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The Case for the Legal Protection of Cooperative Reserves in “Old” Cooperatives in Germany and Austria (Part 2)

Abstract

This article builds on the text published in issue V of the journal (2023, 152–158) and examines in more detail the origins of today’s financial constitution under § 73 of the German Cooperative Act. This norm can be seen as a protective norm for the permanent continuation of the unity of an increasing portion of the reserves remaining in the cooperative. The norm emphasizes the ‘social dimension’ of cooperative reserves. Developments in Austria are also considered. Over time, special protection is required for cooperatives that have existed for several generations: for so called “old” cooperatives. This protection can come from both exceptions in the transformation law and additional – foundation-like – supervision.

Keywords: Cooperative reserves, cooperative unit, exceptions from transformations, external supervision, § 73 German Cooperative Act

Introduction

“In this article, the term ‘old’ cooperatives is used to refer to e.g. agricultural, consumer, credit or housing cooperatives that have been in existence for more than a generation.”¹ Even more, an “old” cooperative is a cooperative all of whose members did not belong anymore to the cooperative because

¹ Blisse, “The Case for the Legal Protection of Cooperative Reserves in ‘Old’ Cooperatives in Germany and Austria,” p. 152.

they had left the cooperative and/or died since they had contributed to the creation of the cooperative.

“Generations of members in ‘old’ cooperatives have contributed to the reserves in good faith, trusting that their cooperative would continue in existence and be available for future generations, given the validity of the designated protective norm (§ 73 German Cooperative Act). This trust should be maintained or restored with suitable legislative protection.”²

Cooperatives are able to continuously develop their social function inherent in their financial constitution. Then cooperatives contribute to balancing – socially – within an economy that is characterized by the division of labor – still without paying the price for it – and that is, not only in Europe, increasingly market-and competition-driven. The constitution of small and medium-sized cooperatives in general counteracts concentration, increasing risks, and imbalances.

However, additional measures are needed to safeguard this contribution and protect cooperatives to ensure that they do not become indistinguishable from other companies, such as corporations. Therefore, the article recommends changes within transformation law and considers additional governmental supervision.

An economy in which market competition concerns the common good becomes problematic. Although this topic does not belong to the article, the question still arises: Why is it so? A brief explanation can be attempted: The general transformation of the economy toward an economy based on common wealth created (only) by companies seems to be a reaction to states whose deficit spending leads to their being replaced, in practice, by companies in the regions concerned. This seems to become a problematic development, but it is a result of viewing states as “deficit spenders.”

1. Legal protection of cooperative reserves

The form of § 73 of the German Cooperative Act (GenG) on settlement, developed and maintained by legislation and supplemented by Chapter 3 in 1974, continues to constitute a protective standard. The protection applies, on the one hand, to the reserves-related unit of the cooperative as a whole, which over time rises to its social dimension. On the other hand, a cooperative

² Blisse, “The Case for the Legal Protection of Cooperative Reserves in ‘Old’ Cooperatives in Germany and Austria”, p. 156.

is seen not to be primarily suitable "for asset investment according to the provisions of the Cooperative Act, since no participation of departing members in any increase in value is provided for, and the cooperative is designed for an open membership base."³ This potentially distinguishes a cooperative from other "competitors" and contributes to maintaining alternatives and options, as well as to the social dimension within a market and competitive economy to the extent that each generation of members is willing to retain a portion of the profits within the cooperative, thereby strengthening the cooperative's reserves.

A similar situation would apply to the state if it did not place an excessive burden on the tax base of its population⁴ or established a so-called economic stabilization reserve at the Deutsche Bundesbank (§ 7(1) of the Act to Promote Stability and Growth of the Economy, *Stabilitätsgesetz*, StabG) to be able to draw on in times of crisis (§ 5(3) and 6(2) StabG). On a smaller scale, a cooperative can provide this for its members and customers (not yet members) and thus within its sector, while ensuring that the members' expectations of the cooperative remain achievable, which also requires the members to stand up for the cooperative.

If the rules of inheritance law are applied to ownership in a company, then the inheritance-law rule for members of a cooperative is that the profit generated during their membership and not paid to the members as dividends or reimbursed to them remains permanently in the cooperative, beyond the individual membership.

2. Foundation-like development of cooperative reserves

If the cooperative builds and expands its reserves in this way, the question arises as to what will happen in the event of the cooperative's dissolution, i.e. its inheritance. Indeed, a considerable amount of reserves can grow over time if the members decide, or if the articles of association (statute) stipulate, that part of the annual surplus is retained (§§ 19 and 20 of the German Cooperative Act): As can be seen from the BVR Annual Report for Credit Cooperatives, the capital paid in on members' shares, calculated across all credit cooperatives, is approximately one quarter of total equity,

³ Deutscher Bundestag, *Drucksache 19/11467*, p. 7.

⁴ Krejci, "Über Bürgen mit leeren Taschen," p. 126.

compared to three quarters allocated to reserves.⁵ This part of the reserves accumulated in today's "old" cooperatives has grown over many generations. One could even say that - due to the financial constitution in the event of a dispute with a member - something social has been created by the individual contribution as a (recognized or voluntary) waiver in favor of the whole, the cooperative.⁶ Over time, it can assume such proportions, and conflict with individual advantage, that it arouses "desirabilities"⁷ and could be abolished or relocated by legal means. Many cooperatives, some of which have been in existence and operating for more than 100 years, find themselves in this situation. Furthermore, they are denied the ability to continue to exercise their promotional function, particularly in local and regional areas.⁸ With each merger and transformation, the number of institutions decreases, and they become increasingly larger, making it more difficult to recognize that they correspond to their cooperative principles.⁹

The legal requirements for a transformation were established in Germany as early as 1969, based on European developments. At that time, cooperatives were given the option of converting to the legal form of a stock corporation (§§ 385m - 385q Stock Corporation Act),¹⁰ which was later expanded by comprehensive transformation law with the Transformation Act of 1995 (*Umwandlungsgesetz, UmwG*).

3. Austrian law

Responses from two professors in Austrian law point in different directions: Van Husen emphasizes that "savvy members of the association derive significant financial advantages from terminating the cooperative at a time favourable to them, as they could thus appropriate the assets of the cooperative."¹¹ In the event of the cooperative's liquidation, the "remaining surplus

⁵ Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), *Jahresbericht 2024*, p. 63.

⁶ Blisse, "Bürgerschaftliches Engagement und wirtschaftliche Förderung verbinden," 13, Blisse, *Genossenschaft und Gemeinwohl*, Blisse, "Warum Genossenschaften ihr Vermögen zusammenhalten sollten," p. 317.

⁷ Beuthien/Klappstein, *Sind genossenschaftliche Rücklagen ein unteilbarer Fonds?*, 123 ("Begehrlichkeiten").

⁸ Scheumann, *Die Abkehr von der Genossenschaftsidee*.

⁹ Beuthien, "Entfernen sich zu viele Genossenschaften von ihrer Leitidee?" .

¹⁰ Deutscher Bundestag, *Drucksache V/4253*, p. 6.

¹¹ Van Husen, *Wem gehört das Genossenschaftsvermögen?*, p. 181 f.

is distributed among the members in accordance with the provisions of the cooperative agreement regarding profit distribution" (§ 48 No. 3 of the Austrian Cooperative Act).

In practice, this arrangement is likely to be the exception, as a credit cooperative rarely enters liquidation and is more likely to merge with another – sometimes due to restructuring. The assets are then transferred to the acquiring cooperative (or bank). A merger is unproblematic from an asset-management perspective, but above all from a development perspective, as long as the cooperative remains manageable in size, maintains its cooperative orientation and legal form, and no generation of members is disadvantaged. If there is a change in legal form, or a merger with higher-level credit institutions within a multi-level cooperative network, for example, with institutions at the regional level up to the national level of this cooperative organization, then also the reserves that have been placed at the service of the cooperative for generations are also transferred. Furthermore, the influence of the individual member decreases not only over time but also with the increasing size of the group of all members. If the acquiring companies are corporations – possibly listed on the stock exchange – then the assets would be individualized and tradable, thus making them accessible for exploitation on the capital market.

In the liquidation of a cooperative that excludes any distribution of profits during its existence in favour of its owners, as reflected, for example, in the design principles of Raiffeisen cooperatives, the question arises of how any liquidation surplus should be treated. This is because the members of the cooperative at the time of liquidation receive nothing beyond the capital they paid in on their shares, just like previous or deceased members do. In his commentary on the Austrian Cooperative Act, Dellinger points out that, in such cases, efforts are made to "go beyond the continued interest of their own cooperative... to preserve the 'cooperative idea' and the cooperative assets as a supra-individual legacy for the region."¹² "Region" here likely refers to a limited and manageable catchment area.

In practice, for example, the statutes of Raiffeisen banks provide that the remaining assets must be invested with the solidarity association of the respective Raiffeisen banking group "until a new Raiffeisen bank is established in the area of activity... If no Raiffeisen bank is established within ten years of the deletion, the solidarity association may, in agreement with the auditing association, use the funds in accordance with the statutes."

¹² Dellinger, *Genossenschaftsgesetz samt Nebengesetzen*, § 79 Rn. 23.

his diploma thesis from Linz (Catholic Theological Private University), Opitz cites the statutes of the Raiffeisen Solidarity Association for members of the Upper Austrian Raiffeisen Financial Organization (§ 2): “The purpose of the association is to support individual members of Upper Austrian Raiffeisen credit cooperatives, or their relatives, who have fallen into hardship through no fault of their own, provided that these are cases of hardship, in particular by providing support in cases of accidents and illness, assistance for relatives in the event of death, and support for widows and orphans of members.”¹³

But the situation has also changed in Austria – albeit with some delay.¹⁴ The Cooperative Merger Act (*Genossenschaftsverschmelzungsgesetz*, GenVG) has been in force since 1980. Although cooperatives – with the exception of credit cooperatives (§ 92 of the Banking Act (BWG), or previously § 8a of the former Banking Act (KWG))¹⁵ – are still generally exempt from converting to a corporation, this suggests that the legislature is committed to the idea that “the establishment of a cooperative should have a lasting effect.”¹⁶ However, this legal situation, which corresponds to the structure of a cooperative that permanently preserves its reserves as a unit, was changed in 2019 by the Cooperative Split Act (*Genossenschaftsspaltungsgesetz*, GenSpaltG).¹⁷ Later, even non-profit associations were allowed to convert into cooperatives (§ 91a of the Austrian Cooperative Act). The risk that the Austrian legislation will also move towards a general Transformation Act, and that cooperatives will lose their distinctive characteristics, has likewise increased in Austria.¹⁸

¹³ Opitz, *Genossenschaften und Caritas*, p. 78.

¹⁴ Dellinger, *Genossenschaftsrecht Kommentar*.

¹⁵ E.g. van Husen in Laurer et al., *Bankwesengesetz*, § 92, Dellinger/Schellner in Dellinger, *Genossenschaftsrecht Kommentar*, § 92 BWG.

¹⁶ Blisse, “Genossenschaft als Marktwirtschaft-Moderator.”

¹⁷ Mösenbacher, “Das bringt das neue Genossenschaftsspaltungsgesetz,” Dellinger/Schellner, “Das neue Genossenschaftsspaltungsgesetz,” Ritt-Huemer/Simonishvili, “Genossenschaft, spalte dich!,” 328, as an answer Blisse, “Warum Genossenschaften ihr Vermögen zusammenhalten sollten.” Furthermore Kalss, “Die nichtverhältniswahrende Spaltung von Genossenschaften,” and referring to her Blisse, “Die Blickwinkel der Umgründungen.”

¹⁸ The general development of cooperative law into the direction of corporate law has been described with the term “Verkapitalgesellschaftung”: Henry, “Genossenschaften und das Konzept der Nachhaltigkeit,” p. 69.

4. Capital market-oriented development or protection of cooperative capital?

In the case of a cooperative sector with a listed central institution, today's decision-makers, by converting the cooperative or merging it with listed affiliated companies, are enabling capital market investors to inherit assets built up by generations of members who had renounced their claim to the reserves. The members would, to a large extent and in part without their knowledge and consent, have been deprived of the cooperative's social function, both now and in the future.

Even if the members today become shareholders or receive a partial equity stake through cooperative shares,¹⁹ only those who are members of the cooperative at the time of the conversion, as well as future members (and future generations), would benefit.²⁰

Asset disposals are highly regrettable:²¹ on the one hand, they mean the loss of an institution in the market and for the future, namely cooperatives whose offerings help moderate prices. On the other hand, one generation appropriates reserves that have accumulated over many generations.

But reserves that have accumulated over generations require protection and responsible use: "This is one of the reasons why awareness of the social dimension and the preservation of the assets of the 'old' cooperatives are required."²²

Because this "social dimension" can reduce some of the pressure for adjustment or change exerted by market and price mechanisms within a money-based, hierarchical, competitive economy. The continued existence of cooperatives can provide a complementary contribution to state services, for example with regard to the economic and social protection of people particularly affected during periods of significant social change. This is another reason why awareness of the social dimension and the protection

¹⁹ E.g. Hofinger, "Beteiligungsinstrumente an der Genossenschaft," van Husen, *Der genossenschaftliche Geschäftsanteil mit Substanzbeteiligung*, Beuthien/Klappstein, *Sind genossenschaftliche Rücklagen ein unteilbarer Fonds?*, 54, 117, and Beuthien, "Erwerben Genossenschaftsmitglieder 'genossenschaftliches Eigentum'?", p. 1327.

²⁰ Münkner, "Go public and remain cooperative?."

²¹ Blisse, "The Case for the Legal Protection of Cooperative Reserves in 'Old' Cooperatives in Germany and Austria," p. 155.

²² Blisse, "The Case for the Legal Protection of Cooperative Reserves in 'Old' Cooperatives in Germany and Austria," p. 156.

and preservation of reserves, and thereby the financial constitution of the “old” cooperatives, is necessary.²³

If the federations themselves pursue their own merger and transformation strategy – supported by the European Commission²⁴ then only state oversight and legal adjustments would remain²⁵ to prevent significant financial harm to members and even the state itself, as has repeatedly affected larger “old” cooperative structures.²⁶

Having established a cooperative, the first generation of members, like all subsequent generations, trusted in good faith in the continued existence of their cooperative and in the validity of the current protection standard (nowadays § 73 of the German Cooperative Act, similar to the third ICA/IGB principle). This trust must be maintained or restored by appropriate legal institutions. But the fewer “old” cooperatives remain, the less the question of their protection arises. However, the question arises before every decision that entails the disposal of assets – such as mergers, divisions, asset transfers, or changes of legal form – and for all newly created cooperatives, at the latest when the first generation of members is no longer alive, and is therefore of general relevance.

For “old” cooperatives, it is worth considering viewing them as a “life’s work for generations” – also for the sake of their credibility.²⁷

²³ For the limited-profit housing associations in Austria Feichtinger/Schinnagl, “Die Vermögensbindung als Eckpfeiler der Wohnungsgemeinnützigkeit,” for the German limited liability company (GmbH) Preis, *Anforderungen an eine systemkonforme Ausgestaltung der Vermögensbindung im Recht der GmbH* and for cooperatives Blisse, “Wohnungsgemeinnützigkeit, ihre Träger und deren Angebot,” p. 165.

²⁴ Commission of the European Communities (Kommission der Europäischen Gemeinschaften), *Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions on the promotion of co-operative societies in Europe*, 13: “The Commission encourages [German: “fordert auf”, p. 15] Member States to ensure that the assets of cooperatives upon dissolution or conversion should be distributed according to the cooperative principle of ‘disinterested distribution’.”

²⁵ Beuthien/Klappstein, *Sind genossenschaftliche Rücklagen ein unteilbarer Fonds?*, 104 – 107, Beuthien, “Die Pflichtmitgliedschaft im genossenschaftlichen Prüfungsverband nur selbstgewollte Zuschreibung?,” p. 1307 (II., 1., lit. f).

²⁶ Brazda/Schediwy, *Consumer Co-operatives in a Changing World*, Todev/Brazda, *Aufstieg und Untergang der Österreichischen Volksbanken-AG*.

²⁷ Raiffeisen, *Die Darlehenskassen-Vereine*, 18, Deutscher Genossenschaftsverband, *Schulze-Delitzsch – ein Lebenswerk für Generationen*.

5. Conclusion

In the "old" cooperatives – often in existence for many generations – and within their federal structures, reserves have grown over time, with each generation of members waiving their rights in favor of the cooperative. Due to the cooperative's unique financial constitution, these reserves can no longer be directly attributed to any single generation of members and increasingly resemble a foundation fund.

Cooperatives, as the bearers of these reserves, are able to contribute to social balance within a market-based and competitive economy. In order to preserve these reserves within a cooperative and protect them within a framework consistent with cooperative principles, an increasing number of institutions, both external to the cooperative and accepted by it, are needed over time. These institutions should be equipped by the legislation as needed – including, where appropriate, exempting older and larger cooperatives from the provisions of transformation law, such as the German Transformation Act, and, if necessary, subjecting them to additional state oversight, since the extent of the damage they can cause in the event of failure is particularly great. In this regard, experience from foundation law could make a valuable contribution to the further development of cooperative law, helping to protect and preserve the reserves of the "old" cooperatives.

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