f. ex. R. Bierzanek, *Nowe prawo spółdzielcze,* „Państwo i Prawo" No. 11, 1982, p. 31 and next; M. Gersdorf, *O nowych rozwiązaniach wprawie spółdzielczym,* Warszawa 1983, p. 5 and next; K. Kruczalak, *Prawo*…, op. cit., p. 333.

From the point of view of the current shape of the provisions of cooperative law, the most important were the amendments adopted in the years 1990-1991 and 1994 (Act of 20 January 1990 concerning changes in organization and activity of cooperatives[33], Act of 30 August 1991 on the valorization of members' shares in cooperatives[34], Act of 25 October 1991 amending the Civil Code, the Code of Civil Procedure, cooperative law, acts on land and mortgage registers and housing law[35], Act of 7 July 1994 amending the Act - Cooperative Law and some other laws[36]).

The new solutions have emphasized the cooperative independence. Over the years, central cooperative associations were gradually losing their competences to interfere cooperatives' internal affairs[37]. However, solutions concerning cooperative banks are an exception in this respect. The provisions of separate acts (the above mentioned banking law and the act on the operation of cooperative banks), due to the banking law principle of security of funds accumulated in banks, still place great emphasis on the principle of the banks' participation in associations, performing many functions for their members, including entering the sphere of their autonomy and independence.

According to the new definition (introduced by the amendment of 1994), cooperatives are independent associations of an unlimited number of people, which composition and share fund may be variable and which conduct joint economic activity. This joint economic activity is a characteristic feature of the cooperative today. Other types of cooperative activities (social, educational and cultural activities undertaken for the benefit of cooperative members – art. 1 p. 2) are not their mandatory tasks any longer, although in practice these tasks are fulfilled by almost all cooperatives. This is due to the history of cooperative activity, which always included all these non-economic tasks. Therefore, a cooperative is primarily an entrepreneur today. It is a form of conducting joint business activity so its goals are similar to those of commercial law companies. However, it differs from them in that it is

33 Official Journal of Laws „Dziennik Ustaw" No. 6, item 36 with later amendments.

34 Official Journal of Laws „Dziennik Ustaw" No. 83, item 373 with later amendments.

35 Official Journal of Laws „Dziennik Ustaw" No. 115, item 496.

36 Official Journal of Laws „Dziennik Ustaw" No. 90, item 419 with later amendments.

37 Compare f. ex.: K. Stefaniuk, *Samodzielność spółdzielni pod rządami nowego prawa spółdzielczego,* [w:] *Seminarium Prawa Gospodarczego*, vol. 4, 1984, p. 26-41.

an association of persons, not capital, in which individual members have the same, equal rights. A cooperative today it a specific type of business corporation[38].

The cooperative's internal structure is in general regulated by cooperative law. It also determines the rules of joining and leaving cooperatives by their members. The provisions of statutory law are supplemented by the cooperatives' statutes. The statutes can above all specify their organizational structure as well as rules concerning their composition.

The act also defines cooperatives' rights and obligations dividing them into economic and non-economic (organizational, corporate) ones. Thus, this is a similar situation that can be found in regard to provisions concerning companies. The economic rights and duties include the obligation to pay the entry fee, the obligation to bring declared shares or other contribution if required, the right to profit and equal participation in it, the right to various types of benefits from the cooperative (such as work, the development of professional activity or the implementation by the cooperative of specific tasks in the field of education, culture, etc.). Non-economic rights and duties include, for example, the right to vote, passive and active electoral rights to cooperative bodies and right to information[39].

The contemporary Polish legislator also tends to regulate the specific types of cooperatives. The cooperative law traditionally includes provisions relating to agricultural cooperatives, such as agricultural production cooperatives and machinery rings cooperatives. It also allows for the establishment of other cooperatives which main activity is focused on running a joint farm. Additionally, Polish cooperative law also regulates labor cooperatives that carry out activities based on the work of its members.

As it has been already mentioned, the previous laws regulating cooperative activities also included provisions concerning specific types of cooperatives. At present, however, the legislator tends to regulate them outside the cooperative law. The Act of 7 December 2000 on the operations of cooperative banks, their affiliation and affiliating banks[40] relating to banking cooperatives can serve as an example. The legislator did the same with regard to cooperative savings and credit unions, regulating them in the Act of 5 November 2009 on cooperative savings and credit unions[41]. Also housing cooperatives, which still occupy an important place in the Polish reality, sho-

38 See f. ex. K. Pietrzykowski, *Prawo spółdzielcze,* Zielona Góra 1995, p. 7; K. Kruczalak, *Prawo*…, op. cit., p. 335.

39 Compare f. ex. R. Bierzanek, *Prawo*…, op. cit., p. 128–167; K. Kruczalak, *Prawo*…, op. cit., p. 343-350.

40 Official Journal of Laws „Dziennik Ustaw" 2018, item 613.

41 Official Journal of Laws „Dziennik Ustaw" 2018, item 2386 with later amendments.

uld be mentioned in this regard. In 2000, it was decided to exclude the provisions relating to these cooperatives and transfer them to a separate act, the solutions of which were also greatly expanded and changed in comparison to the previous regulations included in the cooperative law[42].

The provisions of the cooperative law related to cooperatives conducting agricultural activity are supplemented by the provisions of the Act of 4 October 2018 on farmers' cooperatives[43]. The act refers to cooperatives, which are voluntary associations of natural or legal persons who run a farm within the meaning of the provisions on agricultural tax or conducting agricultural activity in the field of special departments of agricultural production, are producers of agricultural products or groups of these products, run the breeding or fish farming. A cooperative of farmers may also be established by legal or natural persons who are not farmers but who carry out activities in the field of storage, warehousing, sorting, packaging or processing agricultural products or groups of these products, or fish, produced by farmers or carry out service activities supporting agriculture such as providing farmers with services involving the use of machines, tools or equipment for the production of agricultural products or groups of such products, or fish by these farmers. The farmers' cooperative is an association of variable composition and variable share fund which, in the interest of its members, conducts joint economic activity.

A new solution, although not as young as farmers' cooperatives, are also social cooperatives regulated in the Act of 27 April 2006 on social cooperatives[44]. Social cooperatives operate on the bases of the work of their members, and their task is to act for the social reintegration of its members and employees (including the unemployed, listed in detail in art. 4 p. 1 of the act), which means activities aimed at rebuilding and maintaining the ability to participate in the life of the local community and to perform social roles in the place of work, residence or stay. The task of social cooperatives is to work for the professional reintegration of its members and employees (referred to in art. 4 p. 1 of the act), which means activities aimed at rebuilding and maintaining the ability to work independently on the labor market. The social cooperatives perform these activities as part of their business activity.

42 Act of 15 December 2000 in housing cooperatives, Official Journal of Laws 2018, item 845 with later amendments.

43 Official Journal of Laws „Dziennik Ustaw" 2018, item 2073.

44 Official Journal of Laws „Dziennik Ustaw" 2018, item 1205.

The legal regulation on European cooperatives is provided by the Act of 22 July 2006 on European Cooperatives[45], which develops provisions of European law[46].

6. Evaluation of the current solutions – selected issues

Despite the changes already made and those being made, the current state of the provisions relating to cooperatives do not seem satisfactory[47].

The Act of 1982 contains provisions that conflict with each other from the point of view of their legal significance. The most striking example in this regard is art. 3 which states that "cooperative property is the private property of its members". This norm is in complete contradiction with the concept of legal personality of the cooperative.

The second example is art. 1 p. 1 of the act which is contrary to art. 43 p. 1 of the Civil Code. The content of both provisions raises doubts as to whether the cooperative is actually an entrepreneur within the meaning of the Civil Code, since it conducts business[48]. In the literature it is also emphasized that the regulation of cooperative law on certain aspects related to the cooperative's economy (art. 87, art. 88a) and its bankruptcy (art. 130-137) in unnecessary[49]. Specific laws relating to accounting and bankruptcy contain a detailed regulation of these issues so it seems that there is no need to include provisions relating to them in the cooperative law, especially that the nature of the cooperative as an entrepreneur and the nature of its activities do

45 Official Journal of Laws „Dziennik Ustaw" 2018, item 2043 with later amendments.

46 Compare: Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society, Official Journal of EU L 207 of 18 August 2003 and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, Official Journal of EU L 201 of 18 August 2003.

47 See f. ex. M. Wrzołek-Romańczuk, *Przyszłość prawa spółdzielczego w Polsce,* [w:] *Prawo spółdzielcze. Zagadnienia materialno-prawne i procesowe,* ed. A. Herbet, J. Misztal-Konecka, P. Zakrzewski, Lublin 2017, p. 17-51; P. Zakrzewski, *Fundusze własne spółdzielni de lege ferenda,* „Przegląd Prawa Handlowego" No. 12, 2016, p. 16-21.

48 These and other contradictions occurring in cooperative law are noted by: P. Zakrzewski, *Stan aktualny* ..., op. cit., p. 91 and next and literature cited therein.

49 See f. ex. P. Zakrzewski, *Stan aktualny i perspektywy rozwoju polskiego prawa spółdzielczego,* „Roczniki Nauk Prawnych" No. 4, 2017, p. 87 and literature cited therein.

not differ from other organizational forms of conducting business activity (companies).

It should be agreed that the scope of activity of „professional" cooperatives needs to be amended, which in particular concerns agricultural cooperatives[50]. In practice, mainly dairy cooperatives operate in this field today. The cooperative activity, from the point of view of its members, is not limited to running a business together (art. 1 p. 1 of the cooperative law). First of all, the most important for a member of such cooperative is that it buys products from his/her farm. Therefore, such cooperatives perform a supporting function for their members[51] and their activity does not fully correspond to the definition resulting from the cooperative law.

While considering the future amendment of the cooperative law, the legislator should take into account the case law and doctrinal opinions related to commercial companies, as well as the provisions introduced to the Code of Commercial Companies related mainly to the organization of these entities. The provisions of the cooperative law in this regard are quite laconic. In particular, it concerns the provisions on the functioning of companies in the organization and provisions related to the scope of control (under cooperative law - lustration)[52].

However, it seems that in regard to the scope of future amendments and the content of new provisions the most important is to determine the purpose of cooperative activity. In order to do so several questions should be answered. Do cooperatives run a business on the same terms as commercial law companies? Is the cooperative's activity related to the personal interest of the cooperative's members as they purchase services or goods from it or they are its suppliers, thanks to which they also record positive results in their households (enterprises)? Should the cooperative, apart from economic activity, implement other activities for its members (social, cultural, educational)?[53]

There are also opinions expressed in the literature that cooperatives should be shaped in a way that allows for the participation of such members as investors interested in the return on investment rather than taking advantage of cooperative services. Such solutions have been already introduced into some legal systems (f. ex. in France). However, it seems that they completely contradicts the basic principles of the cooperative movement.

50 See: A. Suchoń, *Prawna koncepcja spółdzielni rolniczych,* Poznań 2016, p. 54-82.

51 P. Zakrzewski, *Stan aktualny* …, op. cit., p. 90.

52 See: P. Zakrzewski, *Stan aktualny* …, op. cit., p. 93.

53 This idea remains alive in the activities of the international cooperative movement – compare: P. Zakrzewski, *Zasady Międzynarodowego Związku Spółdzielczego,* „Kwartalnik Prawa Prywatnego" vol. 1, 2005, p. 291-292.

Another issue is the scope of the normative regulation of cooperatives by the universally binding provisions. The question arises to what extent the legislator should allow cooperatives to freely shape their internal statutes.

The final wording of provisions of the cooperative law will largely depend on the choice of the concept of the future cooperative.

7. Summary

The provisions of cooperative law in Poland have a long history. The cooperative movement itself exists even longer. The achievements of Polish legislation in the interwar period also needs to be emphasized. The Polish Act of 1920 was at that time one of the most modern legal acts relating to cooperatives in Europe and in the world. Its solutions were also used in the course of adopting all subsequent legal acts related to cooperatives, including the current Act of 1982. The Act of 1982 has been amended several times, especially after 1989, in order to adapt the existing regulations to new conditions. Nevertheless, it still has many shortcomings, some of which have quite serious legal significance (the contradictions with other legislative solutions mentioned in the article). There is also a lack of the clear concept of the cooperative's activity, which should decisively affect the final shape of the regulations. The amendments should also concern to the provisions of other laws relating to the specific types of cooperatives and correspond to their normative concepts.

Rafał Mroczkowski

Regulatory and Supervisory Policy Towards the Cooperative Banking Sector in Poland in the Years 2014-2019

In the years 2014-2019 in Poland a comprehensive change was made in the law in the field of cooperative banks and their institutional base. On 25 June 2015 the bill amending the Act on the Operations of Cooperative Banks, their association, and associating Banks and certain other laws was adopted, which determined the organizational model of the cooperative banking sector in Poland for the next decades. According to the concept of the regulator and the supervisor, it has been based on the structure of the Institutional Protection Scheme further IPS). This is not a new concept in the European law, however, it has not been applied in Poland until now. Currently, the system of institutional protection is governed by Article 113 para. 7 of the Regulation of the European Parliament and of the Council 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/20122.

The aim of the article is to analyse the regulatory and supervisory policies towards the cooperative banking sector in Poland in the years 2014-2019 and to present de lege lata and de lege ferenda, postulates, as well as the formulation of comments in relation to the supervisory activity carried out by the Polish Financial Supervision Authority.

The implementation of the research goal adopted in this article requires the application of legal research methods, such as in particular the general theoretical method and the formal-dogmatic method.

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Introduction

Cooperative banks in Poland, pursuing a special economic and social mission, create a category of local banks that is extremely important for the development of local self-government communities. As indicated in the doctrine, the constitutive features of a local bank include: targeting banking services to the local community (society) which allows to classify such banks as „locally oriented", fulfilling a specific social mission which is providing local communities with access to financial services and combating financial exclusion and territorially limited

scope of activity[1]. This local nature of cooperative banks is not only their immanent feature, but also a source of competitive advantage related to creating close relationships with clients, providing them with an individual approach and offering banking services tailored to their needs. At the same time, this results in a small scale of activity in comparison to commercial banks, which in turn hinders equal competition with these banks.

Referring these observations to the modern market environment of cooperative banks, it should be noted that the scale of operations is important not only for the current competitiveness of these banks, but primarily for their development potential in the medium and long term. Nowadays they face numerous challenges. These include the environment of low interest rates, which results in the reduction of bank margins, and indirectly in the reduction of the profitability of operations, which in extreme cases leads to business losses. Equally important are the challenges arising from technological progress. We live in a time of technological revolution, introduced to the financial system by the so-called fintechs and neobanks, then adopted by IT-developed universal banks, based, among others, on big data analysis processes, blockchain technology and artificial intelligence. It should be pointed out that applying technologies for these banking involves high costs that cannot be borne by universal banks with a small scale of activity. As a consequence, there is an increasing technological gap between them and technological leaders in the banking industry, such as those operating in Poland: PKO BP S.A., Pekao S.A. and Alior Bank S.A. This gap can already be described as a „gulf". In the near future, it will significantly limit the development opportunities of local banks and will relatively increase their operating costs in comparison to the most technologically advanced banks. As a consequence, this will inevitably lead to the consolidation of small and medium-sized banks and their takeover by market leaders. The results of the European Retail Banking Radar 2019 study indicate that in the next five years every tenth bank in Europe will disappear as a result of the stagnation of revenues from traditional banking models, while the so-called neobanks will increase their scale of operations[2].

The above conditions pose serious challenges not only to the management boards of local cooperative banks and staff managing the structures of associations of these banks, but also to the bodies responsible for regulatory and supervisory policy towards the cooperative banking sector. The purpose

1 It is also postulated in the literature that these features should be legally determined – see: A. Zalcewicz, *Bank lokalny. Studium prawne,* Warszawa 2013, p. 69-70.

2 D. Chikova, S. Kent, R. Freddi, *European Retail Banking Radar 2019,* <https://www.atkearney.com/financial-services/article/?/a/european-retail-banking-radar-2019>, [accessed: 14.06.2019].

of this article is to analyze this policy and present *de lege lata* and *de lege ferenda* postulates in this respect, as well as to formulate remarks regarding the supervisory activities conducted by the Polish Financial Supervision Authority.

The analysis of the Polish state policy towards cooperative banks in the years 2014-2019 leads to the conclusion that it is inconsistent. On the one hand, the legislator created a regulatory framework in this period, in which he took into account various models of cooperative banks' activities, in line with the needs and demands of this sector. On the other hand, however, the Polish Financial Supervision Authority, responsible for supervisory policy in the area of the financial market, limited the freedom to choose these models and conducted activities aimed at consolidating the cooperative banking sector around two, and ultimately one, institutional protection systems with minor deviations from this goal for the benefit of individual cooperative banks operating independently outside the structure of the association.

The implementation of the research objective adopted in this article requires the use of legal research methods, such as in particular the theoretical and the formal-dogmatic methods.

1. State policy towards the cooperative banking sector in Poland. General assumptions

The state policy towards the cooperative banking sector consists of regulatory and supervisory policies. They are implemented by separate centers using various instruments. However, according to the author, they should have a common goal and should be complementary to each other.

Regulatory policy is a conscious impact of the state on a specific area of social or economic activity implemented through instruments from the area of legislation to achieve the objectives set by the entities conducting this policy. In regard to the subject affected by this policy, the central entity is the Minister of Finance[3], who is responsible for preparing draft laws regulating the cooperative banking sector and issuing implementing regulations in this area[4].

3 Pursuant to art. 12 p. 1 of the Act of 4 September 1997 on government departments (consolidate text: Official Journal of Laws „Dziennik Ustaw" 2018, item 762 with later amendments) matters related to the functioning of the financial market, including matters related to banks, belong to the department of government administration "financial institutions". The minister competent for financial institutions is currently the Minister of Finance.

4 The author consciously emphasizes the role of the Minister of Finance as a creator of regulatory policy towards cooperative banks, not mentioning the Sejm and the Senate which are authorities of legislative power

The supervisory policy in the area of operations of financial institutions in the large sense, including cooperative banks, is implemented by the Polish Financial Supervision Authority, which is a collegial public administration body[5], based on the personnel and material resources of the Office of the Polish Financial Supervision Authority, which has been finally granted the status of a state legal person[6]. This policy is an expression of the planned impact on financial institutions through the instruments set out in sectoral laws[7] in the area of control, regulation and supervision in the strict sense in

in Poland and in practice have a decisive but secondary impact on the final shape of legal regulation.

5 Compare: R. Blicharz, *Komisja Nadzoru finansowego jako organ administracji publicznej*, [in:] *Nadzór Komisji Nadzoru Finansowego nad rynkiem kapitałowym w Polsce*, Bydgoszcz-Katowice 2009, p. 15 and next. There is a dispute in the doctrine of financial market law whether the Polish Financial Supervision Authority belongs to the category of central government administration bodies or not. A. Nadolska, who supported the first opinion, expressed it in the article entitled *Status prawny Komisji Nadzoru Finansowego,* „Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia" vol. XLV, 2, Sectio H, 2011, p. 129 and next. The opposite view is presented by P. Stanisławiszyn (*Status prawny Komisji Nadzoru Finansowego w zakresie wykonywania nadzoru bankowego (wnioski de lege lata i de lege ferenda),* paper presented at the conference „Komisja Nadzoru Finansowego – status prawny i zadania nadzoru finansowego w Polsce" organized by the Office of the Polish Financial Supervision Authority and the Faculty of Law and Administration of the Opole University in Warsaw on 22 February 2010. According to the opinion of this representative of the doctrine, also shared by representatives of the Polish Financial Supervision Authority, it is a public administration body, but it is not a part of the government administration.

6 Art. 3 p. 1 of the Act of 21 July 2006 r. on the supervision over the financial market (consolidated text: Official Journal of Laws „Dziennik Ustaw" 2019, item 298 with later amendments).

7 In regard to cooperative banks these laws are: the Act of 29 August 1997 Banking Law (consolidated text: Official Journa of Laws „Dziennik Ustaw" 2018, item 2187 with later amendments) and the Act of 7 December 2000 on operation of cooperative banks, their affiliation and affiliating banks (consolidated text: Journal of Laws „Dziennik Ustaw" 2018, item 613 with later amendments).

order to achieve the objectives of micro-prudential supervision[8]. These goals have been defined by law on two levels. The general objectives applicable to all financial institutions are set out in art. 2 of the act on financial market supervision. Pursuant to the aforementioned provision, the purpose of financial market supervision is to ensure the proper functioning of this market, its stability, security and transparency, trust in the financial market, as well as to protect the interests of market participants. However, specific objectives were set out in sectoral laws, and in relation to banks - in art. 133 p. 1 banking law. The purpose of banking supervision *expressis verbis* indicated in the above provision is to ensure the security of funds accumulated on bank accounts and the compliance of banks' activities with relevant legal provisions.

Since the objectives of regulatory policy in regard to financial institutions have not been defined in any legal act, it should be assumed that the above-mentioned statutory objectives of financial supervision are also the objectives of the legislative activity of the state in this area. These objectives obviously also apply to the cooperative banking sector. However, due to their special legal status and mission related to belonging to the category of local banks, the state should take into account the specificity of these institutions in its policy, which should be manifest, among others, by achieving a specific goal in this area.

Taking above into account, the author postulates that the regulatory and supervisory policy of the state towards cooperative banks should be focused on creating conditions for equal competition of local banks with other commercial banks in order to ensure the full access of local communities to financial services. A practical expression of achieving this goal should be the application of statutory preferences in the area of prudential standards and the level of taxation. This approach is based on the principle of subsidiarity (in Latin „subsidy" means "help", "support"). The idea of subsidiarity has been known and developed for over 2,000 years. Aristotle is considered to be its creator. The modern understanding of this principle derives from Catholic social teaching, and its shape was given to it by papal encyclicals[9], in particular the Pius XI's Quadragesimo anno of 1931, emphasizing its philosophical and moral aspect in the following words: „Just as it is gravely wrong to withdraw from the individual and commit to the community at large what private enterprise and industry can accomplish, so too, it is an injustice, a grave

8 More on macro-prudential supervision see: M. Zygierewicz, *Mikro- i makroostrożnościowa polityka nadzorcza względem sektora bankowego – potencjalne obszary konfliktów i sposoby ich minimalizacji,* „Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia" vol. L, 3, Sectio H, 2016, p. 205 and next.

9 M. Sadowski, *Państwo w doktrynie papieża Leona XIII,* Köln 2002, p. 126 and next.

evil, and a disturbance of right order for a larger and greater organization to arrogate to itself functions which can be performed efficiently by smaller or lower bodies. This is a fundamental principle of social philosophy, unshaken and unchangeable. Of its very nature the true aim of all social activity should be to help individual members of the social body, but never to destroy or absorb them"[10]. On the basis of economic policy, this principle is a justification of state interventionism limited by the purpose and manner of action, which is considered acceptable and even useful when it is necessary for the public interest, the good of an individual or society and it brings better results than the lack of action of public law association if it is undertaken at the lowest possible level. Under the Constitution of the Republic of Poland of 2 April 1997[11], the idea of subsidiarity gained the status of a constitutional principle in Poland. Although its expression in the Basic Law is very modest, limited to its indication in the preamble, it has been confirmed and developed in the doctrine and jurisprudence of the Constitutional Tribunal. In its judgment of 8 May 2002, the Constitutional Tribunal stated that, as shown in the preamble to the Constitution, rights that are fundamental for the state are based, inter alia, on the principle of subsidiarity. It thus constitutes a constitutional directive in determining the tasks and competences of public authorities and in allocating tasks between them in general[12].

2. Regulatory policy towards cooperative banks in Poland in the years 2014-2019

The year 2014 was recorded in history as a time of breakthrough for the cooperative banking sector. After 1 January 2014, cooperative banks in Poland, like all banks in EU Member States, found themselves in a new legal environment. On this date, two legal acts that make up the CRR / CRD IV regulatory package, called the „EU Banking Constitution", entered into force. These are: Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012, hereinafter referred to as the CRR[13], and Directive No. 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access

10 Pius XI, *Quadragesimo Anno: Reconstructing the Social Order and Perfecting it Conformably to the Precepts of the Gospel in Commemoration of the Fortieth Anniversary of the Encyclical 'Rerum Novarum';* in Polish: Pius XI, *Encyklika o odnowieniu ustroju społecznego „Quadragesimo anno"*, translated by J. Piwowarczyk, Karków 1982, p. 707-708.

11 Official Journal of Laws „Dziennik Ustaw", No. 78, item 483 with later amendments.

12 Case No. K 29/00, OTZ ZU 3A/2002, item 30.

13 Official Journal of the European Union L 176 of 27 June 2013, p. 1.

to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, hereinafter referred to as CRDIV[14]. These acts have created a uniform legal framework and are the first of the three pillars of the banking union in Europe.

The new EU regulations have become a catalyst for changes in national law, in such a fundamental scope as in particular the model for associating cooperative banks. As early as in 2013, the legislative process started to develop a draft law amending the act on the operating of cooperative banks, their affiliation and affiliating banks. During the legislative process, the most important postulates of the cooperative banking environment[15] were taken into account, which created the legal basis for four models of local bank operations in Poland, based on:

1) association of cooperative banks with the affiliating bank in the current formula,
2) the Institutional Protection Scheme (hereinafter referred to as IPS),
3) in-depth association as part of the so-called integrated association,
4) independent operations of cooperative banks that meet prudential requirements, including in particular initial capital at the level of at least the equivalent of EUR 5 million.

Finally, these solutions were adopted pursuant to the Act of 25 June 2015 amending the Act on the operation of cooperative banks, their affiliation and affiliating banks, and certain other acts[16]. The new law, next to the previously regulated associations of the so-called „ordinary" cooperative banks, provided for two new types of associations with a deepened but differentiated level of integration, which are an institutional protection system and an integrated association. In the author's opinion, the legislator also sanctioned previously admissible, but questioned by the Polish Financial Supervision Authority, possibility to conduct independent operations outside the structure of the association by a cooperative bank [17].

14 Official Journal of the European Union L 176 of 27 June 2013, p. 338.

15 R. Mroczkowski [et al.], *Uwagi sektora bankowości spółdzielczej do projektu ustawy o zmianie ustawy o funkcjonowaniu banków spółdzielczych, ich zrzeszaniu się i bankach zrzeszających oraz ustawy – Prawo bankowe z dnia 19 lutego 2014 r. opublikowanego przez Ministerstwo Finansów,* unpublished document.

16 Official Journals of Laws „Dziennik Ustaw" 2015, item 1166.

17 The following analysis covers new business models of cooperative companies.

2.1. Institutional protection system

The genesis of the institutional protection system goes beyond the time frame of the legislative process regarding the CRR regulation. Originally, the legal basis for IPS was art. 80 p. 8 of the repealed Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions[18], hereinafter referred to as CRD III. Based on the provisions implementing this directive and the groups of cooperative banks operating in many Member States of the European Union, including Germany, the first institutional protection systems were created. One of the largest banking groups that adopted the IPS model was created in Germany on the basis of art. 10c p. 1 of the German Act of 10 July 1961 on Banking Law (German: Gesetz uber das Kreditwesen /Kreditwesengesetz/ within the structures of the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken). Art. 80 p. 8 of the CRD III Directive became the prototype of art. 113 p. 7 of the CRR, which is currently the basis for the activities of IPS.

The *Ratio legis* of the institutional protection system is to create for credit institutions, mainly with a small or local scale of operations, in particular for cooperative banks, a legal framework facilitating the fulfillment of prudential standards in accordance with the indications resulting from the application of the principle of proportionality[19]. The prudential standards

18 Official Journal of the European Union L 177 of 30 June 2006, p. 1.

19 In regard to the principle of proportionality both a negative approach (no excessive state interference) and a positive approach can be found in the jurisprudence of the Constitutional Tribunal. The essence of the first of these is the recognition that the legislator may not impose restrictions exceeding a certain degree of nuisance, and in particular distorting the proportion between the degree of violation of the rights of the individual and the rank of the public interest, which is to be protected in this way - see the judgment of the Constitutional Tribunal of 26 April 1995, case K 11/94, OTK, 1995 No. 1 item 12 p. 127. In a positive approach, the principle of proportionality was derived by the Constitutional Tribunal from the principle of a democratic state of law based on the existing jurisprudence (judgment of 9 April 1991, case U. 9/90, OTK 1991, p. 147; judgment of 17 December 1991, case U. 2/91, OTK 1991, p. 160; judgment of 26 January 1993, case U. 10/92, OTK 1993, p. 32; resolution of 2 June 1993, case W. 17/92, OTK 1993, p. 430). In the above mentioned judgment of 26 April 1995, the Constitutional Tribunal made the admissibility of limiting constitutional freedoms conditional upon the fulfillment by the legislative regulation of three conditions: 1) effectiveness - understood as the possibility of achieving its effects with its help; 2) the necessity to protect the public interest

provided for in the CRR, including, among others, liquidity standards[20] are the implementation in the EU Member States of the recommendations adopted by the Basel Committee on Financial Supervision, commonly known as Basel III. As a rule, these standards within the EU apply equally to global and local banks. There is no doubt that these banks have extremely different impacts on the stability of the EU financial market. That is why the European legislator, with the local banks in mind, has used legal constructions that help them meet prudential standards, such as the institutional protection system. These intentions have been most fully expressed in recital 46 of the preamble to the CRR. It states that „the provisions of this Regulation respect the principle of proportionality, having regard in particular to the diversity in size and scale of operations and to the range of activities of institutions (…). Member States should ensure that the requirements laid down in this Regulation apply in a manner proportionate to the nature, scale and complexity of the risks associated with an institution's business model and activities".

According to the structure adopted in art. 113 p. 7 of the CRR the institutional protection system is a form of in-depth cooperation between credit institutions (in principle), aimed at limiting the risk of losing financial liquidity or the risk of its participants' insolvency. The activity of IPS is based on close cooperation mainly of credit institutions with a similar profile, including the consolidation of financial statements, a common risk control and management system and an assistance fund. Although IPS is an open solution for all credit institutions and investment companies, its origin lies in

with which it is associated; 3) proportionality in the strict sense, stating that the effects of the introduced regulation must remain in proportion to the burdens it imposes on the individual. Similarly, the legal doctrine emphasizes that the restriction of freedom of economic activity can only take place while maintaining the principle of proportionality. This principle requires that the following conditions are met: 1) the legality of the public interest protected by the restriction, 2) the usefulness of the restriction of the right for the public interest, 3) the need for the restriction, 4) the proportionality of the restriction in the narrow sense. See: A. Walaszek-Pyzioł, *Wolność gospodarcza w ustawodawstwie Republiki Federalnej Niemiec*, „Przegląd Ustawodawstwa Gospodarczego" No. 5-6, 1992; C. Kosikowski, *Glosa w wyroku TK z 26 kwietnia 1995 r., k 11/94,* „Państwo i Prawo" No. 10-11, 1995, p. 166-169.

20 More about liquidity standards see: M. Zygierewicz, *Normy zarządzania płynnością w świetle propozycji dyrektywy CRD IV,* „Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia" Vol. XLVI, 4 Sectio H, 2012, p. 935 and next.

the creation of a formula dedicated to local banks and cooperative banks in Poland[21].

However, the introduction of the legal regulation concerning IPS in Poland, despite the fact that the CRR Regulation is directly applicable in all Member States, took the form of an act in which, according to the author, the legal structure of IPS was significantly modified. As far as according to the content of art. 80 p. 8 of the CRD III Directive, and then art. 113 p. 7 of the CRR, the institutional protection system includes close cooperation mainly of credit institutions with a similar profile, in practice primarily cooperative banks, the Polish legislator allowed for the creation of IPS by affiliating banks or cooperative banks or an affiliating bank and cooperative banks affiliated with it (art. 22b p. 1 of the act on the functioning of cooperative banks). However, the legislator's real intention was to create a model of in-depth cooperation between cooperative banks and an affiliating bank. The key problem of the structure of such entity is that the profile of the affiliating bank's activity and the types and scale of risk it generates by its nature are different than for the cooperative banks associated with it. With such a construction, the requirement provided for in art. 113 § 7 p. h of the CRR: „a broad membership of credit institutions of a predominantly homogeneous business profile" that are affiliated cooperative banks has been met, which determines its compliance with EU law. However, according to the author, the participation of the affiliating bank generates enormous risks related both to the scale of the bank's operations compared to cooperative banks, as well as problems regarding the quality of management and assets in both affiliating banks in Poland, which are Bank Polska Spółdzielczości SA, hereinafter referred to as BPS and Bank SGB SA, hereinafter referred to as SGB.

This statement gains additional justification in relation to the above mentioned and explicitly pointed out in art. 113 p. 7 of the CRR, essence of the institutional protection system, which is to establish the principles of mutual liability of its members for obligations. In accordance with the wording of the abovementioned provision, IPS constitutes a "contractual or statutory agreement on liability". The purpose of the institutional protection system, explicitly expressed in this provision, is a mutual guarantee of liquidity and solvency in order to avoid bankruptcy. Also in the content of art. 22a p. 2 of the Act on the functioning of cooperative banks it is indicated that the overarching purpose of the protection system is to ensure the liquidity and solvency of each of its participants. Despite the fact that in accordance with p. 2 of the aforementioned provision, the protection system contract should

21 R. Mroczkowski, P. Cioban, *System ochrony instytucjonalnej jako nowa forma zrzeszania banków w Polsce,* [in:] *XXV lat przeobrażeń w prawie finansowym – ocena dokonań i wnioski na przyszłość*, ed. Z. Ofiarski, Szczecin 2014, p. 777.

specify the scope of the participant's liability for the obligations arising from guaranteeing the liquidity and solvency of other participants, the solutions adopted in both protection systems functioning in Poland that are based on transfers of funds through the assistance fund referred to in art. 22h of that act pose a high risk of local cooperative banks being responsible for the obligations of affiliating banks with nationwide scope of activity.

Another consequence of the IPS structure adopted in Poland, assuming the participation of an affiliating bank, is the management of the institutional protection system based on a management unit created for this purpose by IPS participants in the form of a cooperative of legal entities. Such solution, in accordance with the requirements arising from art. 22d of the act on the functioning of the cooperative banks has been adopted in both institutional protection systems created in Poland. Its obvious disadvantage is that cooperative banks have to bear the costs of establishing and maintaining an additional institution that performs monitoring and control functions instead of conducting profit-based operations.

2.2. Integrated association

An integrated association regulated in Chapter 3b of the Act of the functioning of cooperative banks is an organizational and legal model alternative to the institutional protection system, which is a response to the postulates of the cooperative banks environment divided in the assessment of the advisability of transforming ordinary associations into IPS, its economic efficiency and impact on the security and stability of the cooperative banking sector.

The organizational and legal structure of the integrated association is based on the provisions of the CRR Regulation and the Commission Delegated Regulation (EU) 2015/61 of 10 October 2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to the requirement to cover net outflows for credit institutions[22]. It constitutes a practical implementation of the principle of proportionality. The establishment of the so-called cooperative protection system as an alternative to the institutional protection system, was explicitly confirmed in recital 12 of the Regulation 2015/61. This model, adopted in the construction of an integrated association, achieves objectives analogous to the institutional protection system, such as ensuring stability and security of the functioning of its participants, by using instruments adapted to the specifics of the cooperative banking sector.

The model of relations between cooperative banks and the affiliating bank based on the structure of the integrated association shows significant differences in relation to the model of the protection system, which are

22 Journal of Laws of the EU L 11 of 17 January 2015, p. 1.

manifested in particular at the level of legal structure, specific objectives, scope of members' liability and operating costs.

The legal structure of an integrated association is mainly based on the concept of a network of credit institutions (f. ex. cooperative banks) associated with a central credit institution (such as an affiliating bank) on the basis of the provisions of art. 400 p. 2 letter d and art. 422 p. 3 letters a, c, d and p. 8 letters a and v of the CRR Regulation and art.16, art. 27-29 of the Regulation 2015/61.

The purpose of the integrated association is to support the liquidity and solvency of participants, f. ex. by introducing mandatory deposits and creating an assistance fund. However, the participants of the integrated association do not guarantee liquidity and solvency, especially if they are unlimited. This assumption was adopted in art. 22u of the act on the functioning of cooperative banks, constituting the legal basis for limiting the liability of the members of the integrated association by indicating the scope of this responsibility and the level of financial resources accumulated in the assistance fund. With this solution, cooperative banks do not guarantee the solvency of the affiliating bank.

The structure of the integrated association is based on institutional solutions previously tested in the activity of the so-called ordinary associations, supplemented with new liquidity and solvency support instruments. Therefore, it does not require the establishment of new entities, such as a cooperative, to manage the security system, which ensures a comparable level of security, with lower operating costs.

The model of an integrated association is based on a minimum statutory regulation ensuring its durability in changing socio-economic conditions. At the same time, this regulation leaves the parties of the integrated association agreement a wide freedom to regulate: rights and obligations of the parties, specific powers of the authorities, amount of mandatory deposits, as well as basis, dates and frequency of their calculation and interest, rules for managing the liquidity support system and the solvency support system, rules for using assistance funds by the affiliating bank as well as supervision over their use and rules for controlling the activities of the participants of the integrated association and their obligations related to control, including information obligations[23].

The construction of the integrated association model is complemented by its management based on the affiliating apex bank. The main feature of this bank, which distinguishes it from today's affiliating banks, is the focus on the implementation of only one function - service activities for cooperative

23 See more: *Model organizacyjny i finansowy zrzeszenia zintegrowanego z bankiem apeksowym,* red. R. Mroczkowski, Tarczyn 2015, p. 5 and next [unpublished work].

banks (art. 2 p. 2 of the act on the functioning of cooperative banks). Towards these banks it plays a role similar to the central bank in the financial system for commercial banks, and therefore manages liquidity and is the lender of last resort. The affiliating apex bank is a bank which scope of activity is limited to activities for cooperative banks indicated in art. 19 p. 2 of the act on the functioning of the cooperative banks and other activities specified in the banking law or in other acts, to the extent they are necessary to ensure the proper performance of association services. The scope of this bank's activities includes, in particular, activities related to collecting deposits and granting loans to cooperative banks in order to regulate their financial liquidity as well as managing an assistance fund aimed at improving solvency and preventing the bankruptcy of associated cooperative banks[24].

The advantage of basing the management of the integrated association model on the affiliating apex bank is the reduction of not only costs but also risk in relation to IPS. The apex bank, because it does not conduct commercial activities, does not accept deposits and does not grant loans to entities other than its cooperative banks, which significantly limits the risk profile of its banking activities. This found expression in the capital requirements reduced by half, so to the amount equivalent to EUR 10 million, in relation to this type of affiliating banks (art. 2 p. 2 of the act on the functioning of cooperative banks). As a consequence it may focus on service activities for cooperative banks without the need to cover it with aid measures provided for the association's participants.

2.3. Activity of a cooperative bank outside the association's structure

In the current legal status, pursuant to art. 4 of the act on the functioning of cooperative banks, a cooperative bank is obliged to associate with an affiliating bank, on the terms set out in art. 16 of the act. However, this obligation is not absolute. It refers to banks that do not meet all prudential requirements provided for commercial banks, in particular capital requirements. In accordance with art. 1 p. 2 of that act, the obligation to associate does not apply to banks with the initial capital of at least the equivalent of EUR 5 million expressed in zlotys, unless these banks are affiliated pursuant to the rules specified in art. 16 of the act or are participants in the protection system referred to in art. 22b p. 1 or an integrated association referred to in art. 22o paragraph 1 of the act.

A cooperative bank, which owns funds that reach the level required for independent operations, pursuant to art. 16 p. 4 of the act on the functioning of cooperative banks may terminate the association agreement with six month notice. The expiry of the association agreement results in the obligation of the cooperative bank operating outside the existing structure to meet

24 Ibidem, p. 15.

all requirements provided for commercial banks, which are subject to examination during the licensing procedure before the Polish Financial Supervision Authority. This applies in particular to the requirement of possessing share capital, as referred to in art. 32 p.1 letter b (art. 12 p. 1 of the CRD IV Directive), at the equivalent level of at least EUR 5 million as well as compliance with other prudential requirements.

Currently, the procedure for leaving the association structure has a dual nature and involves proceedings before the Polish Financial Supervision Authority, which includes checking compliance with the requirements for independent operations and giving permission to amend the statute, taking into account the independent status of a cooperative bank.

Pursuant to the content of art. 16 p. 4a of the act on the functioning of cooperative banks, the first of the above procedures begins with the cooperative bank notifying its intention to terminate the association agreement. Within a month of its receipt, the Polish Financial Supervision Authority - in the event that this termination could lead to a violation of law, customer interests or the security of funds accumulated by the cooperative bank - may recommend taking steps to remove these irregularities. In the absence of the implementation of these recommendations, the supervisory authority may apply the measures referred to in art. 138 of the banking law. In addition, the Polish Financial Supervision Authority has been equipped by the legislator with a preventive supervisory instrument. Based on art. 16 p. 4ab of the act on the functioning of cooperative banks, it may issue an administrative decision refusing its consent to the cooperative bank's activities outside the association if at least one of the following circumstances occurs in regard to this bank:

1) it does not have initial capital at the level equivalent to at least EUR 5 milion;
2) it does not meet the general prudential requirements in relation to the matters listed in art. 1 of the CRR;
3) it implements the rehabilitation program;
4) there are premises specified in art. 142 p. 1 of the banking law;
5) it is not properly organizationally prepared to start operations outside the association.

Notwithstanding the above, the cooperative bank's establishment outside the association structure requires an appeal to the Polish Financial Supervision Authority to issue the permission to change the statute in the manner provided for in art. 34 p. 2 of the banking law. The procedure for granting this permission is carried out as part of an administrative procedure during which the Financial Supervision Authority examines the compliance of the statute with legal provisions.

It is worth mentioning that the above mentioned amendment to the act on the functioning of cooperative banks of 2015, taking into account the postulates of cooperative banks, introduced a solution that facilitates the independent operation of cooperative banks after the termination of the association agreement. It has been regulated in art. 16 p. 6 of the act. Pursuant to this provision, in the event of termination by the cooperative bank of the association agreement, the affiliating bank shall, at the written request of the cooperative bank submitted by the date of the expiry of the notice period, be obliged to ensure the provision of association services to the cooperative bank for a payment specified in a separate agreement corresponding to the nature of these activities, for a period of at least 24 months from the date of the termination of the association agreement, but not longer than until the cooperative bank concludes the association agreement with another associating bank. This solution provides a transitional period during which the cooperative bank may gradually take over the performance of activities, such as interbank settlements or reporting to the National Bank of Poland, previously carried out for its benefit by the affiliating bank.

3. Supervisory policy towards cooperative banks in Poland in the years 2014-2019

Since the extensive amendment of the act on the functioning of cooperative banks of 25 June 2015 entered into force, intensive actions have been initiated by both affiliating banks and cooperative banks aimed at using the new organizational and legal models and adapting them to the activity they conduct.

The processes of creating institutional protection systems in both existing associations of cooperative banks, which are Zrzeszenie Banku Polskiej Spółdzielczości S.A. and Zrzeszenie Spółdzielczej Grupy Bankowej, were the fastest. In a truly impressive period, given the practice of the Polish Financial Supervision Authority, the necessary decisions were taken to create security systems in both of the above mentioned associations. These were two decisions addressed to Bank Polskiej Spółdzielczości (BPS)[25] and

25 Applications for the recognition of the BPS Association Protection System and approval of the BPS Association Protection System Agreement were received on 23 September 2015, and positive decisions were issued on 22 December 2015 (the decision of the Financial Supervision Authority of 22 December 2015 on the recognition of the BPS Association Protection System, DBS / DBS_W5/7105/15/14/2015/WP; the decision of the Financial Supervision Authority of 22 December 2015 approving the BPS Association Protection System Agreement, DBS/ DBS_W5/7105/15/13/2015/WP).

Spółdzielczej Grupy Bankowej (SGB)[26] in regard to the recognition of the security system and, respectively, approval of the security system agreement. This enabled the establishment of protection systems in both associations in 2015. On 23 November 2015, the SGB Protection System Agreement was signed by the representatives of 191 cooperative banks of the SGB association and the management of the affiliating bank SGB-Bank S.A., while on 31 December 2015 the relevant agreement was concluded by the affiliated cooperative banks and BPS.

The in-depth cooperation model adopted in these associations, based on the IPS structure, enjoyed the support of the Polish Financial Supervision Authority, expressed in official documents[27], the statements of the representatives of this body[28], and in the actual supervisory policy. Moreover, the representatives of both the Polish Financial Supervision Authority and cooperatives expressed their common view as to the advisability of merging two security systems operating in Poland, while pointing out that the obstacle to achieving this goal is a group of banks that have not joined the security systems and are working to create an integrated association. The former Chairman of

26 Applications for the recognition of the SGB Protection System and approval of the SGB Protection System Agreement were received on 17 September 2015, while positive decisions were issued as early as on 3 November 2015 (the decision of the Financial Supervision Authority of 3 December 2015 on the recognition of the SGB Protection System, DBS/DBS_W5/7105/16/3/2015/WP; the decision of the Financial Supervision Authority of the 03 December 2015 approving the SGB Protection System Agreement, DBS/DBS_W5/7105/16/2/2015 / WP).

27 Starting from 2013, the Office of the Polish Financial Supervision Authority clearly indicated the institutional protection system as the target model for associations of cooperative banks in Poland. Office of the Polish Financial Supervision Authority, *Analiza sytuacji bankowego sektora spółdzielczego, w tym funduszy własnych, w 2012 r. oraz informacja o przebiegu prac nad możliwymi modelami działania zrzeszeń w kontekście Dyrektywy CRD IV oraz Rozporządzenia CRR,* Warszawa 2013, p. 1 and next.

28 The most synthetic arguments of the Polish Financial Supervision Authority pointing to the benefits of rebuilding associations in IPS and a critical stance towards the integrated association were made by the Financial Supervision Authority Deputy Chairman W. Kwaśniak in a letter to the Chairman of the Budget and Public Finance Committee of the Senate of the Republic of Poland of 28 May 2015, DBS_DBS_W5/7111/4/24/2015MW, <https://www.senat.gov.pl/gfx/senat/userfiles/_public/k8/komisje/2015/kbfp/materialy/908_knf.pdf>, [accessed: 29.06.2019].

the Polish Financial Supervision Authority M. Chrzanowski explicitly stated that „in organizational terms, the creation of one institutional protection system, covering all local financial institutions on the Polish market, seems possible, although difficult. (...) Some cooperative banks have not been included in the institutional protection systems, and two entities operate outside the structures of associations. Any subsequent stage of sector integration should first cover those institutions that have not joined the IPS". A. Skowroński, the president of the SGB Cooperative Protection System, agreed with this opinion, pointing out that „creating a single protection system covering all cooperative banks would also require the conviction of institutions that currently remain outside IPS. Let us remember that some of them work to create a new association without a protection system. The completion of this process, regardless of the outcome, can have a significant impact on further changes in our sector, including the possibility of integration in this area"[29].

This Polish Financial Supervision Authority's supervisory policy towards institutional protection systems contrasted with the approach towards cooperative banks undertaking the initiative of creating an affiliating apex bank and organizing an integrated association around it. On 31 October 2016, the founders of Polski Bank Apeksowy S.A., hereinafter referred to as PBA, submitted an application to the Financial Supervision Authority for permission to establish an affiliating bank. From the beginning, the Polish Financial Supervision Authority conducted this proceeding in a protracted manner with the violation of art. 12 of the Code of Administrative Procedure that expresses the principle of considering cases with reasonable speed. The activities of the Polish Financial Supervision Authority were characterized by a deconcentration of proceedings, in particular expressed by making repetitive comments in regard to documents submitted with the application, instead of concentrating them in one letter[30]. During the proceedings, the provisions

29 J. Machowski, *Bankowość spółdzielcza – IPS: czy możliwe jest porozumienie ponad zrzeszeniami?,* „Nowoczesny Bank Spółdzielczy" No. 2, 2018, <https://alebank.pl/bankowosc-spoldzielcza-ips-czy-mozliwe-jest-porozumienie-ponad-zrzeszeniami/?id=242791&catid=26173>, [accessed: 30.06.2019].

30 According to the current view of the Provincial Administrative Court in Łódź expressed in the judgment of 7 March 2012 (case II SAB/Łd 2/12, Legalis, thesis 2) „Prolongation in conducting proceedings will occur if the authority fails to settle the matter on time, no while remaining inactive, and the procedural activities undertaken by this body are not characterized by the concentration necessary in the light of art. 12 of the Code of Administrative Proceedings establishing the principle of speed of proceedings, or they are apparent acts, irrelevant to the substantive settlement of the case. Chronic conduct of the administrative procedure

specifying deadlines for settling cases were violated, in particular art. 33 and art. 35 of the Code of Administrative Procedure. The Supreme Audit Office confirmed the faulty way of conducting proceedings by the Financial Supervision Authority in relation to PBA in the report „Ensuring the stability of the banking sector in the years 2015-2017". The Supreme Audit Office audited the 12 month long proceedings to issue a decision to permit the establishment of PBA and found that some of the actions taken by the Financial Supervision Authority in the course of these proceedings were unjustified and affected its extension[31]. It should be noted that the manner in which the Financial Supervision Authority proceeded could in practice prevent cooperative banks that are founders of the PBA from fulfilling their statutory obligation to associate with the affiliating bank and violate the right to fulfill this obligation by creating an affiliating apex bank and establishing a new integrated association around it that is guaranteed to them in art. 4 in connection with art. 2 p. 2 of the act on the functioning of cooperative banks. Finally, it was only a result of the reminder of the founders of PBA submitted on 21 November 2018 pursuant to art. 37 § 1 p. 1, § 2 and § 3 p. 2 of the Code of Administrative Procedure, that the Financial Supervision Authority issued a decision authorizing the creation of PBA[32].

In an analogous manner, characterized by the extension in time of undertaken activities, and thus their excessive length and violation of the deadlines for settling matters provided for in the Code of Administrative Procedure, the proceedings concerning the decision to start PBA's activity were conducted, both at first instance and as a result of submitting an application for reconsidering the case. These decisions in both instances were taken only after reminders submitted by the applicant pursuant to art. 37 § 1 p. 1, § 2 and § 3 p. 2 of the Code of Administrative Procedure, and in the second instance also after a complaint to a voivodship administrative court about

by the authority will occur when it can be effectively presented with a charge of failure to exercise due diligence in organizing the administrative procedure in such a way that it ends within a reasonable time, or charge of conducting activities (including evidence) of no relevance to the case. *A contrario,* it is impossible to attribute to the authority of protracted conduct of proceedings in a situation where it undertakes all possible and necessary actions to complete the proceedings, which, however, for reasons beyond the authority's control do not bring the expected effect in the form of the termination of administrative proceedings".

31 The Supreme Audit Office, *Raport „Zapewnienie stabilności sektora bankowego w latach 2015-2017"*, Warszawa, October 2017, p. 19 and p. 68-69.

32 The decision of the Financial Supervision Authority of 21 November 2017 on the permission to establish PBA, DPP/WOPI/700/1/4/17/DP.

lengthy proceedings. By its decision of 27 November 2018, the Financial Supervision Authority refused to grant permission to start operations by PBA[33]. It had an unprecedented character. For the first time, the Polish Financial Supervision Authority refused to issue a 2nd degree license, when it had previously issued a 1st degree license, and the bank's management board cooperated with the Financial Supervision Authority and sufficiently prepared the bank to start operating activities. However, based on questionable quality of arguments[34], the Polish Financial Supervision Authority stated that there was a lack of proper organizational preparation to start operations, lack of proper conditions for storing cash and other values, taking into account the scope and type of banking operations, and failure to meet the conditions specified in the decision to issue a permit to establish a bank[35]. In addition, as a result of examining the application for re-examination of the case, based on the premises that arose directly as a result of issuing a negative decision in the first instance, the Polish Financial Supervision Authority by the decision of 14 May 2019 upheld the decision issued in the first instance[36].

At the same time, unprecedented pressure was exerted on cooperative banks which were the founders of PBA, manifested in intensified audits aimed at undermining the quality of the loan portfolio, pressure from the supervisors of cooperative banks from the Cooperative Banking Department of the Financial Supervision Authority, as well as threats of *ad personam* sanctions directed to the management boards of these banks.

With respect to cooperative banks, which assumed in their development strategies to conduct independent operations outside the association structure, the Polish Financial Supervision Authority confirms such possibility, but at the same time it conductes the administrative proceedings initiated by these banks in a protracted manner. With respect to the first cooperative bank in Poland, which terminated the association agreement in order to start

33 Decision of the Polish Financial Supervision Authority of 27 November 2018 refusing to issue permission to start operating by Polski Banks Apeksowy Spółka Akcyjna, DLB-DLB2.700.244.2018.

34 The purpose of this article is not a polemic with the KNF's position.

35 Financial Supervision Authority, *Komunikat KNF ws. odmowy wydania zezwolenia na rozpoczęcie działalności przez Polski Bank Apeksowy z* 27.11.2018 r., <https://www.knf.gov.pl/o_nas/komunikaty?articleId=63915&p_id=18>, [accessed: 30.06.2019].

36 Decision of the Polish Financial Supervision Authority of 14 May 2019 to maintain the decision challenged on the application for the re-examination of the matter of the administrative decision of the Polish Financial Supervision Authority of 27 November2018 refusing to issue a permit to start operations by Polski Banks Apeksowy Spółka Akcyjna, DPP-WOPI.700.1.2018.MK.

independent operations, which is Bank Spółdzielczy in Brodnica, administrative proceedings lasted one year and 10 months. In case of other cooperative banks, which in their development strategies provided for independent operation, the procedures before the Polish Financial Supervision Authority took even longer. Until the end of January 2019, the Financial Supervision Authority had recognized the independence of only two cooperative banks[37]. Several other procedures are still ongoing.

Since 2015, the Polish Financial Supervision Authority has changed its position as to the interpretation of the provisions of the Act regarding supervisory powers in connection with the termination of the association agreement by the cooperative bank at least three times. Initially, it took the position that after notifying the cooperative bank of its intention to terminate the association agreement, pursuant to art. 16 p. 4a of the act on the functioning of cooperative banks, the Financial Supervision Authority carries out an audit, as part of which it examines whether the bank meets all requirements for commercial banks. When the audit result was positive, the Financial Supervision Authority did not start proceedings regarding the issuance of a decision pursuant to art. 16 p. 4ab. However, in 2017, it changed its approach and considered that this provision also constitutes the basis for issuing a decision on consent to the cooperative bank's activities outside the association, also in a situation where the association agreement had expired and the cooperative bank *de iure* and *de facto* was already an independent bank. In 2019, the Polish Financial Supervision Authority changed the interpretation of this provision again, stating that firstly it constitutes the basis only for a negative decision, and secondly, it is only possible until the expiry of the association agreement. Proceedings initiated before this date but not completed should be discontinued as groundless.

The analysis of the Polish Financial Supervision Authority's policy towards cooperative banks indicates that it clearly prefers the institutional protection system as the optimal organizational and legal structure for associations of cooperative banks in Poland. At the same time, in relation to any alternative strategies of cooperative banks based on the initiative to create an association integrated with the apex bank or to undertake independent operations, it applies obstruction of activities under conducted administrative proceedings combined with formal and informal pressure on cooperative banks involved in these projects. According to the author, these actions are to discourage cooperative banks from any strategies alternative to joining one of the two institutional protection systems operating in Poland. At the same time,

37 Financial Supervision Authority, *Informacja o sytuacji banków spółdzielczych i zrzeszających w trzech kwartałach 2018 r.,* Warszawa February 2019, <https://www.knf.gov.pl/knf/pl/komponenty/img/analiza_publ_2018-09_64697.pdf>, [accessed: 30.06.2019].

the Polish Financial Supervision Authority allows the largest and best managed cooperative banks to operate outside the association structure, after meeting the strictly tested conditions specified in art. 16 p. 4ab of the act on the functioning of cooperative banks and showing determination in achieving this goal. An example of the effectiveness of such strategy is Bank Spółdzielczy in Brodnica - not only the oldest cooperative bank in Poland, but also the first to break down the legal path related to the termination of the association agreement in accordance to the Financial Supervision Authority's control and supervisory procedures.

Conclusions

The analysis of the activities of the Polish Financial Supervision Authority in relation to cooperative banks since 2014 leads to the conclusion that the actual goal of financial supervision towards cooperative banks is not to support their fulfillment of the specific mission contained in the concept of a „local bank", but to consolidate them around institutional protection systems to ensure the sanation of both affiliating banks operating in Poland, in particular BPS S.A. as part of the recovery program conducted by this bank for 2014-2019. Such conclusion may result from a relative rush that characterized the proceedings before the Polish Financial Supervision Authority in 2015 in regard to the approval of the protection system agreement and the recognition of the BPS and SGB protection systems, contrasting with the lengthiness of administrative cases concerning the PBA and the integrated association formed around it, as well as in matters related to the activities of cooperative banks outside the association.

Such conclusions confirm the thesis set out in the introduction that the policy of the Polish state towards cooperative banks conducted after 2014 is inconsistent. During this period, the legislature created a regulatory framework that takes into account the different models of cooperative banks' activities, in line with the needs and demands of this sector. At that time, legal foundations for the operation of the institutional protection system and integrated association were introduced, and also the premises and supervisory powers of the Polish Financial Supervision Authority related to the termination of the association agreement by the cooperative bank and the commencement of independent operations were clarified. However, in contrast to the correct regulatory policy, the Polish Financial Supervision Authority, responsible for supervisory policy in the area of the financial market, limited the freedom to choose these models and carry out activities aimed at consolidating the cooperative banking sector around two and ultimately around one institutional protection system.

Such activities of the supervisor were aimed at unlawfully preventing cooperative banks from legal activity implementing their strategy to establish an affiliating bank based on the new apex bank structure, and then establish

an integrated association with that bank. In the author's opinion it violates the right of cooperative banks to choose the model of their banking operations as a practical expression of the constitutional principle of freedom of economic activity. This logic of the Polish Financial Supervision Authority's operation could be dictated by the belief that the creation of a new association around PBA, due to its innovative nature and cost competitiveness, may, by taking over several dozen cooperative banks from the Association of Bank Polskiej Spółdzielczości SA, lead to the weakening of this bank and hinder the implementation of the reorganization program, which could then lead to the necessity of subjecting the bank to forced restructuring. In addition, the creation of a new association undermined plans for the consolidation of the entire cooperative banking sector around ultimately one institutional protection system by the Financial Supervision Authority representatives.

While such a supervisory policy of the Polish Financial Supervision Authority is logical and can be effective in retrospect, it is unlawful. The body implementing it, guided by its own vision of the cooperative banking sector, applied to a group of cooperative banks that did not join the institutional protection systems actions that were a combination of activities consisting of both failure to fulfill obligations and exceeding powers. In this way, the supervisory authority prevented the start of a new type of affiliating bank (apex bank), based on applicable law, and the creation of a group of cooperative banks around it implementing the concept of an integrated association.

Only a small gap in this policy is the Financial Supervision Authority's formal recognition of the independence of two cooperative banks operating outside the association's structure, including Bank Spółdzielczy in Brodnica.

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Cooperation in the Krasnodar Region: History and Modernity

The article presents a brief study of the history of the creation and development of different types of cooperatives in Kuban, which include consumer societies, agricultural associations, credit cooperatives and their allied organizations. A brief description of current trends in the development of enterprises in the system of consumer cooperation in Krasnodar Region is given.

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Cooperation is a set of organizationally formed partnerships and societies (cooperatives) that unite consumers and small commodity producers in order to satisfy their economic, social and cultural needs through a jointly owned and democratically controlled organization. Such cooperation arose under the conditions of the dominance of the capitalist type of commodity-money relations in order to jointly protect the interests of consumers and producers from large owners who dominated the market for their survival under severe competition conditions in the market.

The origin of cooperation in Kuban is associated with the creation of the Yeisk consumer society in 1872. Before the first Russian

revolution, the cooperative movement developed slowly. Afterward, the self--organization of consumers and manufacturers accelerated. By 1912, there were already 90 consumer societies in Kuban, including 81 rural ones. In the Black Sea province, there were 10 societies of which 3 were rural.

World War I was a new incentive for the organization of cooperatives. On January 1, 1816 in the Kuban region, there were 150 consumer societies, and 27 were present in the Black Sea province. Consumer cooperatives at the expense of shareholders bought necessary goods through the system of cooperative benches, realized the goods of shareholders, and obtained their own enterprises (bakeries, dining rooms, etc.).

Also, cooperative agricultural associations were created for the purpose of supplying their members with agricultural stock and selling the agricultural products of its members. In 1913, there were 84 such associations in Kuban, with a total of 89 existing in the North Caucasus.

Credit cooperation played a major role in the national economic life of Kuban. The formation of Kuban's credit cooperatives is associated with the emergence of savings and loan associations, whose main capital was formed mainly due to the share contributions of members of cooperatives. The first association of this type was established in Tikhoretskaya village in 1894, and until 1903, only savings and loan associations operated in the region. After the Provision on Small Loan Institutions was published in 1895, which unified the credit system in Russia, credit partnerships were established in the Kuban region. The main capital of the latter was formed with the help of State Bank loans.

By 1905, there were 35 loan-and-savings and credit associations in Kuban, and in 1916 there were already 188 credit associations which united 138,371 members, and 79 united 62,095 members. In the Black Sea province there were 13 credit associations with 4,521 members, but not a single loan-and-savings association. According to the estimates of P. I. Lyashchenko, credit cooperation up until 1917 covered 30% of the population of Kuban. About 80% of all loans issued by credit cooperatives to their members were for production purposes. By the end of 1917, in the Kuban region alone there were 288 credit and loan-and-savings associations (194,700 members), and in the Black Sea province there were 14 associations (5,000 members).

With the growth of cooperatives, there was a need for their association. In 1912, the Kuban Central Union of Small Credit Institutions, the largest in the South-East and second after the Kiev's in Russia, opened its operations. By January 1, 1917, the Kuban Central Union included 159 credit, savings and loan associations with a turnover of 52 million rubles. In 1916, the South Kuban Credit Cooperative Union was formed with its center in Armavir, uniting 86 credit, savings and loan associations by November 1917.

That same year, 4 unions of consumer societies were formed in the Kuban, the largest of which was the Kuban Union of Consumer Societies

(Kubsoyuz), which by the end of the year covered 215 consumer societies and numbering 98,962 members. By this time, cooperation had become an important part of Kuban's economy.

During the Civil War years, in spite of all the unfavorable conditions such as multiple authority, weakening of economic ties, and the violation of monetary circulation, the Kuban cooperation continued its activities as an independent organization. The number of cooperative organizations (credit, savings and loan associations and consumer societies) in the middle of 1919 was 932, and the number of members increased to 704,000 people. Cooperative unions increasingly organized and developed their own production.

By the autumn of 1919, the Kuban Union of Consumer Societies had soap-making, leather, brick factories, chemical production, and a printing house. The Armavir Union of Consumer Societies had a printing house, a sausage factory, a shoe shop, and a bakery.

The Kuban Central Union of Small Credit Institutions (at the beginning of 1919 it was renamed the Kuban Cooperative Bank) had its own mechanics factory, where agricultural tools were repaired. In those difficult years, cooperatives and their unions continued to carry out their cultural, educational and agronomical activities.

With the final establishment of Soviet power in Kuban (March 1920), cooperation was reorganized on the basis of the decree of the Council of People's Commissars of January 27, 1920 „On the Unification of all Types of Cooperative Organizations". In connection with the reorganization, all types of cooperatives joined consumer societies and unions, and mandatory membership of the population in consumer societies was introduced. The cooperation gradually lost its former functions, becoming the body through which the state distributed goods to the population by cards. This reorganization process had a negative impact, especially on the position of the regional credit cooperation. In many places, the collapse of cooperative partnerships began. If on January 1, 1921 the total number of members of credit unions was 204 thousand, including 328 unions in the Kuban-Black Sea region, by mid-1921 the number of members decreased to 150 or 120 thousand.

The transition to a new economic policy was a prerequisite for the revival of certain types of cooperation. In April 1921, the SNK Decree "On Consumer Cooperatives" was issued, which freed cooperation from being subordinated to the People's Commissariat of Education and allowed forming voluntary consumer societies within the United Consumer Society. In 1922, the Kuban Union of Consumer Societies united 501 companies numbering 368,235 members. Already in the first years of NEP, Kubsoyuz, being a major social and economic organization, began to play a tangible role in the economic life of the region. Its share in the entire market turnover reached 30%, in grain procurements it was 27% and in logging, 25%.

During the period of the New Economic Policy, there is a revival of agricultural cooperation. In August 1921, the decree of VTsIK and SNK „About Agricultural Cooperation" was adopted, which proclaimed the separation of agricultural cooperation from the consumer and its transformation into an independent system. By 1923, Kubselsoyuz, which was formed in 1921, united 333 agricultural associations, most of which were associations of a universal type (combined marketing, supplying and credit functions). There were 38,907 members involved in agricultural cooperation in the area in 1923, and by the beginning of 1924, it included 52,788 people (about 13% of the region's population).

In spite of the fact that various types of cooperation were recognized in the decrees of Soviet power during the years of the New Economic Policy, administrative restrictions on the economic activities of cooperatives were abolished, and the state continued to interfere in the internal life of cooperatives. After the New Economic Policy was curtailed and the command-administrative model of the economy was strengthened in the country, all types of agricultural cooperation except collective farms were eliminated, and consumer cooperation practically became a state organization, although it had significant tax and credit benefits.

The revival of cooperation in the USSR began in the „perestroika" period. In May 1988, the law „On Cooperation in the USSR" was adopted, which restored the diversity of forms of cooperative ownership and gave the cooperatives certain freedom for planning, pricing, profit sharing, and tax breaks. New cooperation was intended to be the first break in the chain of the nationalized economy and aimed to solve the problem of the shortage of goods and services.

By the end of 1989, 1,720 cooperatives were operating in the Krasnodar Region in the production of consumer goods, 2,534 worked in the consumer services sector (more than a thousand of them were repair and construction), 146 cooperatives were engaged in transport services for the population, about 500 cooperatives operated in the sphere of public catering, and 151 medical cooperatives were registered. However, state policy regarding cooperation during this period was contradictory, therefore, the cooperative movement did not receive proper development. After the collapse of the USSR, Russian cooperation remained without legal support.

Despite the adoption in the mid-1990s of the legislative basis for cooperative organizations, any tangible development of cooperation in the region began at the beginning of 2000. Moreover, there is a noticeable tendency towards the development of rural cooperation that was promoted by the developed target regional programs aimed at cooperation development. In 2006, 51 agricultural consumer cooperatives were established in the region (7 processing, 12 supply, 32 credit). The region's reorganized system of consumer cooperation, numbering 513,000 members, was revived.

At the present stage in the system of consumer cooperation on the territory of Krasnodar, there are 28,256 shareholders and 5,189 employees. Krasnodar Regional consumer union unites 108 consumer societies (cooperatives), 13 district consumer associations, and 48 economic societies. The total cost of the activities of the consumer union is about 6.5 billion rubles. Over 532 thousand people in the population are served by the region's consumer cooperative.

The main activities of the region's consumer cooperation organizations still remain being trade (industrial and food products, jewelry, pharmacies); catering; educational activities; production activities (bread and bakery products, bricks, food products, mink cultivation); procurement activities; household services (hairdressing, repair shops and tailoring of clothes and shoes, funeral services, sharpening cutting tools, etc.).

Despite the crisis and sanctions, many organizations of the system continue to work on introducing progressive forms of trade and automating business processes, category management, and raising the professional level of workers in mass professions and specialists.

To this day, the consumer cooperation of Kuban continues to play an important role in the development of the cooperative movement by ensuring the food security of the inhabitants of Russia and the region. It is one of the main budget-forming organizations in the majority of Kuban's municipalities and rural settlements.

Thus, the Kuban cooperation originating in the second half of the XIX century underwent a difficult but fruitful path of development, and during all of its stages, it proved and continues to prove its viability and relevance both to the state and the region's population in small and remote settlements.

Jakub Stelina

Specificity of the Cooperative Employment Contract

The cooperative employment contract results in hiring a member of workers' cooperative. A workers' cooperative conduct joint business activities based on the personal work of their members. Workers' cooperative can also hire other employees then members (e.g. for administrative services) with ordinary employment contracts. The specific of cooperative employment contract compared to ordinary employment contract relates primarily to the obligation of a member of the cooperative to conclude such an agreement and to take into consideration the remuneration for the participation in the cooperative's profit.

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1. In Polish labor law, there are five possible grounds for establishing an employment relationship – employment contract, appointment, nomination, election and cooperative employment contract. Each of these legal actions leads to the creation of an employment relationship governed by labor law. These are the so-called employee bases of employment, which should be distinguished from the so-called non-employee bases of employment, functioning mainly within civil law (civil law contracts, f. ex. contracts of mandate or for the provision of services) and administrative law (used in state services of the military and police type). As a rule, labor law provisions are not applied to persons in non-employee employment. Therefore, these

persons are either deprived of social protection (as in case of civil law employment[1]), or this protection is constructed as the protection of public officials serving in militarized (so-called uniformed) formations.

Of course, the employment contract is the most important among the employee grounds for establishing an employment relationship and it is the most common legal form under which work can be provided. Other employee bases, which include appointment, nomination, election and cooperative employment contract, fall into the so-called non-contractual grounds for establishing an employment relationship, used as forms of employment for specific professional groups (e.g. civil servants or teachers). The term „non--contractual grounds", however, should not be perceived as emphasizing the lack of contractual nature of the above mentioned legal acts, because each of them requires for its validity a declaration of intent of both the employer and the employee, so each of them is in fact a contract. Therefore, the term „non-contractual" grounds for establishing an employment relationship is used only to emphasize their separation from ordinary employment contracts, which are in fact the paradigm of employee employment. In fact, each of the „non-contractual" grounds can be characterized by far-reaching specificity, and the employment relationships they establish are very different from the model of „contractual" employment relationship. The following part of the article will be focused on demonstrating the distinctiveness of the cooperative employment contract and the cooperative employment relationship established on its basis from the employment relationship established on the basis of an "ordinary" employment contract.

2. A cooperative employment contract is only established in labor cooperatives. These cooperatives are characterized by the fact that their purpose of business activity is running a joint venture based on the personal work of its members. So, the work for the cooperative is a membership contribution. In addition to strictly economic goals, labor cooperatives can also pursue other socially useful goals. For example, the subject of activity of the cooperative of the disables and the cooperative of blind persons is focused on their professional and social rehabilitation by working in a jointly run enterprise. It is possible to establish labor cooperatives in order to create and cultivate traditional values of material culture, as well as to organize and develop folk and artistic handicrafts, art and the artistic industry.

Thus, the cooperative employment contract concerns the employment of members of the labor cooperative. A labor cooperative as a legal entity may

1 Recently, we have been observing a partial extension of some labor protection provisions to persons employed under civil law contracts (e.g. as regards minimum wages or maternity rights).

employ other persons (f. ex. for administrative purposes). In such case, the cooperative concludes regular employment contracts with such persons.

3. At present, the role of labor cooperatives is not as significant as it was thirty years ago. In the socialist system (in the years 1944-89, so in the times of the Polish People's Republic), these cooperatives played a very important role in the social system. This was due to the privileged position of cooperative property. Cooperative property, as a type of social property, had a high status during the period of real socialism, being, next to state (national) property, a pillar of the economic system. The vast majority of enterprises engaged in economic activity had state or cooperative nature, hence the majority of employees were employed in the state sector. On the other hand, private enterprises constituted a clear minority in the employment structure, although significant in comparison with other socialist countries.

During the Polish People's Republic, labor cooperatives played a very important role – it is estimated that by the end of the socialist regime (in 1988) there were almost 2.5 thousand labor cooperatives, mainly the cooperatives of the disabled. They served then as an important instrument of professional and social rehabilitation of people with various dysfunctions. Currently, the number of labor cooperatives has clearly decreased – in 2005 there were about 700 of them. It should be noted, however, that a certain renaissance of labor cooperatives took place in connection with the dissemination of the idea of the so-called social cooperatives. They are a type of labor cooperatives, and their most important goal is primarily to prevent social exclusion. Therefore, among the members of such cooperatives there must be people who are in a special situation on the labor market (f. ex. the unemployed or the disabled). Currently, about 1.5 thousand social cooperatives have been registered, of which approximately 1 thousand are active. On average, each of them employs five people.

Labor cooperatives currently operate on the basis of the Act of 16 September 1982 – Cooperative Law, and social cooperatives on the basis of the Act of 27 April 2006 on social cooperatives. In matters not covered by these provisions, general labor law provisions shall be applied to cooperative employment contracts.

4. As it has already been mentioned, the characteristic feature of a labor cooperative is that the joint venture is based on the personal work of cooperative members. This means that cooperative members remain simultaneously in two social roles. On the one hand, in economic terms they are the „owners" of the enterprise (in the legal sense the cooperative is a legal person), so they have the legal title to manage or influence the management of the cooperative. On the second hand, the specificity of labor cooperatives means that they are obliged to work for the cooperative. This means that they have two legal

relationships - membership and employment. To put it simply, it can be stated that a member of a labor cooperative partly plays a dual role: an employee and an employer. This shape of the legal situation of labor cooperative members required the creation of a new legal structure in the field of labor law, used as the basis for their employment. An ordinary employment contract could not be concluded here because it is adapted to subordinated work, in which the functions of the employee and the employer are clearly separated. Hence the concepts of a cooperative employment contract and a cooperative employment relationship have appeared. In the times of the Polish People's Republic, the high legal and actual position of labor cooperatives gave rise to distinguish employee labor relations and cooperative labor relations[2]. The criterion for this differentiation was the basis of employment. Currently, due to the smaller importance of labor cooperatives, the division into employee and cooperative labor relations is no longer presented in the doctrine[3].

It should be emphasized that in cooperatives other than labor cooperatives, employment contracts are concluded on general terms (so they are „ordinary" employment contracts).

5. As it has been stated above, the work of cooperative members is the membership contribution in labor cooperatives, so a cooperative member is obliged to work for the cooperative, which means that he/she acts simultaneously as the owner of the enterprise and its employee. Therefore, cooperative employment contracts show some differences in comparison to ordinary employment contracts. These distinctions mainly concern two issues:

a) the relation between the employment relationship and the membership relationship in the cooperative and b) the remuneration for work.

Ad a) The acquisition of membership in a labor cooperative obliges both parties (the cooperative and its member) to establish a cooperative employment relationship that follows the conclusion of the cooperative employment contract. Therefore, it can be concluded that the cooperative employment relationship is accessory to the membership relationship in the labor cooperative. This means that there cannot be a cooperative employment relationship without a membership relationship. As a rule, the refusal to establish or remain in the employment relationship constitutes a violation of essential rights and obligations arising from the membership relationship. A member of the labor cooperative has the right to be employed according to his/her

2 M. Gersdorf, *Spółdzielcza umowa o pracę*, Warszawa 1979, p. 23 and next.

3 For more on cooperative labor relationships see: W. Jaśkiewicz, *Prawny stosunek pracy w polskich spółdzielniach pracy,* Warszawa 1955; M. Święcicki, *Spółdzielczy stosunek pracy w spółdzielniach produkcyjnych rolnych,* Warszawa 1958; A. Żabski, *Spółdzielcze prawo pracy*, Warszawa 1985.

professional and personal qualifications and the current economic opportunities of the cooperative. In case of failure to establish an employment relationship through the fault of the cooperative, the member may seek to conclude the cooperative employment contract throughout the duration of his cooperative membership. Regardless of this, he may, within one year from the date of the establishment of the membership, claim compensation on general rules (according to the provisions of civil law) for cooperative's failure to conclude the employment relationship with him/her.

The statute of the cooperative can make the admission of a cooperative member subject to the completion of the candidate period. In such case, the statute should indicate the cooperative body authorized to admit candidates and should specify the duration of the candidate period. The provisions of the Labor Code regarding persons employed under a fixed-term employment contract shall apply to candidates for members of the cooperative.

As regards the termination of the cooperative employment relationship, it occurs in the event of the expiration or termination of the cooperative employment contract. The cooperative employment contract expires with the expiration of cooperative membership and in other cases specified by labor law (f. ex. in the event of the employee's death or the employee's three months' absence from work due to his/her pre-trial detention). The accessority of a cooperative employment relationship means that, in principle, it is not permissible to terminate a cooperative employment contract during cooperative membership. Exceptions relate to the possibility of termination the contract by the cooperative in the event of: 1) reduction of employment dictated by economic necessity on the basis of a resolution of the cooperative council; 2) granting the right to pension to the member; 3) reasons entitling the employer to terminate the employment contract without notice despite the lack of employee's fault, f. ex. long-term excused absence from work (such as long--term sick leave). The termination of the employment contract due to the above reasons does not cease the membership relationship, which is an exception to the principle that during the membership relationship the cooperative and its member should remain in the employment relationship. The law provides, however, that after the cessation of the above reasons, the cooperative and the cooperative member are obliged to conclude a cooperative employment contract. In case of the breach by the cooperative of the re-employment obligation, a member of the cooperative may claim to conduct a cooperative employment contract with a content that corresponds to the current economic capacity of the cooperative. A member who has started work is entitled to remuneration for the period of remaining unemployed.

The law also allows the exclusion of a member from the cooperative, which results in the immediate termination of the cooperative employment relationship. This may occur for disciplinary reasons, f. ex. in the event of: 1) serious breach by a cooperative member of his basic employee responsibilities,

2) committing a crime that prevents his/her further employment, 3) culpable loss of entitlements necessary to perform a given job (f. ex. culpable loss of driving license), 4) serious breach of membership obligations or willful misconduct to the detriment of the cooperative. The exclusion cannot occur after one month from receiving by the cooperative the information about the above circumstances.

The exclusion from the cooperative, due to the reasons attributable to the member, should be distinguished from the removal from the register of cooperative members. It may occur only if: 1) the member has not been employed in the cooperative for a period longer than one year for reasons not attributable to the cooperative, 2) the member has lost his/her ability to work to a significant degree or completely, and the cooperative cannot employ him/her because of his/her limited capacity for work, 3) the member has lost full capacity to perform acts in law, and the statute does not provide for the membership of persons without such capacity. The removal from the register results in the immediate termination of the cooperative membership, except for the loss of capacity to work, when the removal becomes effective after the end of the termination period of the employment contract.

It should be remembered that in the event of the termination of the cooperative employment contract, the termination of the terms of this contract or the termination of the contract without notice, the cooperative member shall be entitled to claim the ineffectiveness of the termination of the cooperative employment contract or its conditions, and if the cooperative employment contract has already been terminated – a claim for restoration to work on previous conditions. A cooperative member who has taken up work as a result of reinstatement to work, is entitled to remuneration for work for a period of unemployment, not exceeding six months, calculated on the basis of the average current remuneration for the last three months.

If a trade union operates in a labor cooperative, the termination of a cooperative employment contract must be consulted with the union. Such consultation is also obligatory if a member is excluded or removed from the register of cooperative members. It should also be mentioned that provisions prohibiting or limiting the termination of an employment contract shall be applied to cooperative members as well. This means that the mechanisms of the so-called special protection (f. ex. women during pregnancy or employees who are four years before retirement age) shall be also applied in labor cooperatives.

Ad b) Another special feature of the cooperative employee relationship is the unusual shape of the structure of remuneration for work. For his/her work in the cooperative, the cooperative member receives remuneration, which consists of a current salary and a share in the balance sheet surplus intended for distribution among members, in accordance with the rules set out

in the cooperative's statute. Both components of the remuneration benefit from the protection provided by law to the employee's remuneration.

6. The provisions of the cooperative law provide for the possibility to change the working conditions or remuneration of cooperative members. First of all, the cooperative can make the so-called amending notice to propose new employment conditions to the employee (concerning f. ex. the type of work, remuneration policy etc.). If the employee–cooperative member does not refuse to accept the new conditions, the new content of the employment relationship proposed by the employer (labor cooperative) enters into force after the expiration of the termination period. However, such termination is permissible only in two cases. First, when it is justified by the economic or organizational needs of the cooperative, and in particular the introduction of new remuneration policy, the liquidation of work department in which the cooperative member is employed, the liquidation of his workplace or the need to employ persons with higher or special qualifications in a given position. Second, when the member loses the ability to perform his/her current work which is confirmed by a medical certificate or if he/she in a faultless way loses the necessary rights to perform it. The new work or remuneration conditions proposed to the member should correspond to his/her qualifications and the economic possibilities of the cooperative. If a cooperative member refuses to accept the new terms the employment contract will terminate after the notice period.

However, in the event of economic necessity, in order to provide work for all members, the general meeting of the cooperative may evenly reduce the working time and reduce the members' remuneration without notice. The resolution of the general meeting should concern at least one work department or all members performing the same type of work.

7. In conclusion it should be also noted that the statute of a labor cooperative can exclude the obligation to conclude a cooperative employment contract and allow for civil law contracts, or even „ordinary" employment contracts instead. The statute may provide for the employment of all or some members not on the basis of a cooperative employment contract, but on the basis of a cottage industry, mandate contract or contract for specific work, if it is justified by the type of cooperative activity. The cooperative is obliged to evenly distribute work among these members, taking into account their qualifications. The statute may also provide for the employment of all or some of the members of the labor cooperative under an employment contract. In such cases, an obligatory civil law relationship established on the basis of the aforementioned agreements or an „ordinary" employment relationship established on the basis of an „ordinary" employment contract, coexist with the membership relationship in a cooperative on the same terms as those applicable to

the cooperative employment relationship. The statute of a cooperative should determine the specific rights and obligations of members employed under a mandate contract or a specific task contract, and the reasons justifying the exclusion of those members from the cooperative or their removal from the register of members.

The cooperative employment contract and the cooperative employment relationship are, in fact, optional, as they may be excluded in the statute for all or only some members of the labor cooperative. However, if the statute of the cooperative does not contain any regulations in this regard, the establishment of the cooperative employment contract with the cooperative member is mandatory.

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Cooperative Ownership Right to Premises in Administrative Enforcement and Security Proceedings. A Few Remarks

The article analysis aspects of administrative execution from cooperative right to a premises (dwelling, habitation or flat) and aspects of using this right as security of claims. This subjective right burdens cooperative's premises as iura in re aliena. This right is of pecuniary character as it can be transfered inter vivos or mortis causa (as inheritage) and become a subject of execution. The execution could be performed under civil or administrative procedure. Under the administrative precedure the cooperative right to a premises is considered as a real estate. In this case applicable are provisions on execution from real estate of the act of 17th of June 1966 on procedure of administrative execution. However, this provisions may apply in this case with modifications, regarding the nature of cooperative right to a premises.

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The cooperative ownership right to premises shows an inseparable connection with the cooperative movement – more specifically the housing cooperatives – which has a relatively long history in Poland[1]. In the current law, this

1 This movement was already operating under partitions based on the Austrian Act of 1873, the German Act of 1889 and the Russian Credit Act. After regaining independence, it initially developed on the basis of the decree of the Head of State of 8 February1919, and then the first Polish statutory regulation – the Act of 29 October 1920 on cooperatives (Official Journal of Laws „Dziennik Ustaw" No. 111, item 733, with

issue is regulated by the Act of 15 December 2000 on housing cooperatives (consolidated text: Official Journal of Laws „Dziennik Ustaw" 2018, item 845, with later amendments; hereinafter a.h.c). Pursuant to its provisions, the cooperative ownership right to premises is a civil property limited right[2] (art.17[2] p. 1 sentence 1 of the a.h.c. in connection with art. 244 of the Civil Code), which is transferable, passes to heirs and is subject to enforcement (art. 17[2] p. 1 sentence 2 a.h.c.).

Currently, there is one type of cooperative ownership right to premises in Polish law, which can refer to a dwelling house, also a single-family house, as well as a commercial premises[3] such as a garage, parking space, utility

later amendments), which, after numerous amendments, was in force until the entry into force of the Act of 17 February 1961 on cooperatives and their associations (Official Journal of Laws „Dziennik Ustaw", No. 12, item 61, with later amendments), which in turn was replaced by the Act of 16 September 1982 Cooperative Law (consolidated text: Official Journal of Laws „Dziennik Ustaw" of 2016, item 21 with later amendments). And although it did not cover separate provisions relating to housing cooperatives, it was the basis on which housing and housing-construction cooperatives were created, which pursued their purpose by granting members the equivalents of today's cooperative rights to premises, cooperative ownership rights to premises or transferring ownership of individual apartments to members (see: R. Strzelczyk, *Prawo nieruchomości*, 5th edition, Warszawa 2017, <http://sip-1legalis-1pl-13ysy-p6lh0194.hansolo.bg.ug.edu.pl/document-full.seam?documentId=mjxw62zogi3damjvha3tcmq> [accessed: 23.04.2019]). However, housing cooperative flourished after World War II, due to the privilege of cooperative property resulting directly from art. 11 of the Constitution of the Polish People's Republic of 22 July 1952. Its significance was also appreciated after the change in the system, which was reflected in the Act of 15 December 2000 on housing cooperatives (consolidated text: Official Journal of Laws „Dziennik Ustaw" 2018, item 845, with later amendments).

2 K. Pietrzykowski, *Rozdział VI. Prawa rzeczowe do lokali w spółdzielni mieszkaniowej,* [in:] *System Prawa Prywatnego,* t. IV, *Prawo rzeczowe*, ed. E. Gniewek, 3rd edition, Warszawa 2012, <URL=http://sip-1legalis-1pl-13ysyp6lh0668.hansolo.bg.ug.edu.pl/document-full.seam?documentId=mjxw62zoge2tambvge2dimrog4xdelrs#tabs-tocarea>, [accessed: 23.04.2019].

3 According to art. 2 p. 1-2 a.h.c., the premises within the meaning of the act is an independent residential premises, as well as premises for other purposes, referred to in art. 2 p. 1 of the Act of 24 June 1994 on the ownership of premises (consolidated text: Official Journal of Laws

rooms or areas intended for business activity[4]. This right arose as a consequence of concluding by the cooperative one of two agreements with its members – a contract for the construction of premises or for the establishment of a cooperative ownership right to premises (see Chapter 2^1 of the a.h.c.). It should be noted, however, that as a result of the entry into force of the Act of 14 June 2007 amending the Act on housing cooperatives and amending certain other acts (Official Journal of Laws „Dziennik Ustaw", No. 125, item 873) in art. 7 p. 1 a.h.c. a ban was introduced on the constitutive establishment of cooperative ownership rights to premises, which also results from the repeal by the same amendment of art. 17^1 p. 1-5, art. 17^3 - art. 17^5 a.h.c. However, the rights previously obtained remain in force.

Two rights should be distinguished from the cooperative ownership right to premises - the cooperative tenant right to premise and the separate ownership of premises in housing cooperative buildings which do not have a nature of limited property rights. It is characteristic for the cooperative tenant right to premises that it arises upon conclusion of the contract for the establishment of the cooperative tenant right to a dwelling between the member and the cooperative. On this basis, the cooperative undertakes to give the person for whom the right is established the dwelling premises to be used and this person undertakes to make a housing contribution and pay fees specified in law and cooperative's statute. The cooperative right to premises can belong entirely to one person or to spouses. Cooperative tenant right to a dwelling is non-transferable, does not pass on to heirs and is not subject to enforcement. It expires when the membership in the cooperative ceases and in other cases specified by law. On the basis of a written request of a member who is entitled to a cooperative tenant right to dwelling in a building erected by

„Dziennik Ustaw" of 2019, item 737; hereinafter: a.o.p.), as well as the studio of the creator intended for conducting activities in the field of culture and art. On the other hand, a single-family house within the meaning of the act is a residential house, as well as an independent part of a semi-detached or terraced house intended primarily to meet housing needs (art. 2 p. 3 of the a.h.c.). The provisions of the act on premises shall apply to single-family homes (art. 2 p. 3 of the a.h.c.).

4 Since the reform implemented by the Act of 2 July 2004 amending the Act – Code of Civil Procedure and some other acts introducing one type of property law, the status of the right to a parking space in a multi-garage has been a debatable issue due to the appropriate application of enumerated provisions concerning the cooperative ownership right to premises (see art. 17^{19} a.h.c.). In the opinion of the Supreme Court in the light of art. 244 of the Civil Code in connection with art. 1 p. 2 p. 1^1 of the a.h.c. this right is a limited property right (see the decision of the Supreme Court of 27 October 2004, IV CK 271/04. LEX No. 147751).

the cooperative or its legal predecessors on the ground of which he/she is the owner or perpetual usufructuary, the cooperative is obliged to conclude with this member a contract of the transfer of ownership of the premises within six months (see chapter 2 of a.h.c.).

On the other hand, the separate ownership of premises in housing cooperative buildings is created on the basis of the contract for the construction of premises concluded by the cooperative with members who apply for the establishment of separate ownership of premises (art. 18 of the a.h.c.)[5]. This contract requires a written form to be valid, and upon its conclusion, a claim arises to establish separate ownership of tremises – the so-called premises ownership expectancy, which is negotiable along with the construction contribution, hereditary and subject to enforcement (art. 19 of the a.h.c.). The cooperative is obliged to establish separate ownership of premises for the benefit of the member who is entitled to the expectancy or its purchaser not later than three months after the premises is constructed, and when an occupancy permit is required, at the latest within three months of obtaining this permission (art. 21 p. 1 sentence 1 of a.h.c.). Establishing separate ownership of premises takes place according to the principles set out in the act on the ownership of premises. At the request of a member, the cooperative is obliged to establish separate ownership of premises earlier than on the dates indicated above, if due to the status of the investment it is possible to mark the premises spatially (art. 21 p. 1 sentence 2 of a.h.c.). To issues not regulated by the act on housing cooperatives, the provisions of the act on the ownership of premises shall be applied respectively to the right to separate ownership of premises (art. 27 of a.h.c.). The legislator also provided for the application of the regime of the act on the ownership of premises in the situation of establishing a housing community by the majority of owners of premises in a building or buildings located within a given property (art. 24^1 of a.h.c.) and after separating all premises (art. 26 of a.h.c.).

Cooperative ownership right to premises is one of the forms of using cooperative premises. Its characteristic feature is that it does not give any

5 As a side note, it is worth noting that a housing cooperative may also act as a developer under the provisions of the Act of 16 September 2011 on the protection of the rights of a buyer of a dwelling or a single-family house (consolidated text Official Journal of Laws „Dziennik Ustaw" 2017, item 1468; the so-called developer act). However, the cooperative is subject to the provisions of the said act, if it carries out the activities specified in art. 1 p. 2 p. 5 of the act that is constructing buildings for the purpose of selling the residential premises contained therein to non-members.

legal title to the property on which the building is located[6]. For cooperative ownership rights to premises, however, land and mortgage registers may be established, which are kept in the same way as registers forpremises constituting a separate property – i n the second section, however, not the cooperative but the person entitled to premises is entered as its owner (art. 1 p. 3 in connection with art. 24^1 p.1 in connection with art. 25 p.2 of the act of 6 July 1982 on land and mortgage registers, consolidated text: Official Journal of Laws „Dziennik Ustaw" 2018, item 1916 with later amendments, hereinafter a.l.m.r.,)[7]. For those premises for which separate land and mortgage registers have been established, housing cooperatives must keep a register of premises (art. 17^6 of a.h.c.).

A person who has a cooperative ownership right to premises, has two basic rights - to use the premises and to dispose of the right by selling, donating, giving to someone in a will, renting, giving to free use in accordance with its purpose or establishing mortgage burden. On the other hand, changes in the way of using the premises or changes of the purpose of the premises or its parts (f. ex. for business premises) require the consent of the housing cooperative (art. 17^{16} p. 1 sentence 1 of a.h.c.). In addition, if renting or putting into free use would affect the amount of fees paid for the cooperative, these persons are obliged to notify the cooperative in writing about this activity (art. 17^{16} p. 1 sentence 2 of a.h.c.). Therefore, the person entitled to the cooperative ownership right to premises cannot use the property in the same way as the premises owner who has full right to use and dispose of the

6 Consequently, a person who has a cooperative ownership right to premises is not entitled to a party's right in real estate proceedings, e.g. in real estate division proceedings (see, inter alia, the judgment of the Provincial Administrative Court in Poznań of 9 June 2010, reference number II SA/Po 676/09, Legalis). The recognition of a cooperative member as a party to the administrative procedure requires the existence of an individual legal interest in relation to the specific premises of the cooperative member. This interest must be manifested in the individual threat to the right of the cooperative member caused by the impact of the investment on his/her individual property right. Therefore, it must be an interest specified in this right, and not derived from the interest of all members of the cooperative (see the judgment of the Provincial Administrative Court in Lublin of 22 May 2014, case II SA / Lu 874/13, Legalis).

7 If there is no register, the document confirming the existence of a cooperative ownership right to premises is confirmed by a certificate issued by the cooperative. Usually such certificate will be requested by a notary public when preparing the cooperative ownership rights to premises sales agreement in the form of a notarial deed. Compare: K. Pietrzykowski, *Rozdział VI. Prawa rzeczowe…*, op. cit.

property. In case of the cooperative ownership right to premises, it is necessary to take into account the cooperative's opinion in most decisions regarding the real estate. Nevertheless, due to the similarity of the cooperative ownership right to premises to the right to separate ownership of premises, the legitimacy of maintaining them both is questioned and it is postulated to replace them by the right of ownership[8].

The disposal of the cooperative ownership right to premises also includes the construction contribution, and until the right expires, the disposal of only the contribution is invalid (art. 17^2 p. 1 and p. 2 of the a.h.c.). Pursuant to art. 17^2 p. 6 of the act on housing cooperatives, also a fraction of the cooperative ownership right to premises can be subject to a sale. However, other entitled persons have the pre-emption right. The agreement to sale a fraction of the ownership right to premises concluded unconditionally or without notifying the entitled persons about the sale or with providing them with false information about the essential provisions of the contract is invalid by law. This right is also subject to transformation at the written request of a person entitled to the cooperative ownership right to premises. With a few exceptions, the cooperative is obliged to conclude a contract of transfer of the ownership of premises with that person within six months of submitting the request, after prior mutual settlements (art. 17^{14} of the a.h.c.).

The cooperative ownership right to premises is also a hereditary right. Upon the death of a person entitled to it, the cooperative right to premises passes to one or several heirs in accordance with the provisions of Book IV of the act of 23 April 1964 Civil Code (consolidated text: Official Journal of Laws „Dziennik Ustaw" 2018, item 1025, with later amendments; hereinafter: Civil Code). In accordance with art. 17^9 p. 1 of a.h.c., in the event of a transfer of rights to several heirs, they should, within one year of the day of opening the inheritance, appoint a representative to perform legal actions related to the exercise of this right, including the conclusion on their behalf of a contract for the transfer of the premises ownership. After the expiration of the deadline, the court appoints a representative in non-litigious proceedings at the request of the heirs or the cooperative. At this point it should be noted that pursuant to the content of art. 3 p. 5 sentences 1 in connection with art. 17^2 p. 6 of a.h.c., only one of the heirs can be a member of the cooperative[9].

8 It is emphasized in the literature that both rights are used to satisfy identical (housing) needs, both are transferable, hereditary, are enforceable, they may be vested in legal and natural persons, belong to many entities, be sold in shares, land and mortgage registers may be created for them and they can be mortgaged. Compare: Por. R. Strzelczyk, *Prawo nieruchomości*…, op. cit.

9 However, the existing regulations do not imply the need for an inheritance division. Nevertheless, each of the heirs may demand the abolition

In the event of the death of one of the spouses who jointly had the right to premises, art. 17^9 p. 1 of a.h.c. shall apply accordingly (art. 17^9 p. 2 of a.h.c.).

In regard to the enforcement from the cooperative ownership right to premises, it should be noticed that it is possible under both civil[10] and administrative procedures and in the light of art. 17^{13} p. 1 of a.h.c. it requires appropriate application of real estate enforcement law.

As far as the first remark in concerned, as rightly pointed out by A. Skoczylas: „The Polish legal system adopted a two-pronged scheme for the enforcement of obligations. To put it simply, it can be said that civil law

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of fractional ownership right, pursuant to the provisions on the abolition of joint ownership (art. 1035 in connection with art. 210-212 of the Civil Code). In the case of an out-of-court division of the inheritance which includes a cooperative ownership right to premises a notarial deed is required. See: A. Stefaniak, *Art. 17²*, [in:] *Komentarz do ustawy o spółdzielniach mieszkaniowych*, [in:] *Prawo spółdzielcze. Ustawa o spółdzielniach mieszkaniowych. Komentarz*, 14th edition, Warszawa 2018, <URL=https://sip-1lex-1pl-1ze0y2ulh0014.hansolo.bg.ug.edu.pl/#/commentary/587374535/569749>, [accesed: 28.04.2019]; See also: R. Dziczek, *Art. 17²*, [in:] *Spółdzielnie mieszkaniowe. Komentarz. Wzory pozwów i wniosków sądowych*, 8th edition, Warszawa 2018, <URL=https://sip-1lex-1pl-1ze0y2ulh066b.hansolo.bg.ug.edu.pl/#/commentary/587545924/571356>, [accessed: 28.04.2019].

10 The enforcement of the cooperative ownership right to premises (as well as the fractional part of the cooperative ownership right to premises – see: the decision of the Supreme Court of 17.5.2007, case III CK 9/06, OSNC 2008, No. 6, item 67) is conducted with the respective application of art. 921-1013 of the Code of Civil Procedure relating to the enforcement of real estate, since the ownership right is not real estate. Therefore, the creditor of a cooperative member having a final court judgment, an order for payment, a court settlement or yet another enforcement title ordering payment, provided with an enforcement clause, may apply to the bailiff for the enforcement of this right. Compare: R. Dziczek, *Art. 17¹³*, [in:] *Spółdzielnie mieszkaniowe. Komentarz. Wzory pozwów…*, op. cit. In connection with the above provisions, it is worth noting that the provisions of the Code of Civil Procedure on the enforcement of real estate also apply to the so-called forced sale of premises by auction, if the person using the premises is in arrears with payment for a long period of time, grossly or persistently goes against the applicable house order or when his/her improper behavior makes the use of other premises or common property burdensome (art. 17^{10} of a.h.c.). Due to the scope of the article, the issues of civil enforcement will not be further analyzed.

obligations are enforced as part of judicial enforcement, and public law obligations are subject to separate administrative enforcement"[11]. Although both proceedings seek compulsory performance of duties, the other issues differ from each other. Obligations in civil enforcement result from civil law relations, and any entity authorized to request a certain civil law benefit from the debtor can be a creditor. On the other hand, administrative enforcement proceedings have been created to enable public administration to fulfill public law obligations without the need for court assistance[12]. In administrative enforcement proceedings, only a public administration body can be a creditor. Judicial enforcement proceedings is based on the principle of availability, which means that the creditor can „dispose of" the process by deciding to initiate or discontinue enforcement proceedings[13]. The principle of availability does not exist in administrative compulsory proceedings because according to art. 6 of the act on the enforcement proceedings in administration, the creditor „should take actions to apply enforcement measures". The phrase „should" shall be interpreted as an obligation of the indicated authority, not its right. It should be clearly emphasized that, despite the separable nature of the two procedures, there are exceptional situations when administrative enforcement is carried out in civil law cases, and judicial enforcement in cases concerning the implementation of public law obligations[14]. However, the analysis of this issue is beyond the scope of this paper.

It must be emphasized that the cooperative ownership right to premises (residential, commercial, a single-family home in a housing cooperative), pursuant to art. 1a p. 5 of the act of 17 June 1966 on the enforcement proceedings in administration (Official Journal of Laws „Dziennik Ustaw" 2018, item 1231, with later amendments; hereinafter: a.e.p.a.), is treated as

11 A. Skoczylas, *Rozdział XX. Postępowanie egzekucyjne w administracji,* [in:] *System prawa administracyjnego*, vol. IX, *Prawo procesowe administracyjn*e, ed. R. Hauser, A. Wróbel, Z. Niewiadomski, 3rd edition, Warszawa 2017, p. 462.

12 R. Hauser, Z. Leoński, *Art. 1,* [in:] *Postępowanie egzekucyjne w administracji. Komentarz*, ed. R. Hauser, A. Skoczylas, 8th edition, Warszawa 2016, p. 7 and next.

13 E. Wengerek, *Postępowanie cywilne w sprawach cywilnych*, Warszawa 1961, p. 69 and next.

14 D. R. Kijowski indicates that such situation may occur when obligations arising from civil law norms pursuant to a special provision are transferred to be implemented in the course of administrative enforcement proceedings, or when a common court transfers them as a result of a confluence of administrative and judicial enforcement; D. R. Kijowski *Art. 1,* [in:] *Ustawa o postępowaniu egzekucyjnym w administracji. Komentarz,* ed. D. R. Kijowski, Warszawa 2010, p. 31.

real estate. Thus, the legislator extended the civilian definition of the term real estate, because according to art. 46 of the Civil Code real estate is part of the earth's surface constituting a separate object of ownership (land), as well as buildings permanently connected with land or part of buildings, if pursuant to special provisions they constitute a separate from land object of ownership. Therefore, having in mind the content of art. 46 of the Civil Code and art. 1a p. 5 of the a.e.p.a., the administrative enforcement may concern the ownership right to real estate (land, buildings, land with buildings), a fractional part of the real estate, perpetual usufruct, residential premises constituting a separate real estate and the cooperative ownership right to premises, as well as the expectation of separate ownership of premises[15]. It should be noted that the enforcement of the cooperative ownership right to premises is subject to the provisions of Chapter 7 of Section II of the a.e.p.a. concerning the enforcement from real estate. At the same time, the provisions of the enforcement act relating to real estate should be applied respectively, taking into account the specificity of ownership rights to premises.

The enforcement from real estate is one of the means of enforcing monetary claims (art. 1a p.12 letter a of the a.e.p.a.). These means are institutionalized forms of state coercion, which are used by the appointed bodies provided for in the act and aimed at ensuring that the obligated persons comply with their obligations arising from administrative law relations and other obligations that are subject to administrative enforcement and are used according to a strictly defined procedure[16]. The enforcement from real estate was introduced to the civil law as a consequence of the amendment of 6 September 2001 (Official Journal of Laws „Dziennik Ustaw", No. 125, item 1368) and included in the added chapter 7 of section II of a.e.p.a[17]. In regard to this regulation, the attention should be first drawn to the similarity of both its

15 See: A. Skoczylas, *Rozdział XX. Postępowanie egzekucyjne w administracji*, op. cit., p. 582-583.

16 See: E. Bojanowski, *Wykonanie zastępcze w egzekucji administracyjnej*, Warszawa 1975, p. 35.

17 The literature emphasized the exceptional nature of this measure due to the content of art. 110 § 1-2 a.e.p.a., which implied that it is used only:
1) in those cases where the use of other enforcement measures listed in chapters 2-6 of the Enforcement Act was not possible or proved to be ineffective, however, about the circumstances of the enforcement authorities are obliged to inform the creditor who is not the enforcement authority or the authority implementing the enforcement, if the enforcement is carried out in order to collect foreign currency receivables;
2) to enforce monetary claims specified or established in a final court decision issued on the territory of the Republic of Poland - also provided with an enforcement clause;

content and taxonomy to the provisions of art. 921-1013 of the Code of Civil Procedure[18]. Secondly, the severity of the measure is emphasized. It should be pointed out that the means of the enforcement of monetary claims are listed in art. 1a p. 12 letter a, indents 1-13 of the a.e.p.a. from the mildest (ranging from execution against money, through enforcement of rights from financial instruments or other property rights) to the most painful (enforcement from real estate). In the enforcement proceedings regarding monetary claims, „an enforcement measure means execution against the debtor's assets"[19]. They are applied in accordance with the principle of using the mildest measure leading directly to the performance of the obligation, of course taking into account the type of resources available to the body to perform the obligation and the facts of the case, or as emphasized in case-law – the purpose for which this measure serves[20]. Thirdly, the detailed nature of the legal regulations regarding the enforcement of immovable property should be also emphasized, which is probably connected with the ailment of the enforcement measure for the debtor[21]. In light of the provisions of the act on enforcement proceedings in administration, the use of such measure as the enforcement of real estate consists of the following stages: real estate seizure, description and estimation

3) to enforce monetary claims arising from an enforcement title issued by the Minister of Public Finance on the basis of documents related to the State Treasury's claims arising from the performance of a surety or guarantee. Such formation of premises was an expression of the legislator's assumption as to the nature of this measure - it was to constitute the final solution. Under the legal status of 21 November 2013, no special conditions are required. See: A. Skoczylas, *Rozdział XX. Postępowanie egzekucyjne w administracji*, op. cit., p. 583; W. Grześkiewicz, *Art. 110,* [in:] *Ustawa o postępowaniu egzekucyjnym w administracji. Komentarz*, ed. D. R. Kijowski, 2nd edition, Warszawa 2015, <URL=https://sip-1lex-1pl-1ze0y2u0f362f.hansolo.bg.ug.edu.pl/#/commentary/587708124/426648>, [accessed: 23.04.2019].

18 See: Cz. Martysz, *Egzekucja administracyjna z nieruchomości,* [in:] *System egzekucji administracyjne*j, ed. Niczyporuk, S. Fundowicz, J. Radwanowicz, Warszawa 2004, p. 420.

19 D. R. Kijowski, E. Ciskowska-Sakrajda, W. Grześkiewicz, *Art. 1(a),* [in:] *Ustawa o postępowaniu egzekucyjnym w administracji. Komentarz*, ed. D. R. Kijowski, 2nd edition, op. cit.

20 *Ustawa o postępowaniu egzekucyjnym w administracji. Komentarz*, ed. D. R. Kijowski, 2nd edition, op. cit.

21 P. Rączka, Środki egzekucyjne należności pieniężnych, [in:] T. Jędrzejewski, M. Masternak, P. Rączka, *Administracyjne postępowanie egzekucyjne*, 5th edition, Toruń 2011, p. 203.

of the real estate value, sale by public auction, acceptance of a bid, granting the ownership and distribution of the amount obtained from the enforcement[22]. Because of the extensive scope of this subject, we will focus on some of the most important, in our opinion, issues.

According to current law, the use of the enforcement[23] from the cooperative ownership right to premises is possible after the advance payment by the financing creditor to cover the expected expenses. Creditors and obligors are participants in this proceeding. In addition, also a person who has a limited property right - mortgage on the cooperative ownership right to premises or a share in this right – can be a participant in such proceeding provided that a land and mortgage register is kept for this right (art. 1 p. 3 in connection with art. 67 of a.l.m.r.)[24]. A buyer of a cooperative ownership right to premises as an obligated party may also become a participant.

22 Compare: P. Rączka, Środki egzekucyjne..., op. cit.; P. M. Przybysz, *Art. 110*, [in:] *Postępowanie egzekucyjne w administracji. Komentarz*, 8th edition, Warszawa 2018, <URL=https://sip-1lex-1pl-1ze0y2u0f37d2.hansolo.bg.ug.edu.pl/#/commentary/587519443/570003>, [accessed: 23.04.2019].

23 As to the admissibility of the enforcement of immovable property, it is not conditional upon obtaining a final character by the administrative decision that is the basis on which the writ of execution is issued. In connection with the above, different views are presented in the literature regarding the admissibility of using enforcement in the event of a complaint to the administrative court against the decision on the basis of which an enforceable title was issued. L. Guzek, argues in favor of suspending the initiation of execution of the debtor's real estate. P. M. Przybysz is critical of this position (see: L. Guzek, *Egzekucja z nieruchomości za podatki*, part I, „Monitor Podatkowy", p. 35; P. M. Przybysz, *Art. 110*, op. cit. However, in the case of judgments enforced by means of administrative enforcement, they constitute the basis for issuing an administrative enforceable title only after being provided with a judicial enforcement clause, regardless of which enforcement measure is to be used (art. 26 § 3 of a.e.p.a.). Therefore, the obligations arising from them are final.

24 Provisions on life annuity, easement, lease, pledge whether ordinary or registered as well as - in accordance with the dominant opinions of science representatives - on usufruct in accordance with art. 25 of the act on land and mortgage registers and art. 253 of the Civil Code cannot be applied to cooperative rights to premises (Compare: the decision of the Supreme Court of 24 January 2013 r., case V CSK 549/11, OSNC 2013/7–8, item 97). R. Strzelczyk, *Prawo nieruchomości*, op. cit.; K. Pietrzykowski, Rozdział *VI. Prawa rzeczowe*…, op. cit.

The first stage of enforcement – real estate seizure – occurs by summoning the obligated party to pay the enforced monetary claim with interest for non-payment on time and enforcement costs. The obligated person is set a 14 day period from the day of delivery of the summons, under pain of commencing the description and estimation of the value of the cooperative ownership right to premises. The obligated party shall be provided with a copy of the writ of execution. Pursuant to art. 110c § 4 of a.e.p.a., the real estate seizure is effective upon the delivery of the summons to the obligated party.

If the obligated person was not delivered the summons, the cooperative ownership right to premises is seized at the moment of making the entry in the land and mortgage register, provided that it is kept as there is no such requirement. For anyone who knew about the initiation of the enforcement, the effects of the seizure arise as soon as he/she receives such information, even if the summons has not been sent yet or the entry in the land and mortgage register has not been made (art. 110c § 5 of a.e.p.a.). In the light of court decisions, the failure to deliver the request for payment to the obligated party has effects not so much as to the effectiveness of the seizure itself, but in regard to the moment in which the seizure takes place[25]. The disposal of real estate (cooperative ownership right to premises) after its seizure does not affect further enforcement proceedings. The buyer may participate in the enforcement proceedings as an obligated party. Also the encumbrance of the cooperative ownership right to premises by the obligated person after the seizure is not valid. If a compulsory mortgage is entered in the register after the real estate has been seized, the claim secured by it does not benefit from the priority of satisfaction provided for claims secured by mortgage (art. 110f § 3 of a.e.p.a.). A compulsory mortgage may be established on the cooperative ownership right to premises, on the basis of an enforceable title confirming the claim, if specific provisions do not provide otherwise (art. 109 in connection with art. 65 p. 2 p. 2 in connection with p. 4 of a.l.m.r. and in connection with art. 26 a.e.p.a.)[26]. In addition, a compulsory mortgage may be obtained on the basis of a decision when specific provisions so provide, which results from art. 110 p. 3 in connection with art. 65 p. 2 p. 2 in connection

25 A. Skoczylas, *Rozdział XX. Postępowanie egzekucyjne w administracji*, op. cit., p. 585.

26 See: T. Czech, *Art 65,* [in:] idem, *Księgi wieczyste i hipoteka. Komentarz*, Warszawa 2014, <URL= https://sip-1lex-1pl-1ze0y2ulh00ab.hansolo.bg.ug.edu.pl/#/commentary/587618487/415927>, [accessed: 23.04.2019]; idem, *Art 109,* [in:] idem, *Księgi wieczyste*…, op. cit.; See also: H. Ciepła, Z. Pawelczyk, *Hipoteka po nowelizacji w systemie wieczystoksięgowym. Pytania i odpowiedzi*, 3rd edition, Warszawa 2017, p. 68-69.

with p. 4 of a.l.m.r.[27]. For example, a compulsory mortgage on a cooperative ownership right to premises is available to secure the social security contributions receivable on the basis of decisions determining the amount of the social security contributions, third party liability or legal successor liability (art. 26 p. 3b of the act of 13 October 1998 on the social security system, consolidated text: Official Journal of Laws „Dziennik Ustaw" 2019, item 300).

At this point, it is worth paying attention to the influence of the contractual and statutory transformation of the cooperative ownership right to premises into separate ownership of premises or the ownership of land with a single-family house, on the ongoing administrative enforcement proceedings. In the event of the acquisition of the ownership of a premises or a detached house, the land and mortgage register kept for the cooperative ownership to premises pursuant to art. 45 p. 3 of a.h.c. becomes, in principle, a land and mortgage register for the real estate[28]. Therefore, according to art. 45 item 1 of a.h.c., mortgages established on the cooperative ownership right to premises, ownership right to a single-family house - and thus also compulsory mortgages - will charge the housing property or land property with a single-family house resulting either from the conclusion of a contract transferring ownership or by virtue of law[29]. Moreover, in accordance with art. 45 p. 2 of the a.h.c., a creditor whose claim on the day of concluding the agreement on the transfer of premises ownership was secured by a (compulsory) mortgage on the cooperative ownership right to premises or a single-family

27 T. Czech, *Art 110,* [in:] idem, *Księgi wieczyste*…, op. cit.

28 Compare the remarks of M. Kućka, *Art. 24[1]*, [in:] *Komentarz do ustawy o księgach wieczystych i hipotece,* ed. *J. Pisuliński,* [in:] *Ustawa o księgach wieczystych i hipotece. Przepisy o postępowaniu wieczystoksięgowym. Komentarz*, Warszawa 2014, <URL=https://sip-1lex-1pl-1ze0y2u3916cf.hansolo.bg.ug.edu.pl/#/commentary/587607834/405274>, (accessed on 28.04.2019), p. 10 and p. 11.

29 The transformation of the cooperative ownership right to premises into separate ownership of premises or ownership of the land with a single-family house occurs by virtue of law, if in the course of liquidation, bankruptcy or enforcement proceedings from the cooperative's real estate, the buyer of the building or participation in the building is not a housing cooperative (see art. 17^{18} p. 1 of a.h.c.). In addition, this transformation will also occur as a result of the removal of the cooperative from the National Court Register after the end of liquidation or bankruptcy proceedings, if the building owned by the liquidated or bankrupt cooperative is not sold. Compare: M. Kućka, *Art. 24[1]*, op. cit.; K. Pietrzykowski, *Rozdział VI. Prawa* rzeczowe, op. cit.); J. Pisuliński, *Rozdział VIII. Hipoteka*, [in:] *System Prawa Prywatnego*, t. IV, *Prawo rzeczowe*, 3rd edition, op. cit.

house, may seek satisfaction from premises constituting separate ownership or from land with a single-family house which is the result of the conclusion of the agreement. It is, after all, what aptly notes E. Bończak-Kucharczyk „the same mortgage (securing the same claim)"[30].

The second stage includes the description and estimation of the property in order to determine the subject of enforcement and its value, which will be the basis of the starting price. The value of the seized cooperative ownership right to premises is estimated by a real estate appraiser (art. 110s of a.e.p.a.), but the description and estimation is carried out by an enforcement authority in the form of a report. When estimating its value, the value of benefits should be also specified[31]. However, the value of the land is not taken into account because the cooperative is entitled to the ownership or use of the land as well as the value of the associated rooms, such as a basement or an utility room, because they are in the cooperative's resources but do not affect the content of the cooperative ownership right to premises[32].

The third stage is a public auction - the seized cooperative ownership right to premises, can be sold by the enforcement authority only by public auction. The date of the auction cannot be set earlier than after 30 days from the day of delivering to the obligor the description and estimation of the value of the cooperative ownership right to premises. The auction must be also notified in a public announcement. The bidding takes place in public, orally, and is conducted by a tax collector in the presence and under the supervision of a bailiff, and up to three bidding dates are allowed. The starting price in the first date is 75% of the estimated value of the cooperative ownership right

30 E. Bończak-Kucharczyk, *Art. 44, 45*, [in:] idem, *Spółdzielnie mieszkaniowe. Komentarz*, 4th edition, Warszawa 2018, <URL: https://sip-1lex-1pl-1ze0y2u3916cf.hansolo.bg.ug.edu.pl/#/commentary/587237301/552852>, [accessed: 23.04.2019].

31 For example the rent for a residential or commercial premises as well as the rent for a room assigned to the premises - basement, storage room.

32 Compare: art. 42 p. 1 in connection with p. 3 p. 2 of a.h.c., according to which only in the case of the first application for the isolation of premises, the cooperative shall, in the form of a resolution, determine the subject of separate ownership of all residential premises and premises of a different purpose in this property, including the type, location and area of premises and belonging rooms, including basements or utility rooms, provided that the basement or utility room in this building is assigned to the premises. See also: the decision of the District Court in Szczecin of 19 November 2013, case II Cz 856/13, <URL= http://orzeczenia.szczecin.so.gov.pl/content/$N/155515000001003_II_Cz_000856_2013_Uz_2013-11-19_001>, [accessed: 28.04.2019]; R. Dziczek, *Art. 42,* [in:] *Spółdzielnie mieszkaniowe. Komentarz. Wzory pozwów*…, op. cit.

to premises, in the second date it is 70%, and in the third date it is 65% (art. 111e – 111j of a.e.p.a.). Persons interested in participating in the auction must pay a deposit, which is 1/10 of the estimated value (art. 111 § 1 of a.e.p.a.).

Pursuant to art. 111h § 3 of a.e.p.a. if the enforcement concerns the cooperative ownership right to premises (residential, commercial or single-family house in a housing cooperative), the mortgage creditor – other than the tax office – may take over this right for a price not lower than 75% of the estimated value of the property after submitting the application of takeovers within 7 days from the day of the auction, as long as no one has entered the auction[33]. As D. R. Kijowski correctly proposes, this term should be understood as „the situation when no bidders appeared at all, and also if there were potential bidders at the auction, but none of them entered the bidding or the offer comes from a person who did not lodge a security deposit, a person excluded from participating in the auction or a proxy without proper authorization, or submitted offers are lower than the estimated sum. This assessment is made by the tax collector"[34]. It is worth mentioning, however, that the acquisition of the real estate after the second auction (if no one has joined it) is referred to in art. 111i of a.e.p.a., which concerns agricultural and non-agricultural real estate. However, its application – due to the phrase „taking ownership of real estate" – should be excluded in relation to the cooperative ownership right to premises for which a special procedure has been established in art. 111h § 3 of a.e.p.a.[35].

The takeover of the cooperative ownership right to premises is possible on the basis of art. 111h § 3 of a.e.p.a. if the mortgage creditor has submitted a security deposit. Otherwise, it does not meet formal requirements, which justifies the relevant application of art. 64 § 2 of the Code of Administrative Procedure in connection with art. 18 of a.e.p.a. As emphasized by R. Hauser and A. Skoczylas, „the submission of a security deposit by the mortgage creditor together with an application for the takeover of the cooperative ownership right to premises must be considered a formal condition of

33 This takeover, however, will not be possible in all cases of the enforcement from the cooperative ownership right to premises, but only in those for which land and mortgage registers are established and, as a consequence, a mortgage can be entered.

34 W. Grześkiewicz, *Art. 111h,* [in:] *Ustawa o postępowaniu egzekucyjnym w administracji. Komentarz*, ed. D. R. Kijowski, 2nd edition, op. cit.

35 R. Hauser, A. Skoczylas, *Art. 111i,* [in:] *Postępowanie egzekucyjne w administracji. Komentarz*, ed. R. Hauser, A. Skoczylas, 9th edition, Warszawa 2018, <URL=http://sip-1legalis-1pl-13ysyp6lh00b9.hansolo.bg.ug.edu.pl/document-view.seam?documentId=mjxw62zogi3damjxhe4tmmjoobqxalrugm2tqnrsgmzq>, [accessed: 23.04.2019].

such an application within the meaning of art. 64 § 2 of the Code of Administrative Procedure"[36].

The fourth stage is the acceptance of a bid. After the auction closes, the enforcement authority issues a decision on the acceptance of a bid to the bidder who has offered the highest price. The decision shall be published immediately. It is a preliminary activity, which is designed to prepare the issuing of a decision on the granting of ownership.

The fifth stage is the granting of property ownership. When the decision on the acceptance of the bid is final, the enforcement authority calls the bidder who obtained the acceptance to deposit the purchase price, minus the safety deposit, at the enforcement authority within 14 days of receiving the call. At the request of the buyer, the enforcement authority may extend the date of payment of the purchase price to 3 months. If the decision on the acceptance of the bid or the decision to set the purchase price has become final and the buyer has paid the price, the enforcement authority is obliged to issue a decision on the acquisition of the cooperative ownership right to premises[37]. The decision can be complained against (art. 111r of a.e.p.a.). The acquisition of the cooperative ownership right to a dwelling in the enforcement proceedings is subject to tax on civil law transactions[38].

The sixth stage – distribution of the amount obtained from enforcement – ends the enforcement of monetary claims. The order of the settlement of claims from the amount obtained from the administrative enforcement is determined by art. 115 a.e.p.a. In the first place, the sums obtained are eligible for enforcement costs and the cost of admonition (art. 115 § 1 p. 1 of a.e.p.a.), then receivables secured by maritime mortgage or privilege on the seagoing ship are satisfied (art. 115 § 1 p. 2 of a.e.p.a.), then receivables

36 R. Hauser, A. Skoczylas, *Art. 111h,* [in:] *Postępowanie egzekucyjne w administracji. Komentarz*, ed. R. Hauser, A. Skoczylas, 9th edition, op. cit. See also the views expressed in the course of civil proceedings by the Supreme Court in the resolution of 30 January 2002, case III CZP 84/01, OSNC 2002, No. 10, item 122, „If procedural provisions provide for the need to perform a certain act with the submission of a pleading, treating this act as a component of the basic act covered by a given pleading, then making the constituent act should be treated as a formal condition of the pleading, determining its correctness".

37 See the decision of the Voivodeship Administrative Court in Lublin of 18 January 2012, case I SA/Lu 691/11, Legalis.

38 See the decision of the Voivodeship Administrative Court in Gliwice of 15 November 2011, case I SA/Gl 819/11; The decision of the Voivodeship Administrative Court in Lublin of 18 January 2012, case I SA/Lu 691/11, Legalis; The decision of the Supreme Administrative Court of 16I FSK 1354/12, Legalis.

secured by a mortgage, pledge, registered pledge and tax pledge or enjoying the statutory priority and rights that were in force before the entry in the land and mortgage register about the initiation of enforcement or before submitting to the file of documents an application for such entry (art. 115 § 1 p. 3 a.e.p.a.), then receivables to which the provisions of section III of the Tax Ordinance are applied and social insurance contributions unless they were satisfied in the third place (art. 115 § 1 p. 4 of a.e.p.a.) and finally other receivables and interest subject to § 2a and § 3 (art. 115 § 1 p. 6 of a.e.p.a.).

Treating the cooperative ownership right to premises as a property within the meaning of the Enforcement Act, it can be assumed that if the right is mortgaged, it will be satisfied in the third place. The justification for the adopted solution is that „the content of the provision referred to includes the principles of social justice guaranteed by art. 2 of the Constitution of the Republic of Poland. The above principle guarantees a balance between the public interest related to financing the costs of administrative enforcement proceedings, as well as the interests of, among others, minors entitled to maintenance payments"[39]. In addition, as pointed out by the Voivodeship Administrative Court in Gdańsk in its judgment of 28 November 2018, „the distribution of the sum obtained from enforcement takes into account the principle of preference and the principle of equivalence, which may take the form of the principle of proportionality or priority. The privilege principle is that certain debts are privileged over others[40]. This principle has been reflected in art. 115of a.e.p.a., in which the legislator divided the receivables according to specific categories, and then indicated the order in which the receivables in a given category shall be satisfied"[41]

The distribution of the amount obtained from the enforcement is mandatory. This was indicated by the Supreme Administrative Court in the judgment of 7 June 7 2011, which argued that: „when dividing the sum obtained from the execution of real estate, the order of satisfying creditors is strictly defined in art. 115 a.e.p.a. This means that there is no way to depart from this order by applying rules set out in art. 7 of the Code of

39 See the decision of the Voivodeship Administrative Court in Gdańsk of 9 July 2013, case I SA/Gd 469/13, LEX nr 138566.

40 R. Hauser, J. Olszanowski, *Art.115,* [in:] *Postępowanie egzekucyjne w administracji. Komentarz*, ed. R. Hauser, A. Skoczylas, 8th edition, op. cit., p. 558.

41 The decision of the Voivodeship Administrative Court in Gdańsk of 28 November 2018, case I SA/Gd 920/18, LEX nr 2600035.

Administrative Procedure, i.e. having in mind the social and legitimate interests of the citizens"[42].

The division of the amount obtained from the enforcement in the context of the cooperative ownership right is also referred to in art. 115 § 4 of a.e.p.a.: „if the subject of the enforcement is the cooperative ownership right to a dwelling, cooperative right to a business premises or the right to a single-family home in a housing cooperative, the claim of a housing cooperative due to the unpaid construction contribution related to this right is satisfied before the claim secured by mortgage on this right". Therefore, it can be assumed that this is a specific regulation in relation to art. 115 § 1 of a.e.p.a. If the obligation to be enforced is refraining from making a construction contribution to a housing cooperative, the mortgage creditor is satisfied next. The justification for the preference is to secure the cooperative's claims bypassing the need to establish a mortgage[43].

It is also worth noticing that the distribution of the amount obtained from the enforcement is an enforcement action against which the obligor is entitled to lodge a complaint in accordance with art. 54 of a.e.p.a.[44].

However, in the context of security proceedings, it should be mentioned that there is a prohibition of selling cooperative ownership rights to premises as a form of securing monetary claims in security proceedings. The essence of the security proceedings is that it seeks to ensure the effectiveness of future enforcement proceedings. It is used in cases regulated in art. 154 § 1 of a.e.p.a., such as f. ex. the lack of the financial liquidity of the obligated person, the avoidance by the obligated person to fulfill the obligation by non-disclosure of *ex lege* obligations or unreliable keeping of tax books, selling assets by the obligor, failure to submit the declaration referred to in art. 39 § 1 of the Tax Ordinance despite a call to submit it or the failure to provide in the submitted statement all items or rights subject to disclosure. Therefore, this procedure is used whenever there is a justified fear that the obligated person's actions may impede or prevent the administrative enforcement[45]. The entities that take part in the security proceedings are primarily the enforcement authority (art. 1a p. 7 of a.e.p.a.), the obligated person and the creditor

42 This opinion is also presented by R. Hauser, J. Olszanowski, *Art.115,* [in:] *Postępowanie egzekucyjne w administracji. Komentarz*, ed. R. Hauser, A. Skoczylas, 8th edition, op. cit., p. 558.

43 W. Grześkiewicz, *Art. 115,* [in:] *Ustawa o postępowaniu egzekucyjnym w administracji. Komentarz*, ed. D. R. Kijowski, op. cit., p. 1022.

44 Decision of the Supreme Administrative Court of 14 August 2012, case II FSK 142/11, LEX nr 1244059.

45 Z. Leoński, *O istocie postępowania zabezpieczającego w administracyjnym postępowaniu egzekucyjnym,* [in:] *System egzekucji administracyjne*j, ed. J. Niczyporuk, S. Fundowicz, J. Radwanowicz, Warszawa 2004, p. 577.

who is not an enforcement authority and who delivers, among others, security application and collateral order to the enforcement authority. The procedure for submitting this application is specified in art. 156 a.e.p.a. The provisions governing the security proceedings should be interpreted with due regard to the provisions of specific acts related to the procedure[46]. The nature of the security order is similar to the writ of enforcement existing in the main proceedings. The basis for its issue may be a decision on security or a decision issued under specific provisions. A. Skoczylas indicates that administrative decisions issued pursuant to art. 35 § 2 of the Tax Ordinance[47], which include decisions setting the amount of tax liability (art. 35 § 2 letter a), determining the amount of tax liability (art. 35 § 2 letter b) and determining the amount of default interest (art. 35 § 2 letter c).

Art. 164 § 1 of a.e.p.a. points out such methods of securing monetary receivables[48] as, among others, encumbering the real estate with a compulsory mortgage by f. ex. submitting documents to the file of documents in the case of real estate that does not have a land and mortgage register (art. 164 § 1 p. 2 of a.e.p.a.), establishing a ban on the sale and encumbrance of real estate that has no land and mortgage register or whose land and mortgage register has been lost or destroyed (art. 164 § 1 p. 4 of a.e.p.a.), as well as establishing a ban on the sale of a cooperative ownership right to a dwelling, a cooperative ownership right to a business premises or the right to a single-family home in a housing cooperative (art. 164 § 1 p. 5 of a.e.p.a.). In all three cases, it is possible to secure a monetary claim by means of a cooperative ownership right to premises. In the first two, the legislator regulated this issue by applying art. 164 § 1 of a.e.p.a. in connection with art. 1a p. 5 of a.e.p.a., which also includes the cooperative ownership right to premises. The third case, however, relates directly to the cooperative ownership right to premises.

The catalog of security measures is closed because the legislator enumerates those that can be used, which is in accordance with the rule of law expressed in art. 7 § 1 of a.e.p.a. It is worth mentioning that security measures are considered to be measures of administrative coercion due to the fact

46 A. Skoczylas, *Rozdział XX. Postępowanie egzekucyjne w administracji,* op. cit., p. 481 and next.

47 Ibidem, p. 482.

48 The amendment that was made in 2001 increased the catalog of security measures, including for establishing a ban on the sale of cooperative rights to premises, cooperative rights to business premises or the right to a single-family home in a housing cooperative, M. Faryna, *Art.164,* [in:] *Ustawa o postępowaniu egzekucyjnym w administracji. Komentarz.* ed. D. R. Kijowski, op. cit., p. 1154.

that they are taken without the consent of the obligated person and result in limiting, and sometimes preventing, exercising of his/her rights[49].

Referring to the encumbrance of the real estate of the obligated person by a compulsory mortgage, also by submitting documents to a file of documents in case of real estate that does not have a land and mortgage register (art. 164 §1 p. 2 of a.e.p.a.), it should be recalled that all provisions of the enforcement act relating to real estate should be applied accordingly – that is with taking into account the specifics of the cooperative ownership right to premises. As an example, it can be pointed out that for the limited property right that is being considered there is no obligation to keep a land and mortgage register, and art. 1 p. 3 of the act on land and mortgage registers provides only for the possibility and not obligation to keep it in order to determine the legal status. In addition, if the cooperative is not entitled to ownership or perpetual usufruct of land on which there is premises covered by cooperative ownership rights, the land and mortgage register cannot be established[50]. The consequence of this interpretation is, among others, the fact that the cooperative right to premises is not subject to the entry in the file of documents, because these files cannot be established in order to determine the legal status of the indicated right *in rem*[51]. There is no doubt, however, that a compulsory mortgage can also be used for a cooperative ownership right to premises, which results not only from the act on enforcement proceedings, but also from specific acts, including art. 34 § 4 p. 2 of the Tax Ordinance, which indicates that the compulsory mortgage may also concern the cooperative ownership right to premises or a share in this right. The effects of encumbering the cooperative ownership right to premises with a compulsory mortgage result from the general provisions on mortgage, regulated in art. 65 p. 1 in connection with art. 24^1 of a.l.m.r. – the creditor may claim satisfaction from the cooperative ownership right to premises in relation to each holder of this right and has priority over other personal creditors of that right holder. The main difference between ordinary and compulsory mortgages is that the first one is established voluntarily – with the consent of the owner of the property (the person who is entitled to the cooperative ownership right to premises), while the second in based on the writ of execution issued in the enforcement proceedings, which in its essence is compulsory proceedings conducted against the will of the debtor (art. 109 of a.m.l.r.). It is also worth mentioning that in accordance with art. 70 § 8 of the Tax Ordinance, the liabilities secured by a mortgage or tax lien are not subject to prescription, however, after the lapse of the limitation period these obligations may be enforced

49 Ibidem, p. 1155.

50 T. Czech, *Art. 24 [1]* [in:] idem, *Księgi wieczyste*…, op. cit.

51 M. Faryna, *Art.164,* [in:] *Ustawa o postępowaniu egzekucyjnym w administracji. Komentarz.* ed. D. R. Kijowski, op. cit., p. 1160.

only on the subject of the mortgage or pledge. Therefore, this is an additional effect of establishing a compulsory mortgage, resulting from *lex specialis*, which in this case the Tax Ordinance is.

The basis for establishing a compulsory mortgage may also be: a court decision on granting security (art. 110 p. 1 of a.l.m.r.), a decision of the prosecutor (art. 110 p. 2 of a.l.m.r.), and the most common in the context of administrative enforcement proceedings - an administrative decision, if specific provisions provide so, even if the decision is not final (art. 110 p. 3 of a.l.m.r.), the security document referred to in art. 3 p. 1 of the Act of 11 October 2013 on mutual assistance in the recovery of taxes, customs duties and other monetary claims (Official Journal of Laws „Dziennik Ustaw" 2018, item 425) (art. 110 p. 4 of a.l.m.r.), ordering the security specified in the provisions on enforcement proceedings in administration or ordering security specified in the act referred to in art. 110 p. 4 of a.l.m.r. (art. 110 p. 5 of a.l.m.r.). The authority entitled to enter a compulsory mortgage in the register of the cooperative ownership right to premises is the enforcement authority. However, if it is a participant in the enforcement proceedings separate from the creditor – then this obligation rests with the creditor (art. 164 § 2 of a.e.p.a.).

In addition to the above considerations, it seems reasonable to draw attention to the consequences of the expiry of a compulsory mortgage as a result of, f. ex., the repayment of the required obligation subject to administrative enforcement. Then the creditor (or enforcement authority, if it is also a creditor) is obliged, pursuant to art. 100 of a.l.m.r., to perform all activities enabling the mortgage to be removed from the land and mortgage register. M. Faryna indicates that „all actions" should be understood as the presentation of relevant documents referred to in art. 31 of a.l.m.r.[52].

The compulsory mortgage is established as soon as it is entered in the land and mortgage register. The question therefore arises: what about the cooperative ownership right to premises which does not have a land and mortgage register? Given the need to properly apply the provisions relating to real estate, it seems reasonable to state that in the absence of the land and mortgage register of the cooperative ownership right to premises, a compulsory mortgage cannot be established. An entry into the land and mortgage register is a *sine qua non* condition of its existence. Although the legislator provided for a situation in which an entry of a compulsory mortgage in relation to real estate not having a land and mortgage register is made to a file of documents, in accordance with art. 123-124 of a.l.m.r., the file of documents cannot be established for the cooperative ownership right to premises.

Prima facie, it may seem that collateral on cooperative ownership right to premises for which no land and mortgage register has been established may be in the form of a ban on selling and encumbering real estate that

52 Ibidem.

has no land and mortgage register or which land and mortgage register has been lost or destroyed (art. 164 § 1 p. 4 of a.e.p.a.). However, there is again a problem of the inability to enter the cooperative ownership right to premises into a file of documents. According to art. 123 p. 1 of a.l.m.r. for real estates that do not have land and mortgage registers or which registers have been lost or damaged, the competent district courts keep a file of documents intended for submitting applications and documents regarding limited property rights and restrictions on the disposal of these real estates until establishing the registers. Since the act does not provide for keeping files of documents for cooperative ownership right to premises, it should be considered that the indicated form of security cannot be established on that limited right.

Securing the required amount in the form of a ban on the sale of cooperative ownership rights to premises (residential, commercial, as well as the right to a single-family house in a housing cooperative) is provided directly by art. 164 § 1 p. 5 of a.e.p.a. This measure seems to be the main way of securing the cooperative ownership right to the premises, primarily due to the fact that it is applied both to rights for which land and mortgage registers have been established and for those which do not have such registers. The entity competent to establish the prohibition is the enforcement authority which, according to art. 17 § 1 of a.e.p.a., issue an appropriate decision in this regard. M. Faryna is right when she indicates that „the decision of the enforcement authority to establish this security measure may not be appealed by the complaint to the appeal body, which results from art. 17 § 1 second sentence of a.e.p.a. It may be the subject of an objection regarding security referred to in art. 33 p. 6 or p. 8 in connection with art. 166b of a.e.p.a. (inadmissibility of the applied security measure or the application of an overly burdensome security measure), filled within 7 days from the date of delivery to the obligated person of a copy of the order for security or a complaint regarding a security measure provided for in art. 54 in connection with art. 166b of a.e.p.a."[53]. It is worth noting that if the cooperative ownership right to premises has a land and mortgage register, a request to enter into it a warning on the ban on selling that right can be submitted. This action results in the increased effectiveness of the security, because the buyer of the cooperative ownership right to premises does not benefit from the protection of the guarantee of public faith of land and mortgage registers regulated in art. 5 of a.l.m.r.[54].

Finally, it is worth emphasizing that in this paper only key, in the authors' opinion, issues related to the indicated research area has been presented. Its assessment, however, leads to several conclusions.

53 Idem, *Art.164,* [in:] *Ustawa o postępowaniu egzekucyjnym w administracji. Komentarz.* ed. D. R. Kijowski, op. cit., p. 1164.

54 Ibidem, p. 1165.

First of all, despite the statutory ban on establishing cooperative ownership right to premises, its significant role in the Polish legal order and judicature – both as it comes about the form of using cooperative premises and the execution subject or the form of securing monetary claims, cannot be ignored.

Secondly, it should be noted that regulations concerning the enforcement of cooperative ownership rights to premises are dispersed into several normative acts, which significantly hinders its proper application. Especially in the context of the „proper application" of real estate regulations, it is necessary to make the right interpretation which does not affect the essence of the cooperative ownership right to premises.

Thirdly, the mere existence of a legal solution that allows for conducting the administrative enforcement of the cooperative ownership right to premises should be considered appropriate. Otherwise, in relation to the obligor having the ownership right to property the enforcement authority would have at its disposal a broader catalog of actions and enforcement measures aimed at fulfilling the obligation subject to administrative enforcement, than in relation to the obligor having the cooperative ownership right to premises. In the latter case the execution could be less severe and, as a consequence, less effective.

Fourthly, legal solutions enabling the securing of monetary claims in security proceedings should be assessed as justifiable in the form of a ban on the disposal of cooperative ownership right to premises. This measure can be applied also to rights for which a land and mortgage register has not been established. The above is important because land and mortgage registers are not obligatory for cooperative ownership rights to premises. Therefore, the use of other methods of securing monetary receivables with the help of the cooperative ownership right to premises, such as a compulsory mortgage or a ban on selling and encumbering of real estate that has no land and mortgage register or which register has been lost or destroyed, is not always possible in regard to the ownership right to premises.

To sum up, it should be clearly noted that in the current literature the issue of administrative enforcement of cooperative ownership right to premises and possible ways of securing monetary claims by using this right has been ignored by the authors as there is not even a cursory analysis of the subject. This fact justifies the above considerations and is an interesting area for scientific research from the perspective of law and administrative procedure.

GLOSA

Paweł Bucoń

Glosa do wyroku sądu apelacyjnego w Krakowie z dnia 27 marca 2019 r., Sygn. Akt I AGa 503/18 (Niepubl.)

With the commented judgement the Court of Appeal in Kraków, by amending the Regional Court's decision, ruled in accordance with Article 527 § 1 of the Polish Civil Code (actio pauliana) that the legal action of establishing a contractual joint mortgage was ineffective. The standpoint expressed by the Court of Appeal in Kraków does not merit for approval as the premises of actio pauliana were not fulfilled. More specifically, there was no damage to the creditors as the establishment of a contractual joint mortgage for the benefit of one of the creditors caused no loss of the debtor's assets. It did not lead to debtor's insolvency or increased the debtor's insolvency. Nor did it result in any material profit of the creditor. Considering the above, there was no action in bad faith by a third party, which is required by the legislator for fulfillment of the premises of actio pauliana.

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I

Powód Syndyk masy upadłości S. T. spółka z o. o. w M. w pozwie skierowanym przeciwko CP T. T. spółce z o. o. w T. domagał się uznania za bezskuteczną w stosunku do powoda czynności ustanowienia hipoteki umownej łącznej do kwoty 10 700 000 zł ustanowionej aktem ustanowienia hipoteki z dnia 5 marca 2014 r. numer aktu notarialnego Rep. A (…) sporządzonym w siedzibie CP T. T. spółki z o. o. w T. przed notariuszem M. K. prowadzącym Kancelarię Notarialną w K., obciążającej nieruchomość gruntową składającą się z działek nr (…), nr (…) położonych w M., gmina W., objętej księgą wieczystą nr (…) prowadzoną przez Sąd

Rejonowy w T. Wydział VI Ksiąg Wieczystych dokonanej z pokrzywdzeniem powoda oraz zwrotu kosztów procesu.

Sąd Okręgowy w Krakowie, w sprawie z powództwa Syndyka masy upadłości S. T. spółki z o.o. w upadłości w M. przeciwko CP T. T. spółce z o.o. w T., sygn. akt IX GC 865/17, wyrokiem z dnia 1 sierpnia 2018 r. oddalił powództwo oraz zasądził od powoda na rzecz pozwanej kwotę 25 017 zł tytułem zwrotu kosztów procesu.

Na skutek apelacji powoda Sąd Apelacyjny w Krakowie, w sprawie sygn. akt I AGa 503/18, wyrokiem z dnia 27 marca 2019 r. zmienił zaskarżony wyrok w ten sposób, że: uznał za bezskuteczną w stosunku do masy upadłości S. T. spółki z o. o. w upadłości w M. czynność ustanowienia hipoteki umownej łącznej do kwoty 10 700 000 zł ustanowionej aktem ustanowienia hipoteki z dnia 5 marca 2014 r. numer aktu notarialnego Rep. A (…) sporządzonym w siedzibie CP T. T. spółki z o.o. w T. przed notariuszem M. K. prowadzącym Kancelarię Notarialną w K., obciążającej nieruchomość gruntową składającą się z działek nr (…), nr (…) położonych w M., gmina W., objętej księgą wieczystą nr (…) prowadzoną przez Sąd Rejonowy w T. Wydział VI Ksiąg Wieczystych, zasądził od pozwanej na rzecz powoda kwotę 25 017 zł tytułem kosztów procesu oraz nakazał pobrać od pozwanej na rzecz Skarbu Państwa - Sądu Okręgowego w Krakowie kwotę 100 000 zł tytułem opłaty sądowej od pozwu, która nie została uiszczona. Ponadto, Sąd II instancji zasądził od pozwanej na rzecz powoda kwotę 18 750 zł tytułem kosztów postępowania apelacyjnego i nakazał pobrać od pozwanej na rzecz Skarbu Państwa – Sądu Okręgowego w Krakowie kwotę 100 000 zł tytułem opłaty sądowej od apelacji, która nie została uiszczona.

Sąd Apelacyjny w Krakowie, zmieniając treść wyroku Sądu Okręgowego w Krakowie, uznał więc za bezskuteczną czynność prawną ustanowienia hipoteki umownej łącznej na podstawie art. 527 § 1 Kodeksu cywilnego[1] (tzw. skarga pauliańska – *actio pauliana*). Z rozstrzygnięciem Sądu Apelacyjnego nie można się zgodzić, bowiem ustanowienie hipoteki nie spełnia warunków skuteczności skargi pauliańskiej ze względu na brak pokrzywdzenia wierzyciela i uzyskania korzyści majątkowej przez osobę trzecią, które to przesłanki stanowią *conditio sine qua non* rzeczonego środka prawnego.

II

Zgodnie z ogólnie obowiązującymi regułami odpowiedzialności cywilnoprawnej za zaciągnięte zobowiązanie dłużnik odpowiada całym swoim majątkiem wówczas, gdy wierzytelność staje się zaskarżalna. Do tego czasu dłużnik nie jest w żaden sposób ograniczony w dysponowaniu składnikami

1 Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (tekst jedn. Dz.U. z 2018 r., poz. 1025 z późn. zm.), dalej jako: k.c.

swojego majątku. W praktyce oznacza to, iż normalnym stanem rzeczy jest ponoszenie przez wierzyciela ryzyka niewypłacalności dłużnika[2]. Na wypadek, gdyby działania dłużnika zmierzały do uszczuplenia jego majątku w takim celu, by wierzyciel nie miał możliwości zaspokojenia jego roszczeń, przewidziana jest instytucja określana jako skarga pauliańska[3]. Przez złożenie *actio pauliana* wierzyciel dąży do stwierdzenia bezskuteczności wobec niego czynności prawnej dokonanej przez dłużnika[4]. Wierzyciel może żądać zaspokojenia swoich roszczeń wobec osoby trzeciej, która uzyskała korzyść majątkową wskutek czynności prawnej dokonanej przez dłużnika z pokrzywdzeniem jego wierzyciela[5]. Z prawa tego może skorzystać każdy z wierzycieli. Nie ma w szczególności znaczenia wielkość zadłużenia ani czas jego powstania. Nie występuje w Kodeksie cywilnym jakakolwiek konstrukcja uprzywilejowująca któregokolwiek z wierzycieli.

Skarga pauliańska jest składana w drodze powództwa lub zarzutu przeciwko osobie trzeciej, która wskutek tej czynności uzyskała korzyść majątkową (art. 531 § 1 k.c.)[6]. Osoba trzecia, która uzyskała korzyść majątkową wskutek czynności prawnej dłużnika dokonanej z pokrzywdzeniem wierzycieli, może zwolnić się od zadośćuczynienia roszczeniu wierzyciela żądającego uznania czynności za bezskuteczną, jeżeli zaspokoi tego wierzyciela albo wskaże mu wystarczające do jego zaspokojenia mienie dłużnika (art. 533 k.c.). W wypadku, gdy osoba trzecia rozporządziła uzyskaną korzyścią, wierzyciel może wystąpić bezpośrednio przeciwko osobie, na rzecz której nastąpiło rozporządzenie, jeżeli osoba ta wiedziała o okolicznościach uzasadniających uznanie czynności dłużnika za bezskuteczną albo jeżeli rozporządzenie było nieodpłatne (art. 531 § 2 k.c.).

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2 Z. Radwański, A. Olejniczak, *Zobowiązania – część ogólna*, Warszawa 2018, s. 29; por. M. Wilejczyk, *Przesłanki skargi pauliańskiej*, „Studia Prawa Prywatnego" nr 2, 2012, s. 75.

3 T. Szanciło, *Istota skargi pauliańskiej na tle orzecznictwa sądowego*, „Przegląd Sądowy" nr 9, 2012, s. 5; M. Jasińska, *Skarga pauliańska – istota idei zaskarżenia*, „Prawo Spółek" nr 5, 2004, s. 48 i n.

4 K. Konieczna, *Czynność dłużnika jako przedmiot skargi pauliańskiej – przegląd orzecznictwa za lata 2007-2017*, „Gdańskie Studia Prawnicze – Przegląd Orzecznictwa" nr 3, 2018, s. 33-34.

5 Zob. M. Wilejczyk, *Skutki rozporządzenia przez dłużnika pauliańskiego uzyskaną korzyścią majątkową*, „Przegląd Sądowy" nr 10, 2013, s. 31 i n.

6 Zob. M. Pyziak-Szafnicka, *Ochrona wierzyciela w razie niewypłacalności dłużnika*, Warszawa 1995, s. 175-176; E. Gniewek, *Dochodzenie roszczenia pauliańskiego*, [w:] *Odpowiedzialność w prawie cywilnym*, red. P. Machnikowski, Wrocław 2006, s. 43 i n.

Prawo wierzyciela ograniczone jest terminem zawitym. Zgodnie z art. 534 k.c. uznania czynności prawnej dokonanej z pokrzywdzeniem wierzycieli za bezskuteczną nie można żądać po upływie lat pięciu od daty tej czynności.

Wykazanie przesłanek konstytuujących skargę pauliańską powoduje bezskuteczność czynności prawnej, która stała się przedmiotem skargi, względem wierzyciela składającego skargę. Zachodzi zatem w tym przypadku sankcja wadliwości czynności prawnej w postaci bezskuteczności względnej[7]. Wierzyciel, względem którego czynność prawna dłużnika została uznana za bezskuteczną, może z pierwszeństwem przed wierzycielami osoby trzeciej dochodzić zaspokojenia z przedmiotów majątkowych, które wskutek czynności uznanej za bezskuteczną wyszły z majątku dłużnika albo do niego nie weszły (art. 532 k.c.)[8]. Uznanie skargi pauliańskiej powoduje zatem możliwość zaspokojenia przez wierzyciela swojej wierzytelności z majątku osoby trzeciej, z którą nie łączył go żaden stosunek prawny. W przypadku, gdy przedmiotami, o których mowa w art. 532 k.c., są pieniądze lub rzeczy zamienne, których nie da się zidentyfikować, wierzyciel władny jest przeprowadzić egzekucję z całego majątku osoby trzeciej[9].

III

Przesłanki zastosowania skargi pauliańskiej zostały określone w art. 527 k.c. Wystąpienie ze skargą pauliańską możliwe jest tylko i wyłącznie wówczas, gdy wierzytelność jest zaskarżalna[10]. Warunkiem wniesienia skargi

7 Zob. M. Gutowski, *Bezskuteczność czynności prawnej*, Warszawa 2017, s. 51 i n.

8 Odrębnym problemem jest odpowiedź na pytanie o zasadność skargi pauliańskiej, jeżeli w momencie wytoczenia powództwa osoba trzecia nie ma już rzeczy uzyskanej od dłużnika. Zob. na ten temat M. J. Naworski, *Actio pauliana – uwagi na tle art. 531 § 2 i art. 532 k.c.*, „Przegląd Prawa Handlowego" nr 5, 2009, s. 48 i n.

9 M. Pyziak-Szafnicka, *Ochrona*…, op. cit., s. 183-188.

10 W doktrynie i judykaturze utrwalony jest pogląd, że wierzytelność musi istnieć zarówno w momencie dokonania przez dłużnika czynności prawnej, która prowadzi do pokrzywdzenia wierzycieli, jak i w chwili wytoczenia powództwa (M. Wilejczyk, *Skarga pauliańska w najnowszym orzecznictwie Sądu Najwyższego*, „Glosa" nr 3, 2017, s. 35; P. Machnikowski, *Komentarz do art. 527*, [w:] *Kodeks cywilny. Komentarz*, red. E. Gniewek, P. Machnikowski, Warszawa 2017, s. 1104). Wierzytelności chronione skargą pauliańską muszą być skonkretyzowane, zarówno pod względem podmiotowym, jak i przedmiotowym (wyrok Sądu Najwyższego z dnia 27 listopada 2003 r., III CKN 355/01; J. Naczyńska, *Komentarz do art. 527*, [w:] *Kodeks cywilny. Komentarz*, t. III,

pauliańskiej jest ponadto dokonanie przez dłużnika czynność prawnej[11]. Jeżeli dłużnik doprowadzi do uszczuplenia swojego majątku w jakikolwiek inny sposób niż przez dokonanie czynności prawnej (np. przez zniszczenie rzeczy), taki sposób zachowania się dłużnika nie może być przedmiotem skargi pauliańskiej[12]. Czynność prawna musi być dokonana przez dłużnika z pokrzywdzeniem wierzycieli i przy świadomości dłużnika w przedmiocie działania w tym celu. W doktrynie odróżnia się świadomość pokrzywdzenia od zamiaru pokrzywdzenia wierzycieli przez dłużnika, czyli działania umyślnego nastawionego na pozbawienie możliwości zaspokojenia wierzytelności przez wierzyciela. W takim przypadku prawo chroni nie tylko aktualnego wierzyciela, ale również przyszłego, tzn. takiego, który nawiązuje stosunek zobowiązaniowy dopiero po dokonaniu niekorzystnej czynności prawnej przez przyszłego dłużnika[13].

Jeżeli wskutek czynności prawnej dokonanej przez dłużnika z pokrzywdzeniem wierzycieli osoba trzecia uzyskała korzyść majątkową bezpłatnie, wierzyciel może żądać uznania czynności za bezskuteczną, chociażby osoba ta nie wiedziała i nawet przy zachowaniu należytej staranności nie mogła się dowiedzieć, że dłużnik działał ze świadomością pokrzywdzenia wierzycieli (art. 528 k.c.).

Przesłanki zastosowania *actio pauliana* są złożone. Można podzielić je na dwie grupy: obiektywne i subiektywne[14]. Wierzyciel jest uprawniony do złożenia skargi pauliańskiej tylko i wyłącznie wówczas, gdy spełnione są wszystkie przesłanki wskazane przez ustawodawcę[15]. Brak spełnienia którejkolwiek z nich powoduje, że skarga pauliańska nie może przynieść skutku

Zobowiązania. Część ogólna (art. 353-534), red. M. Habdas, M. Fras, Warszawa 2018, s. 1132.

11 Może ona mieć charakter nie tylko dwustronny, ale również jednostronny.

12 Dodać należy, iż nie spełnia przesłanki złożenia skargi pauliańskiej zaniechanie (M. Jasińska, *Skarga pauliańska. Ochrona wierzyciela w razie niewypłacalności dłużnika. Komentarz do art. 527–534 KC i przepisów powiązanych (KRO, PrUpad, KPC, KK)*, Warszawa 2018, s. 82; A. Karnicka-Kawczyńska, J. Kawczyński, *Skarga pauliańska*, „Prawo Spółek" nr 1, 1999, s. 18 i n.).

13 Z. Radwański, A. Olejniczak, *Zobowiązania*…, op. cit., s. 33.

14 A. Doliwa, *Zobowiązania*, Warszawa 2012, s. 193.

15 Wyrok Sądu Najwyższegoz dnia 22 marca 2017 r., III CSK 143/16 (LEX nr 2312011); T. Szanciło, *Zabezpieczenie roszczenia ze skargi pauliańskiej*, „Przegląd Sądowy" nr 4, 2019, s. 7.

oczekiwanego przez wierzyciela. Z drugiej zaś strony, nie można przyjmować wykładni rozszerzającej listy przesłanek, o których mowa w art. 527 k.c.[16].

IV

Pokrzywdzenie wierzycieli możliwe jest do oceny w sposób obiektywny, ponieważ stosowną miarą tej przesłanki jest uszczerbek na majątku, z którego może być zaspokojona wierzytelność[17]. Oceny, czy doszło do uszczerbku na majątku dokonuje się przez pryzmat art. 527 § 2 k.c. Pokrzywdzenie wierzycieli zachodzi zatem, jeżeli wskutek czynności prawnej dłużnik stał się niewypłacalny albo stał się niewypłacalny w wyższym stopniu, niż był przed dokonaniem czynności[18]. Niewypłacalność oznacza taki stan majątku dłużnika, w którym przeprowadzenie egzekucji na podstawie przepisów Kodeksu postępowania cywilnego nie może przynieść zaspokojenia wierzyciela[19]. Dla zastosowania skargi pauliańskiej nie ma konieczności ogłoszenia upadłości dłużnika, wystarczy wykazanie nieskuteczności egzekucji[20]. Natomiast istotą pogłębienia niewypłacalności jest uszczerbek na majątku dłużnika przez wyprowadzenie z niego rzeczy, które potencjalnie mogą służyć zaspokojeniu wierzyciela[21]. W przypadku skargi pauliańskiej chodzi o każde powiększenie niewypłacalności, bez względu na to, czy ma ono charakter istotny, czy nieistotny[22].

16 Wyrok Sądu Najwyższego z dnia 1 kwietnia 2011 r., III CSK 209/10; W. Popiołek, *Komentarz do art. 527*, [w:] *Kodeks cywilny. Komentarz*, t. II, red. K. Pietrzykowski, Warszawa 2018, s. 230.

17 T. Szanciło, *Istota*…, op. cit., s. 11.

18 Wyrok Sądu Najwyższego z dnia 17 stycznia 2017 r., IV CSK 194/16 (LEX nr 2237415). Między dokonaniem czynności prawnej przez dłużnika a faktem pokrzywdzenia wierzyciela musi zachodzić związek przyczynowy. Należy zatem wykazać, iż zaskarżona czynność spowodowała rezultat w postaci niewypłacalności dłużnika lub jej zwiększenia. Wyrok Sądu Najwyższego z dnia 22 października 2004 r., II CK 128/04, „Biuletyn Sądu Najwyższego" nr 2, 2005, poz. 1. Zob. także M. Jasińska, *Skarga pauliańska. Ochrona wierzyciela*…, op. cit., s. 47 i n.

19 Wyrok Sądu Najwyższego z dnia 16 marca 2016 r., IV CSK 269/15; zob. M. Pyziak-Szafnicka, *Ochrona*…, op. cit., s. 92-93.

20 Wyrok Sądu Najwyższego z dnia 18 września 1998 r., III CKN 612/97, OSNC 1999, nr 3, poz. 56; G. Wolak, *Komentarz do art. 527*, [w:] *Kodeks cywilny. Komentarz*, red. M. Załucki, Warszawa 2019, s. 1207.

21 Z. Radwański, A. Olejniczak, *Zobowiązania*…, op. cit., s. 33.

22 M. Pyziak-Szafnicka, *Ochrona wierzyciela w razie niewypłacalności dłużnika*, [w:] *System prawa prywatnego*, t. VI, *Prawo zobowiązań – część*

Nie znaczy to jednak, że dopuszczenie możliwości uznania skuteczności akcji pauliańskiej przez każdy przypadek zwiększenia niewypłacalności dłużnika pozwala na przyjęcie rozszerzającej interpretacji art. 527 ust. 1-2 k.c. Spowodowanie niewypłacalności dłużnika albo jej zwiększenie stanowi jedyne dopuszczone przez ustawodawcę kryterium pokrzywdzenia wierzyciela. Nie jest bowiem tak, iż przez wprowadzenie trudno definiowalnego pojęcia „pokrzywdzenie"[23] ustawodawca przewiduje nieskończoną ilość możliwości wykorzystania skargi pauliańskiej. Dlatego też nie można zgodzić się ze stanowiskiem Sądu Najwyższego wyrażonym w wyroku z dnia 14 lutego 2008 r.[24], w którym Sąd uznał, że wystarczającą przesłanką pokrzywdzenia wierzycieli jest nie tylko brak możliwości zaspokojenia wierzyciela, ale również jego utrudnienie lub odwleczenie[25]. Tak nakreślona wykładnia komentowanego przepisu stoi w sprzeczności z wolą ustawodawcy, który wyraźnie wskazuje na powstanie lub pogłębienie stanu niewypłacalności dłużnika jako jedyną przesłankę spełnienia warunku pokrzywdzenia wierzycieli[26]. Brak sformułowania w art. 527 § 2 k.c. sformułowania „w szczególności" (lub zbliżonego) świadczy o tym, że ustawodawca nie dopuszcza jakiejkolwiek innej możliwości oceny pokrzywdzenia wierzyciela, jak spowodowanie niewypłacalności dłużnika lub zwiększenie jego niewypłacalności.

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ogólna, red. A. Olejniczak, Warszawa 2018, s. 1748; por. P. Machnikowski, *Komentarz*…, op. cit., s. 1107-1108.

23 Podkreślić należy, iż pokrzywdzenie nie jest tożsame ze szkodą w rozumieniu cywilnoprawnym; W. Popiołek, *Komentarz*…, op. cit., s. 237; Z. Radwański, A. Olejniczak, *Zobowiązania*…, op. cit., s. 32.

24 II CSK 503/07.

25 W podobnym kierunku zmierzają ustalenia M. Wilejczyka, *Przesłanki*…, op. cit., s. 83, który przesłankę pokrzywdzenia wierzycieli sprowadza do doznania przez niego uszczerbku w przysługującym mu prawie zaspokojenia. Dodać należy, iż w wyroku z dnia 26 listopada 2014 r. (VI ACa 202/14) Sąd Apelacyjny w Warszawie zaprezentował stanowisko, iż o stanie niewypłacalności dłużnika można mówić także wówczas, gdy co prawda możliwe jest wyegzekwowanie wierzytelności, lecz z dodatkowym znacznym nakładem kosztów, czasu i ryzyka. Zdaniem autora niniejszej glosy tak nakreślony kierunek orzecznictwa nie odpowiada językowej wykładni komentowanego przepisu i dlatego też zasługuje na krytykę. Por. M. Gutowski, *Komentarz do art. 527*, [w:] *Kodeks cywilny. Komentarz*, t. II: *Art. 353-626*, red. M. Gutowski, Warszawa 2019, s. 1383.

26 Podobne stanowisko prezentuje M. Gutowski, *Bezskuteczność*…, op. cit., s. 73.

V

W sprawie będącej punktem odniesienia niniejszej glosy sąd miał zatem obowiązek odpowiedzieć na pytanie, czy ustanowienie hipoteki umownej łącznej spowodowało niewypłacalność dłużnika bądź też zwiększenie tej niewypłacalności. Sąd Apelacyjny w Krakowie przyjął – zdaniem autora niniejszej glosy – błędne stanowisko, iż akt ustanowienia hipoteki spełnia przesłankę skuteczności skargi pauliańskiej.

Istotą hipoteki, jako ograniczonego prawa rzeczowego, jest zaspokojenie wierzyciela z nieruchomości, bez względu na to czyją stała się własnością i z pierwszeństwem przed wierzycielami osobistymi właściciela nieruchomości[27]. Ustanowienie hipoteki umownej łącznej w żaden sposób nie prowadzi zatem do spowodowania niewypłacalności dłużnika lub zwiększenia stopnia niewypłacalności, ponieważ jej jedynym celem jest zabezpieczenie wierzyciela (jednego z wierzycieli)[28]. Ustanowienie hipoteki umownej łącznej nie może być zatem uznane - zdaniem autora niniejszej glosy - za pokrzywdzenie wierzyciela, ponieważ nie doszło do spełnienia podstawowego warunku wniesienia skargi pauliańskiej, o jakim mowa w art. 527 § 1 k.c. w zw. z art. 527 § 2 k.c. Trudno zatem zrozumieć, co Sąd Apelacyjny w Krakowie miał na myśli, wskazując w glosowanym wyroku, iż wskutek ustanowienia hipoteki umownej łącznej nastąpiło pogłębienie stanu niewypłacalności dłużnika. Fakt taki nie zaistniał, ponieważ nie doszło do uszczuplenia majątku, a tylko do uzyskania pierwszeństwa zaspokojenia swojej wierzytelności przez jednego z wierzycieli.

Tego stanu rzeczy w żaden sposób nie można uznać za spełnienie przesłanki pokrzywdzenia wierzycieli w znaczeniu określonym w art. 527 § 2 k.c., ponieważ ustanowienie hipoteki nie wywarło wpływu na zakres zobowiązań dłużnika w stosunku do pozostałych wierzycieli. Jak uznał Sąd Najwyższy w wyroku z dnia 3 lutego 1998 r.[29], obciążenie hipoteką nieruchomości nie jest równoznaczne z pokrzywdzeniem wierzycieli w rozumieniu art. 527 § 1-2 k.c. Jedynym efektem ustanowienia hipoteki jest zmiana

27 Art. 65 ust. 1 ustawy z dnia 6 lipca 1982 r. o księgach wieczystych i hipotece (tekst jedn. Dz.U. z 2018 r., poz. 1916 z późn. zm.), dalej jako: u.k.w.h. Zob. m.in. A. Bieranowski, *Hipoteka*, [w:] *Nieruchomości w prawie cywilnym, administracyjnym i podatkowym*, t. II, *Umowy obciążające i o korzystanie z nieruchomości, orzeczenia spadkowe, wywłaszczenie nieruchomości*, red. S. Babiarz, A. Bieranowski, M. Jaśniewicz, T. Kolanowski, R. Pęk, E. Stefańska, Warszawa 2017, s. 35 i n.

28 Hipoteka umowna łączna obciąża kilka nieruchomości w ten sposób, że wierzyciel może żądać zaspokojenia się z dowolnej nieruchomości spośród obciążonych, wedle własnego wyboru (art. 76 u.k.w.h.).

29 I CKN 403/97.

pierwszeństwa wierzycieli do zaspokojenia roszczeń, która sama w sobie nie stanowi pogłębienia stanu niewypłacalności. Dlatego też uznać należy, iż ustanowienie hipoteki nie jest wystarczającą przesłanką skargi pauliańskiej, a wręcz dopuszczalna jest na mocy przepisów prawa upadłościowego[30].

W orzecznictwie Sądu Najwyższego utrwalony jest pogląd, że przesłanka pokrzywdzenia wierzyciela nie zachodzi, gdy do zaspokojenia wierzyciela występującego ze skargą pauliańską nie doszłoby nawet wtedy, gdyby nieruchomość pozostała w majątku dłużnika, a to z uwagi na zakres jej obciążenia hipoteką[31]. Dlatego też nie zasługuje na uwzględnienie, również ze względów przytoczonych wyżej, stanowisko Sądu Apelacyjnego w Katowicach, przyjęte w wyroku z dnia 7 maja 2014 r.[32], zgodnie z którym do pokrzywdzenia wierzyciela dochodzi w razie zabezpieczenia chronionej wierzytelności hipoteką ze względu na utrudnienie i odwleczenie zaspokojenia wierzyciela[33]. Jak wskazano wyżej, sama sytuacja utrudnienia dochodzenia wierzytelności nie jest równoznaczna ze spełnieniem przesłanek zastosowania skargi pauliańskiej.

Dodać należy, iż Sąd Apelacyjny w Krakowie nie uwzględnił faktu, iż ustanowienie hipoteki umownej łącznej wiązało się nie tylko z zabezpieczeniem istniejących zobowiązań, ale z restrukturyzacją zadłużenia wobec wierzyciela, na rzecz którego została ustanowiona. Istotą restrukturyzacji zadłużenia jest zmiana warunków jego spłaty, a nie jakiekolwiek zwiększenie stopnia zadłużenia, prowadzącego do powstania lub zwiększenia stanu niewypłacalności, które to przesłanki stanowią o skuteczności skargi pauliańskiej. Celem postępowania restrukturyzacyjnego jest uniknięcie ogłoszenia upadłości dłużnika przez umożliwienie mu restrukturyzacji w drodze zawarcia układu z wierzycielami, a w przypadku postępowania sanacyjnego – również przez przeprowadzenie działań sanacyjnych, przy zabezpieczeniu słusznych praw wierzycieli[34].

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30 Na ten argument powołał się Sąd Okręgowy w Krakowie, którego wyrok został zmieniony glosowanym orzeczeniem; zob. także F. Zedler, *Z problematyki dochodzenia roszczeń pauliańskich w postępowaniu upadłościowym*, „Polski Proces Cywilny" nr 1, 2019, s. 9 i n.

31 Wyrok Sądu Najwyższego z dnia 20 lipca 2017 r., I CSK 598/16; por. wyrok Sądu Najwyższego z dnia 13 października 2006 r., III CSK 58/06, wyrok Sądu Najwyższego z dnia 28 czerwca 2007 r., IV CSK 115/07 oraz wyrok Sądu Najwyższego z dnia 31 stycznia 2007 r, II CSK 384/06.

32 I ACa 99/14.

33 J. Naczyńska, *Komentarz*…, op. cit., s. 1133.

34 Art. 3 ust. 1 ustawy z dnia 15 maja 2015 r. Prawo restrukturyzacyjne (tekst jedn. Dz.U. z 2019 r., poz. 243 z późn. zm.). Zob. M. Kubiczek,

W przypadku będącym przedmiotem glosowanego orzeczenia ustanowienie hipoteki stanowiło element restrukturyzacji istniejącego zadłużenia. Z tego też tytułu nie można postawić zarzutu, iż ustanowienie hipoteki mogłoby prowadzić do obejścia prawa. Hipoteka nie prowadziła w jakikolwiek sposób do zwiększenia niewypłacalności dłużnika, stwierdzenie którego to stanu rzeczy wymagane jest przez ustawodawcę w art. 527 § 2 k.c. Akt ustanowienia hipoteki nie odpowiadał zatem przesłankom skuteczności skargi pauliańskiej.

VI

Na kanwie niniejszych ustaleń warto też zwrócić uwagę na fakt, iż ustawodawca w art. 527 § 1 k.c., traktując o pokrzywdzeniu, używa liczby mnogiej („[…] jeżeli dłużnik działał ze świadomością pokrzywdzenia wierzycieli […]"). Zdaniem autora niniejszej glosy świadomość dłużnika musi obejmować pokrzywdzenie jeżeli nie wszystkich, to przynajmniej więcej niż jednego z wierzycieli. Wniosek taki wynika z wykładni językowej przepisu. W poprzedniej części art. 527 § 1 k.c. ustawodawca wyraźnie wskazuje na możliwość wniesienia skargi pauliańskiej przez jednego wierzyciela („…każdy z wierzycieli może żądać uznania tej czynności za bezskuteczną w stosunku do niego"). Gdyby zatem intencją ustawodawcy było umożliwienie wniesienia skargi pauliańskiej w sytuacji, w której pokrzywdzony został tylko jeden z wielu wierzycieli, to fakt ów znalazłby odbicie w treści przepisu. Co więcej, liczba mnoga została zastosowana w art. 527 § 2 k.c. („Czynność prawna dłużnika jest dokonana z pokrzywdzeniem wierzycieli…"), gdzie – z punktu widzenia poprawności legislacyjnej – właściwsze byłoby użycie liczby pojedynczej. Wniosek wypływający z wykładni językowej art. 527 § 2 k.c. dodatkowo przemawia zatem na rzecz interpretacji art. 527 § 1 k.c. w takim kierunku, jak to przedstawiono wyżej.

Odpowiedź na pytanie, czy w sytuacji wielości wierzycieli pokrzywdzenie może ograniczać się tylko do jednego z nich, nie została do tej pory jednoznacznie rozstrzygnięta w orzecznictwie i poglądach doktryny. Z braku przekonywujących argumentów należy zatem dać pierwszeństwo wnioskom płynącym z wykładni językowej komentowanego przepisu. Jak bowiem wiadomo, wykładnia językowa odgrywa podstawowe znaczenie w procesie interpretacji przepisów prawnych[35]. Każde odejście od rezultatów wykładni

B. Sokół, *Przesłanki prowadzenia postępowania restrukturyzacyjnego w świetle jego celu*, „Doradca Restrukturyzacyjny" nr 2, 2015, s. 22 i n.

35 L. Morawski, *Zasady wykładni prawa*, Toruń 2006, s. 87.

językowej i odwołanie się do wykładni celowościowej (funkcjonalnej) wymaga starannego uzasadnienia, którego w danym przypadku nie da się ustalić[36].

Zdaniem autora niniejszej glosy, nawet jeżeli przyjąć, iż przez ustanowienie hipoteki umownej łącznej dłużnik dokonałby pokrzywdzenia jednego z wierzycieli (lub nawet więcej niż jednego), a zabezpieczył tym samym interes wierzyciela, na rzecz którego została ustanowiona hipoteka, skarga pauliańska i tak byłaby nieskuteczna, ponieważ nie doszło do pokrzywdzenia więcej niż jednego z wierzycieli, jak tego wymaga art. 527 § 1 k.c. Jak jednak wykazano wyżej, ustanowienie hipoteki umownej łącznej nie może być poczytane za pokrzywdzenie wierzycieli w rozumieniu art. 527 § 2 k.c., w związku z czym przytoczony argument uznać należy za drugorzędny.

VII

W glosowanym orzeczeniu Sąd Apelacyjny w Krakowie mylnie zinterpretował również drugą niezbędną przesłankę skargi pauliańskiej, jaką jest uzyskanie korzyści majątkowej przez osobę trzecią. Warunek ten zostaje spełniony w przypadku nabycia przez osobę trzecią prawa majątkowego lub zwolnienie z zobowiązania, ale tylko i wyłącznie wówczas, gdy czynność prawna dokonana przez dłużnika powoduje zmianę w majątku dłużnika prowadzącą do pokrzywdzenia wierzycieli[37]. Uzyskanie korzyści majątkowej obejmuje wszelkie przedmioty majątkowe, tj. rzeczy i prawa majątkowe zbywalne, a dzięki dokonanej czynności prawnej następuje powiększenie majątku osoby trzeciej[38].

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36 Stanowisko odbiegające od wykładni językowej komentowanego artykułu prezentuje J. Naczyńska (*Komentarz*…, op. cit., s. 1141). Niemniej przywołana Autorka nie przedstawia moim zdaniem przekonywujących argumentów odrzucenia rezultatów zastosowania wykładni językowej, ograniczając się do stwierdzenia, iż „normy tego przepisu, ani następnych nie uzależniają uwzględnienia skargi pauliańskiej od ustalenia, że zaskarżona czynność krzywdzi – poza skarżącym – również innych wierzycieli (a przynajmniej jeszcze jednego wierzyciela)". Nie istnieje konieczność podkreślania przez ustawodawcę swojej woli w kolejnych przepisach, skoro wynika ona wyraźnie z językowego brzmienia pierwszego z nich.

37 Wyrok Sądu Najwyższego z dnia 29 kwietnia 2015 r., IV CSK 459/14; wyrok Sądu Najwyższego z dnia 7 grudnia 1999 r., I CKN 287/98 (LEX nr 147235); Z. Radwański, A. Olejniczak, *Zobowiązania*…, op. cit., s. 34; W. Popiołek, *Komentarz*..., op. cit., s. 239.

38 B. Burian, *Czynności prawne będące przedmiotem skargi pauliańskiej*, [w:] *Współczesne problemy prawa prywatnego. Księga pamiątkowa ku czci Pro-*

Istotą ustanowienia hipoteki jest – jak wskazano wyżej – zabezpieczenie praw wierzyciela. Uznać należy, iż zabezpieczenie roszczeń nie jest równoznaczne z uzyskaniem korzyści majątkowej. Nie występuje bowiem ani uszczuplenie majątku dłużnika, ani uzyskanie korzyści przez osobę trzecią. W związku z tym trudno uznać czynność prawną dokonaną przez dłużnika za taką, która powoduje uzyskanie korzyści majątkowej przez osobę trzecią, skoro nie powoduje ona zmiany w majątku dłużnika, a jedynie zabezpiecza interes jednego z wierzycieli.

VIII

Autor niniejszej glosy pragnie również odnieść się do sposobu interpretacji przez Sąd Apelacyjny w Krakowie domniemań ustanowionych w art. 527 § 3 i 4 k.c., z takim jednak zastrzeżeniem, iż rzeczą drugorzędną jest odpowiedź na pytanie, czy dłużnik działał ze świadomością pokrzywdzenia wierzycieli, a osoba trzecia o tym wiedziała lub przy zachowaniu należytej staranności mogła się dowiedzieć[39], skoro – jak wykazano wyżej – w sprawie będącej przedmiotem glosowanego orzeczenia nie doszło do spełnienia dwóch podstawowych warunków skargi pauliańskiejo charakterze obiektywnym (tj. pokrzywdzenia wierzycieli oraz uzyskania korzyści majątkowej przez osobę trzecią).

W normalnych okolicznościach obowiązek udowodnienia, iż dłużnik działał ze świadomością pokrzywdzenia wierzycieli, spoczywa na wierzycielu wnoszącym skargę paulińską, zgodnie z zasadą wynikającą z art. 6 k.c.[40]. W świetle tego przepisu ciężar dowodu (*onus probandi*) spoczywa na osobie, która z faktu tego wywodzi skutki prawne. W przypadku przesłanek subiektywnych skargi pauliańskiej proces przeprowadzenia dowodu na okoliczność przeprowadzenia czynności prawnej w określonym stanie psychicznym może okazać się utrudniony[41]. Dlatego też Kodeks cywilny zawiera przepisy pozwalające na przerzucenie ciężaru dowodu na dłużnika przez ustanowienie odpowiednich domniemań prawnych (art. 527 § 3 i 4 k.c.).

Domniemania określone we wskazanych przepisach ułatwiają udowodnienie, że osoba trzecia, która uzyskała korzyść majątkową, wiedziała,

fesora Edwarda Gniewka, red. J. Gołaczyński, P. Machnikowski, Warszawa 2010, s. 59.

39 Jak wynika z art. 527 § 1 k.c. świadomość osoby trzeciej ocenia się z punktu widzenia dwóch kryteriów: 1) posiadania przez nią wiedzy, iż dłużnik działa ze świadomością pokrzywdzenia wierzycieli; 2) możliwości dowiedzenia się, iż dłużnik działa ze świadomością pokrzywdzenia wierzycieli przy zachowaniu należytej staranności.

40 A. Doliwa, *Zobowiązania*…, op. cit., s. 193.

41 Z. Radwański, A. Olejniczak, *Zobowiązania*…, op. cit., s. 34.

że dłużnik działa ze świadomością pokrzywdzenia wierzyciela lub mogła się o tym dowiedzieć przy zachowaniu należytej staranności. Domniemania ustanowienie w art. 527 § 3 i 4 k.c. powodują bowiem zdjęcie z wierzyciela ciężaru dowodu i przerzucenie go na dłużnika (osobę trzecią). W obu przypadkach są to domniemania wzruszalne (*iuris tantum*), które mogą zostać obalone przez przeprowadzenie dowodu przeciwnego.

Art. 527 § 3 k.c. ustanawia domniemanie świadomości osoby bliskiej, będącej osobą trzecią, która uzyskała korzyść majątkową, w przedmiocie działania dłużnika ze świadomością pokrzywdzenia wierzycieli[42]. Natomiast art. 527 § 4 k.c. ustanawia domniemanie świadomości przedsiębiorcy pozostającego z dłużnikiem w stałych stosunkach gospodarczych, będącego osobą trzecią, która uzyskała korzyść majątkową, w przedmiocie działania dłużnika ze świadomością pokrzywdzenia wierzycieli.

Zdaniem autora niniejszej glosy art. 527 § 4 k.c. stanowi *lex specialis* wobec art. 527 § 3 k.c. Znajduje zatem zastosowanie reguła kolizyjna *lex specialis derogat legi generali*. Jeżeli zatem – jak miało to miejsce w przypadku stanowiącym przedmiot glosowanego orzeczenia – dłużnik i osoba trzecia mają status przedsiębiorcy, jakiekolwiek odnoszenie się do art. 527 § 3 k.c. jest nie tylko zbędne, ale i niezgodne z przytoczoną regułą.

Osobą trzecią, która uzyskała korzyść majątkową, jest w rozumieniu art. 527 § 4 k.c. przedsiębiorca pozostający z dłużnikiem w stałych stosunkach gospodarczych[43]. Kodeks cywilny ustanawia definicję legalną przedsiębiorcy (art. 43^1 k.c.). Jest nim osoba fizyczna, osoba prawna i jednostka organizacyjna nieposiadająca osobowości prawnej, której ustawa przyznaje zdolność prawną, prowadząca we własnym imieniu działalność gospodarczą lub zawodową[44]. Natomiast nie jest możliwe dokładne sprecyzowanie przesłanki

42 Pojęcie „osoba będąca w bliskim stosunku z dłużnikiem" jest bardzo szerokie. Nie chodzi w tym przypadku tylko o więzy rodzinne łączące dłużnika i osobę trzecią, ale o wszelkie faktyczne stosunki istniejące między tymi podmiotami. Tytułem przykładu, w wyroku z dnia 9 marca 2007 r., V CSK 473/06 (OSNC 2008, nr 2, poz. 27) Sąd Najwyższy orzekł, iż stosunek bliskości może wynikać także ze sporadycznych kontaktów gospodarczych, którym towarzyszą innego rodzaju relacje o charakterze majątkowym lub niemajątkowym.

43 W ten sposób pojęcie bliskości stosunków z art. 527 § 3 k.c. zostało rozszerzone na pozostawanie w stałych stosunkach gospodarczych (art. 527 § 4 k.c.), co uzasadnia przytoczony wyżej wniosek, iż mamy w tym przypadku do czynienia z przepisem ogólnym i szczególnym.

44 W świetle art. 3 ustawy z dnia 6 marca 2018 r. Prawo przedsiębiorców (Dz.U. z 2018 r., poz. 646 z późn. zm.), działalnością gospodarczą jest zorganizowana działalność zarobkowa, wykonywana we własnym imieniu i w sposób ciągły.

pozostawania w stałych stosunkach gospodarczych i dlatego należy dokonywać takiej oceny *a casu ad casum*. W przypadku glosowanego orzeczenia kwestia ta jednak nie budzi większych wątpliwości.

Nie można natomiast zgodzić się z zarzucaniem złej wiary wierzycielowi, na rzecz którego została ustanowiona hipoteka umowna łączna (tj. osobie trzeciej w rozumieniu art. 527 § 1 k.c.). Trudno bowiem uznać, iż prowadzenie przez przedsiębiorcę działalności gospodarczej w sposób, który uwzględnia w pierwszej kolejności swój własny interes ekonomiczny (a tak należy ocenić ustanowienie hipoteki zabezpieczającej istniejące zobowiązania i połączone z restrukturyzacją zadłużenia) stanowi wypełnienie przesłanek złej wiary z art. 527 § 4 k.c.

Za niestosowne zatem uznać należy poparcie argumentów Sądu Apelacyjnego w Krakowie stanowiskiem Sądu Najwyższego wyrażonym w wyroku z dnia 8 sierpnia 2008 r.[45]. Sąd Najwyższy stwierdził, że przepis art. 527 k.c. ma również zastosowanie do czynności prawnej dokonanej przez dłużnika z jednym tylko z wierzycieli, jeżeli jest to czynność naruszająca wynikającą z ustawy lub umowy kolejność zaspokajania wierzycieli. Podobnie chybiony jest argument wynikający z oparcia się na stanowisku Sądu Najwyższego w wyroku z dnia 23 listopada 2005 r.[46], który Sąd Apelacyjny w Krakowie sprowadził do konkluzji, iż pokrzywdzenie wierzycieli zachodzi w sytuacji, w której dłużnik dokonał wyboru wierzyciela w sposób arbitralny, prowadzący do uprzywilejowania go kosztem pozostałych w okolicznościach, które wskazują na rychłą możliwość ogłoszenia upadłości dłużnika i wyprowadzenia z jego majątku istotnych składników, co może prowadzić do niemożności zaspokojenia się wierzycieli z przyszłej masy upadłości.

IX

Reasumując, stwierdzić należy, że stanowisko Sądu Apelacyjnego w Krakowie zawarte w glosowanym wyroku nie zasługuje na aprobatę, z tego powodu, iż nie zostały wypełnione przesłanki skargi pauliańskiej, o których mowa w art. 527 § 1 k.c., a mianowicie nie zaszedł przypadek pokrzywdzenia wierzycieli w znaczeniu określonym przez ustawodawcę w art. 527 § 2 k.c., ponieważ ustanowienie hipoteki umownej łącznej na rzecz jednego z wierzycieli nie doprowadziło do uszczerbku na majątku dłużnika, powodującego jego niewypłacalność lub zwiększenie niewypłacalności, ani nie spowodowało uzyskania korzyści majątkowej przez owego wierzyciela. Z racji na powyższe nie zaszedł również przypadek działania osoby trzeciej w złej wierze wymagany przesłankami *actio pauliana* określonymi przez ustawodawcę.

45 V CSK 79/08.

46 II CK 225/05.

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