

One-tier model in the cooperative operating under general rules of Polish Law as one of the options of governance of this cooperative, proposed for the law as it should be

System monistyczny w spółdzielni działającej na zasadach ogólnych polskiego prawa spółdzielczego jako jedna z opcji zarządzania tą spółdzielnią *de lege ferenda*

Монистическая система в кооперативе, действующем по общим правилам польского кооперативного законодательства, как один из вариантов управления этим кооперативом *de lege ferenda*

Моністична система в кооперативі, що діє на загальних принципах польського кооперативного права як один із варіантів управління цим кооперативом *de lege ferenda*

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Summary: The article proposes to start in some areas, or to continue (resume) in other ones, the discussion on the reasonableness of introducing the one-tier model of governance as one of the options for a cooperative operating under general provisions of Polish law on cooperatives, specifically the Act – Law on Cooperatives of 1982 (consolidated text: Journal of Laws 2021 item 648 as amended), which is an option not yet provided for in these provisions. At the same time, this option is currently not available to cooperatives operating under special provisions on the operation of specific types of cooperatives (for example, cooperative banks, housing cooperatives, social cooperatives or credit unions), which for matters not regulated in these special provisions refer to the general provisions of the above-mentioned Act. Therefore, the article starts with the question of whether the time has come for the introduction of the one-tier model in cooperatives operating under general rules (on the basis of general regulations) of the Polish law on cooperatives and, in its conclusions, the discussion aims to indicate a number of arguments allowing to answer this question in the affirmative (and therefore supporting the introduction of the one-tier governance model in the cooperative) and the author's original specific proposals for the law as it should be in this regard (concerning the method of introducing this model into the provisions of the law on cooperatives), including in particular the methods of normative regulation (referred to as models of regulation) of the one-tier model in individual entities under Polish law, together with the names of these models proposed by the author. The article also outlines a synthetic comparison of these models, with the main advantages and disadvantages of each of them, above all from the perspective of lawmaking methods, including the coherence and clarity of the legal regulation, which has a fundamental and very important influence on the application of individual regulations.

Key words: cooperative under Polish law, one-tier model of governance, proposals for the law as it should be

Streszczenie: Artykuł proponuje w niektórych obszarach rozpoczęcie lub też w innych obszarach – kontynuację (powrót do) dyskusji na temat zasadności wprowadzenia w spółdzielni działającej na podstawie przepisów ogólnych polskiego prawa spółdzielczego, tj. ustawy – Prawo spółdzielcze z 1982 r. (tekst jednolity: Dz. U. z 2021 r. poz. 648 z późn. zm.) jako jednej z opcji do wyboru – nieprzewidzianego dotychczas w tych

przepisach – monistycznego systemu zarządzania tą spółdzielnią, z uwzględnieniem ich zastosowania do szeregu spółdzielni działających na zasadach szczególnych, jak to jest aktualnie przewidziane w przepisach szczególnych dotyczących działania szczególnych rodzajów (typów) spółdzielni (przykładowo banków spółdzielczych, spółdzielni mieszkaniowych, spółdzielni socjalnych czy spółdzielczych kas oszczędnościowo-kredytowych), które odsyłają w zakresie w nich nieuregulowanym do przepisów ogólnych polskiego prawa spółdzielczego zawartych w wymienionej ustawie. W związku z tym na wstępie artykułu postawione jest pytanie o to, czy nadszedł czas na wprowadzenie systemu monistycznego w spółdzielni działającej na zasadach ogólnych (na podstawie przepisów ogólnych) polskiego prawa spółdzielczego. Zawarte w niniejszym studium rozważania zmierzają do wskazania szeregu argumentów pozwalających na pozytywną odpowiedź na postawione pytanie (a zatem argumentów za wprowadzeniem w spółdzielni prawa polskiego monistycznego systemu zarządzania) oraz konkretnych autorskich propozycji *de lege ferenda* w tym zakresie (dotyczących sposobu wprowadzenia tego systemu do przepisów prawa spółdzielczego), w tym w szczególności wskazują na dotychczasowe sposoby regulacji normatywnej (określane jako modele regulacji) systemu monistycznego w poszczególnych jednostkach organizacyjnych w prawie polskim wraz z oryginalną, autorską propozycją nazw tych modeli. Dokonano przy tym zarysu ich syntetycznego porównania, ze wskazaniem m.in. podstawowych zalet i wad (a zatem tzw. mocnych oraz słabych stron każdego z nich), przede wszystkim z perspektywy techniki legislacyjnej, w tym spójności i jasności regulacji prawnej, która ma podstawowy, a zarazem bardzo istotny wpływ na stosowanie poszczególnych unormowań.

Słowa kluczowe: spółdzielnia prawa polskiego, monistyczny system zarządzania, propozycje *de lege ferenda*

Резюме: В статье предлагается в некоторых областях начать, а в других - продолжить дискуссию о правомерности введения в кооператив действующий в соответствии с общими положениями польского кооперативного законодательства, т.е. закона – Кооперативное право от 1982 года (консолидированный текст: Законодательный вестник 2021 года, поз. 648, с изм.) в качестве одного из вариантов выбора – до сих пор не предусмотренного в этих положениях – монистической системы управления этим кооперативом, учитывая их применение к ряду кооперативов, действующих по специальным правилам, как это в настоящее время предусмотрено в специальных положениях, касающихся деятельности специальных типов (видов) кооперативов (например, кооперативных банков, жилищных кооперативов, социальных кооперативов или кооперативных сберегательных и кредитных союзов), которые отсылают, в части не урегулированной в них, к общим положениям польского кооперативного законодательства, содержащимся в вышеупомянутом Законе. Поэтому в начале статьи ставится вопрос о том, пришло ли время для введения монистической системы в кооперативе, действующем по общим правилам (согласно общим положениям) польского кооперативного законодательства. Соображения, содержащиеся в настоящем исследовании, направлены на указание ряда аргументов, позволяющих положительно ответить на поставленный вопрос (и, таким образом, аргументов в пользу введения монистической системы управления в кооперативе согласно польскому законодательству), а также конкретных авторских предложений *de lege ferenda* в этом отношении (относительно способа введения этой системы в положения кооперативного законодательства), включая, в частности, указание существовавших до сих пор методов нормативного регулирования (именуемых моделями регулирования) монистической системы в конкретных организационных единицах согласно польскому праву, вместе с оригинальным авторским предложением названий этих моделей. Одновременно проведено их синтетическое сравнение с указанием, в частности, основных преимуществ и недостатков (т.е. так называемых сильных и слабых сторон каждого из них), прежде всего с точки зрения законодательной техники, включая последовательность и четкость правового регулирования, оказывающего основное и, в то же время, весьма существенное влияние на применение конкретных нормативных предписаний.

Ключевые слова: кооператив в польском законодательстве, монистическая система управления, предложения *de lege ferenda*

Резюме: Стаття пропонує в одних або інших областях почати – продовження (повернення до) дискусії щодо правомірності запровадження в кооперативі, що діє на основі загальних положень польського кооперативного права, тобто Закону – Кооперативне право 1982 року (уніфікований текст: Журнал законів 2021 року, п. 648 зі змінами) як один із варіантів для вибору – моністична система управління цим кооперативом, яка досі не була передбачена цими положеннями, враховуючи їх застосування до ряду кооперативів, що діють на особливих принципах, як в даний час передбачено в окремих положеннях про

діяльність конкретних типів кооперативів (наприклад, кооперативних банків, житлових кооперативів, соціальних кооперативів або кооперативних ощадно-кредитних спілок), які, у сфері неврегульованій нормативно-правовими актами, відсилають до загальних положення польського кооперативного права, які містяться у зазначеному Законі. Тому на початку статті ставиться питання про те, чи настав час запровадити моністичну систему в кооперативі, що діє на загальних принципах (на основі загальних положень) польського кооперативного права. Міркування, що містяться в цьому дослідженні, мають на меті вказати низку аргументів, які дозволяють дати позитивну відповідь на поставлене запитання (і, отже, аргументи для запровадження польської моністичної системи управління в кооперативі), а також конкретні авторські постулати *de lege ferenda* з цього приводу (щодо способу введення цієї системи в норми кооперативного права), включаючи, зокрема, поточні методи нормативного регулювання (які називають моделями регулювання) моністичної системи в окремих організаційних одиницях у польському праві, разом із оригінальною пропозицією назв цих моделей. Проведено схему їхнього синтетичного порівняння, вказавши, серед іншого, основні переваги та недоліки (а отже, так звані сильні та слабкі сторони кожного з них), насамперед з точки зору законодавчої техніки, у тому числі узгодженості та чіткості правового регулювання, яке має принциповий і, водночас, дуже важливий вплив на застосування окремих нормативних актів.

Ключові слова: кооператив польського права, моністична система управління, пропозиції *de lege ferenda*

Introduction

The subject of this article has been deliberately formulated to encourage, inspire, or provoke (in certain areas the beginning of, and in others – possibly the continuation of) reflection, or even scientific discussion about the model (actually, possible models) of governance of a cooperative operating under the general principles of the Polish law on cooperatives¹ – based on the currently applicable Act – the Law on Cooperatives, which are in their unregulated scope applicable (usually *mutatis mutandis*) to the operation of specific types of cooperatives (operating under special provisions).² This seems justified not only from the perspective of the current trends in governance that draw attention towards the one-tier (or monistic) model of governance which is in opposition to the traditional two-tier (dualistic) model of governance³ in this

¹ Act of 16 September 1982 Law on cooperatives, consolidated text: Journal of Laws 2021 item 648 as amended (hereinafter referred to as ALC).

² Which refers, e.g., primarily to cooperative banks that operate under the Act of 7 December 2000 on the Functioning of Cooperative Banks, their Affiliation and Affiliating Banks (consolidated text: Journal of Laws 2021 item 102 as amended), housing cooperatives that operate under the Act of 15 December 2000 on housing cooperatives (consolidated text: Journal of Laws 2021 item 1208 as amended), social cooperatives operating under the Act of 27 April 2006 on social cooperatives (consolidated text: Journal of Laws 2020 item 2085 as amended), or on credit unions, operating under the Act of 5 November 2009 on credit unions (consolidated text: Journal of Laws 2021 item 1844 as amended).

³ The one-tier model of governance, whose origins refer to the legal solutions provided for in common law systems, most frequently occurs as an option (variant) in the area of management next to the so-called two-tier model of governance and consists mainly in the fact that the powers for running

area – found especially in continental European legal systems. First of all, it is justified because more than a hundred years have passed since the adoption of the first law on cooperatives in the post-partition Poland in the early twentieth century (i.e. the Act on Cooperatives⁴) in the context of looking into the past, but also at the present and future, of Polish cooperative law. Should therefore the one-tier model be one of the options of governance for a cooperative operating under general provisions of the Polish cooperative law as a proposal for the law as it should be? Is it time to introduce the option of a one-tier model of governance in cooperatives operating under the general provisions of Polish law on cooperatives? The term ‘relating to the law as it should be’ (*de lege ferenda*), or the question “Is it time...” indicates that the subject of this article is first of all a question about the future of the cooperative law in Poland, a question that should, of course, be asked with deference for its past and present.

The article uses mainly the formal-dogmatic method (in its context, virtually all methods of interpretation, including in particular the linguistic and systemic interpretation), but also, to a limited extent, the legal comparative method.

1. One-tier models provided for in Polish regulations

When trying to look at the Polish law (including the law adopted by the Polish legislature) as closely as possible, one can arrive at a simple conclusion that currently in Polish law there are two, or rather three, ways of regulating the normative system of

current affairs, representation and supervision over the activity of a specific organisational unit having legal personality (a legal person), and thus acting through governing bodies, are vested jointly in one body called the administering authority, including, in the case of specific legal persons, e.g. the administrative board (as in the case of a *Societas Europaea* [SE] and a *Societas Cooperativa Europaea* [SCE] based in Poland) or, for example, the board of directors (as in the case of a Polish simple joint-stock company with its registered office in Poland). This solution differs from the above-mentioned two-tier model of governance, typical of the so-called positive law system (continental system), where the powers related to running current affairs and representation (but not supervision over the activity) of a particular legal person are vested in a single body called the governing body, including, in the case of particular legal persons – usually the management board, whereas the powers related to the supervision over the activity of this legal person are vested in another body, referred to as the supervisory body, including, in the case of particular legal persons, usually the supervisory board, without the possibility of conversion into the above-mentioned one-tier model – as it is, e.g., in the cooperative under Polish national law covered by this article, in the Polish limited liability company, or in the Polish joint-stock company – for more detail, see G. Kozieł, *Prosta spółka akcyjna. Komentarz do art. 300¹–300¹³⁴ KSH*, Warszawa 2020, pp. 216–220, 325–328 and the studies referred to therein.

⁴ Act of 29 October 1920 on Cooperatives, Journal of Laws 1934 no. 55, item 495 as amended.

the one-tier model, i.e. as the author shall formulate it, the models of its regulation, which are proposed to refer to as follows:

- 1) “European corporate (company) model”,
- 2) “National corporate (company) model”,
- 3) “European cooperative model”.

Re: 1. The “European company (corporate) model” appears as one of the options in managing a *Societas Europaea* (SE) based in Poland. It is regulated in the Act on the European Economic Interest Grouping (EEIG) and the *Societas Europaea* (SE)⁵ (in 21 provisions of Articles 27–47 of this Act) which, in relation to SEs, in the unregulated scope refers to the relevant EU regulation – on the Statute for a European Company⁶ (Article 27 AEEIGSE) and, particularly, fairly broadly to the provisions of the Code of Commercial Partnerships and Companies (CCPC)⁷ on the Polish joint-stock company, including the provisions on its management board (Articles 368–380 CCPC) or the supervisory board (Articles 381–392 CCPC) and members of these bodies (Article 29 (1) sentence 1 AEEIGSE⁸). At the same time, it constitutes a) a general reference together with granting, in case of doubts as to the application of provisions, primacy (priority) to the provisions on the management board (Article 29 (1) sentence 2 AEEIGSE⁹), combined with an indication of specific provisions of the CCPC which do not apply (Article 29 (2) AEEIGSE¹⁰), b) a specific reference to strictly defined and clearly indicated provisions in this area (contained e.g. in Article 43 (2) AEEIGSE or Article 47 AEEIGSE).

Re: 2. The “National company (corporate) model”, similar to the one above, is present in the Polish simple joint-stock company (SJSC) as one of the governance options. It is entirely regulated in the provisions of Articles 300⁵² to 300⁶¹ CCPC,

⁵ Act of 4 March 2005 on the European Economic Interest Grouping (EEIG) and the *Societas Europaea* (SE), consolidated text: Journal of Laws 2018 item 2036 (hereinafter referred to as AEEIGSE).

⁶ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), OJ L 294, 10.11.2001 (hereinafter referred to as RSE).

⁷ Act of 15 September 2000 Code of Commercial Partnerships and Companies, consolidated text of the Journal of Laws 2020 item 1526 as amended (hereinafter referred to as CCPC).

⁸ Pursuant to Article 29 (1) sentence 1 of the AEEIGSE, unless otherwise provided for by law, the provisions of the Code of Commercial Partnerships and Companies and the separate laws on the management board and supervisory board and their members apply *mutatis mutandis* to the administrative board of the SE and its members.

⁹ Pursuant to Article 29 (1) sentence 2 of the AEEIGSE, where doubts arise as to whether the rules on the management board or the rules on the supervisory board should apply to the administrative board or its members, the rules on the management board and its members shall apply.

¹⁰ Pursuant to Article 29 (2) AEEIGSE, Articles 378, 381 to 384, Article 385 (1) to 385 (2), Articles 386 to 387, Article 388 (1) and 388 (4), and Articles 389 to 391 CCPC shall not apply to the administrative board and its members.

that is in ten general provisions on SJSC bodies and in the provisions of Articles 300⁷³ to 300⁷⁹ CCPC (in seven special provisions regarding solely the board of directors, which is specific to the one-tier model in the SJSC). These 17 provisions of the CCPC do not comprise references to national regulations other than the provisions on the PSA (and references to other provisions on the PSA are relatively few, they have been included, for example, in Article 300⁵⁶ (6) CCPC, Article 300⁶⁷ (3) CCPC, Article 300⁶⁹ (3) CCPC and Article 300⁷⁰ (3) CCPC). These provisions do not refer to EU regulations either.

Re: 3. On the other hand, the “European cooperative model” of governance may be chosen for a European cooperative society (SCE) established in Poland. It is governed by the Act on the European Cooperative Society,¹¹ which – as a very short and concise regulation (comprising only 7 short provisions of Articles of 19–25 ASCE) – refers in this regard at length in Article 19 ASCE¹² to the relevant EU regulation on the statute of the SCE¹³), and also, as regards cooperatives operating under Polish national law, refers fairly broadly in Article 21 (1) ASCE to the provisions of the Law on cooperatives (ALC), including the provisions on its management board (Articles 48 to 55 ALC) or supervisory board (Articles 44 to 46a ALC) and members of these bodies (Article 21 (1) sentence 1 ASCE¹⁴), including presumably to the provisions that are common to the supervisory board and the management board contained in Chapter 4 of Section 4 of the Law on Cooperatives (Articles 56 to 58 ALC). This is, in principle, a general reference related to the priority granted, in the event of doubt as to the application of the rules, “to the provisions on the management board (Article 21 (1) sentence 2 ASCE¹⁵). It is, at the same time, related to pointing out the specific non-applicable provisions of the law on cooperatives (Article 21 (2) ASCE¹⁶).

¹¹ Act of 22 July 2006 on European cooperative society, consolidated text: Journal of Laws 2018 item 2043 as amended (hereinafter referred to as ASCE).

¹² According to Article 19 ASCE, if the one-tier model is adopted, pursuant to Article 36 RSCE, the provisions of the RSCE and this chapter (Chapter 2 of the ASCE “One-tier model” [note by G.K.]) shall apply. In such a situation, an administrative board is to be established for the SCE.

¹³ Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJ L 207, 18.08.2003, p. 1 (OJ, hereinafter: RSCE).

¹⁴ Pursuant to Article 21 (1) sentence 1 ASCE, unless otherwise provided by law, the provisions of the Law on Cooperatives and separate acts on the management and supervisory board of cooperatives and their members shall apply *mutatis mutandis* to the administrative board of the SCE and its members.

¹⁵ Pursuant to Article 21 (1) sentence 2 ASCE, in the event of doubt as to whether the provisions on the management board or on the supervisory board should be applied to the administrative board or its members, the provisions on the management board and its members shall apply.

¹⁶ Pursuant to Article 21 (2) ASCE, the provisions of Article 45 (1), 45 (4) and 45 (5), Article 46 (1) (8), Article 48, Article 49 (1), 49 (2), 49 (4) and 49 (5), Article 50, Article 56 (1) and Article 57 ALC shall not apply to the administrative board and its members.

A specific reference – to a clearly defined provision in this area – is contained only in Article 25 sentence 2 ASCE.¹⁷

2. An outline of the key elements of comparative characteristics of the “Polish” one-tier models

Each of the one-tier models of governance noted in the provisions of Polish law and listed in this paper as item 2 has certain very characteristic features, and therefore there are certain differences between these models but, nevertheless, significant similarities (elements common for all of them) should also be noted.

This article is not designed to present detailed (thorough) comparative characteristics of these three models of one-tier systems, as they can often be found (whether as a description, table, diagram or schema) in many different sources for this issue which are purely cognitive (educational), including, for example, in textbooks or monographs in commercial law.¹⁸ It rather undertakes, as stated above, a preliminary, general reflection aimed at initiating or continuing research on whether there is room for the one-tier model in the legal structure of a cooperative governed by the national law, particularly under general rules of Polish law on cooperatives and, therefore, whether this system should be a prospective option for managing this cooperative, whether the time for this has come, what are arguments for this, and also which of the above-mentioned normative models would be most suitable, or whether another, hybrid model, should be adopted. The article also aims to inspire the researchers who are interested in this matter to continue to exchange views in this regard.

In the context of the difference concerning the manner and scope of legal regulation of the one-tier model, which has already been discussed above, it may be stated that in the area of provisions of Polish law (enacted by the Polish legislature – after all, in accordance with the principle of direct application of EU law, EU regulations also constitute a legally binding part of the national law of Poland as an EU member state), the shortest regulation of the one-tier model is contained in the regulations on SCE based in Poland (only 7 relatively short provisions, and at the same time the most extensive reference to EU regulations), while a longer

¹⁷ According to Article 25 (2) ASCE, in those acts (between the SCE and a member of the administrative board or legal acts carried out by the SCE in the interest of a member of the administrative board – Article 25 sentence 1 ASCE), including in the acts referred to in Article 52 (1) ALC, the SCE shall be represented by a representative appointed by the general meeting.

¹⁸ See e.g. A. Kidyba, *Prawo handlowe*, Warszawa 2016, especially pp. 671-676.

regulation (21 average-length and longer provisions, and at the same time a much narrower reference to EU regulations and provisions of the CCPC on the joint-stock company) is found in the provisions on SEs based in Poland. On the other hand, this model has the only fully autonomous regulation (as far as Polish law in the strict sense is concerned, without references to the EU regulations, or to Polish regulations on companies other than the SJSC) in the provisions on the simple joint-stock company¹⁹ (specifically in seven provisions of Articles 300⁷³ to 300⁷⁹ CCPC referring only to the board of directors) since this regulation is, in the author's opinion, the best arranged and most skilfully drafted and linguistically intertwined with the general regulations on the bodies and operations of the company (in the form of ten provisions of Articles 300⁵² to 300⁶¹). These regulations include a total of 17 provisions (ten general and seven specific ones).

From this perspective, the regulations concerning the one-tier model in the SJSC can be assessed as, on the one hand, the most comprehensive and, on the other hand, the most orderly, simple and understandable of the legal regulations mentioned above. The advantages of the provisions of the Act on the European cooperative society relating to the one-tier model of the SCE based in Poland (even though less orderly than the provisions on this model in SJSC) include their synthetic approach and brevity which, from the perspective of their application to a national-law cooperative operating under general principles, may constitute a specific, although apparent (due to the extensive reference to other regulations contained therein) technical and legislative facilitation. The clear indication by the legislature of those provisions of the Law on cooperatives which do not apply to the one-tier model in an SCE based in Poland (in the above-mentioned provision of Article 21 (2) ASCE),²⁰ also typical of the provisions of the AEEIGSE on the one-tier model in the SE based in Poland (and specifically for the aforementioned provision of Article 29 (2) of the said Act²¹ from the perspective of this type of SEs in relation to the provisions of the CCPC on the joint-stock company) can also be considered as facilitation. It should be noted that the above-mentioned "less orderly" nature of the provisions of the ASCE on the one-tier model (including the lack of separation of general provisions on bodies in the on-tier and two-tier models – as is the case with the provisions of the CCPC on the SJSC) may stem from the reference in this regard in Article 19 ASCE to the provisions of the relevant EU Regulation on the Statute for a European Cooperative Society of 2003. This last-mentioned regulation,

¹⁹ In more detail, see G. Kozieł, *Prosta spółka akcyjna...*, pp. 214–266, 322–368.

²⁰ See the provision of Article 29 (2) AEEIGSE referred to above in footnote 10.

²¹ See the provision of Article 21 (2) ASCE referred to above in footnote 16.

in turn, contains such general provisions regarding SCE governing bodies in each of these systems (i.e. Articles 45–51 of Council Regulation (EC) No 1435/2003), unlike in the case of an SE based in Poland, for which the provisions of the RSE of 2001, applicable pursuant to Article 27 AEEIGSE, do not contain such general (common) provisions.

Apart from the above, the main differences are related to the fact the one-tier model is “embedded” (applied, used) in different legal forms: in companies (SE and SJSC) and cooperatives (SCE), which in turn have some influence on the type (or rather subtype) of the legal person within the type of company.²² Companies are referred to as mixed-type legal persons with the predominance of corporate elements, i.e. legal persons of the corporate-establishment type, or so-called capital corporations,²³ while cooperatives, although this explicitly refers particularly to cooperatives under Polish law covered by this paper and not to SCEs (in which the one-tier model appears as one of the options of governance) – are referred to as mixed-type legal persons with the predominance of establishment elements, i.e. legal persons of the establishment-corporate type.²⁴ In fact, an SCE, in addition to elements typical of a cooperative society, has elements typical of companies, and – from the perspective of Polish national law on companies – particularly elements typical of the Polish limited-liability company (e.g. share capital), which brings them structurally closer to companies as the so-called capital corporations.²⁵ The above leads to basic differences in the terminology used in individual one-tier models. In SEs and SCEs based in Poland, instead of the managing authority

²² Legal persons (as well as organisational units without legal personality, with a statutorily granted legal capacity) are traditionally divided into corporations, whose basic substratum determining the granting of subjective separateness and legal existence are legal entities, including primarily individuals (e.g. in associations or partnerships), as well as establishments whose substratum is property (e.g. foundations or state-owned enterprises) – see especially R. Longchamps de Berier, *Wstęp do nauki prawa cywilnego*, Lublin 1922, p. 108; F. Zoll, *Prawo cywilne w zarysie*, part I, vol. 1, Kraków 1946, p. 104; S. Grzybowski, *Prawo cywilne. Zarys części ogólnej*, Warszawa 1985, p. 177; A. Wolter, *Prawo cywilne. Zarys części ogólnej*, Warszawa 1986, p. 191; Z. Radwański, *Prawo cywilne – część ogólna*, Warszawa 2003, p. 191, or a much later study on incorporated entities only, by K. Kopaczyńska-Pieczniak, *Korporacja. Elementy konstrukcji prawnej*, Warszawa 2019, p. 27 et seq.

²³ In this regard, see apt comments presented by A. Szajkowski, *Prawo spółek handlowych*, Warszawa 2000, p. 73.

²⁴ See G. Koziół, *Przeniesienie ogółu praw i obowiązków w handlowych spółkach osobowych. Uwagi na gruncie regulacji art. 10 k.s.h.*, Warszawa 2006, pp. 21–22 and the literature referred to therein.

²⁵ See H. Cioch, *Spółdzielnia europejska jako nowy rodzaj spółdzielni szczebla podstawowego*, Rejent 2006, no. 12, pp. 10–12; A. Koniewicz, *Spółdzielnia Europejska – European Corporation Society*, *Przeгляд Prawa Handlowego* 2007, no. 4, pp. 35–38; G. Koziół, *Prawo członka spółdzielni do przeniesienia udziału. Zagadnienia wybrane*, in: *Prawa i obowiązki współników w spółce, spółdzielni europejskiej i spółce europejskiej*, ed. A. Witosz, Katowice 2012, pp. 41–43.

(management board) and supervisory authority (supervisory board), the administering authority is the administrative board, whereas the SJSC is administered by the board of directors.

The basic similarities are related to the essence (legal and organisational nature) of the one-tier model, its basic functions, advantages and structural elements (combination of competences in governance: running current affairs, management and representation and supervision within the responsibility of one body, separation of so-called committees, e.g. supervisory committee, executive committee, etc., which, on a delegated competence basis, involve members with different status, including, for example, executive directors, by entrusting them with the exercise of specific powers in the preparation and/or implementation in various areas of these competences).

Conclusion, arguments and proposed applications of the conclusion

Answering, in conclusion, the fundamental question (or questions) asked at the outset and repeated at the beginning of the third paragraph of this article, which at the same time constitutes its main research problem, it should be stated: yes, the time has come to thoroughly consider the optional adoption of a one-tier model of governance in the cooperative operating under national law on general principles of the Polish Act – Law on Cooperatives of 1982 (ALC), and this is supported by the following arguments.

First, the one-tier model was introduced in the Polish legal system for the first time at the beginning of 2005 – in the AEEIGSE – as one of the options of governance for an SE established in the territory of Poland.

Second, several months later – in July 2006, the one-tier model was introduced in the Polish legal system also in the ASCE as one of the governance options in an SCE established in the territory of Poland.

Third, in July 2021, the one-tier model finally “reached” also companies incorporated under the Polish Code of Commercial Partnerships and Companies, because it was provided for in 2020 for one of them, namely the SJSC finally introduced as of July 2021.

Fourth, the introduction of the one-tier model in other companies established under Polish law (limited liability company and joint-stock company) has been for a long time considered and discussed in practice, literature, or even at the initial

stage of the legislative work concerning the Code of Commercial Partnerships and Companies.²⁶

Fifth, certain elements of the one-tier model have been applied in the practice of companies and cooperatives as the so-called “joint meetings” of the management and supervisory bodies (supervisory boards) or rather of supervisory board meetings with the participation of management boards (or rather their members), which in many cases facilitate or also make the exercise of supervision more efficient by allowing for much faster, timely and detailed information to be obtained by members of the supervisory bodies (e.g. answers given by the members of the managing body to the questions of supervisory body members), or also explanations in response to their supervisory concerns – while the law does not expressly provide for this, it does not forbid it either.

Sixth, it seems that there are no significant institutional or normative obstacles preventing the one-tier model from being introduced in a cooperative established under Polish law according to the regulatory model adopted for:

- 1) an SCE based in Poland – which seems to be the legal solution to be considered first, because this model concerns the area of management and not the area of property assets in which a cooperative governed by Polish law differs from an SCE (e.g. with regard to its variable assets – share fund – as opposed to the more stable, or even fixed (as in companies) share capital of an SCE), while in other areas there are more similarities between a cooperative under national law and an SCE than in comparison with an SE or SJSC. Furthermore, the introduction of the one-tier model in a cooperative established under Polish law relates directly to the area of management and does not have negative effects on other internal and external relations of this cooperative while improving (or potentially improving) its governance. From the perspective of lawmaking, this may be realised e.g. by reference to selected provisions of the ASCE (including all the

²⁶ See in particular the statements, including comments, contained in the literature referred to on pages 216 to 220 of the paper cited in note 3; as well as in W. Zych, L. Kozioł, *Dualistyczny i monistyczny system nadzoru i zarządzania w przedsiębiorstwie*, Zeszyty Naukowe Małopolskiej Wyższej Szkoły Ekonomicznej w Tarnowie 2009, vol. 12, no. 1, pp. 273-303; K. Reszczyk-Król, *Reforma holenderskiego prawa spółek: System monistyczny i wiele innych zmian*, Korporacyjnie.pl, 23.06.2013, <https://korporacyjnie.pl/reforma-holenderskiego-prawa-spolek-system-monistyczny-i-wiele-innych-zmian/> [access: 1.11.2021]; M. Wierzbicki, *System monistyczny organów w spółce akcyjnej*, 5.07.2013, <https://koniecznywierzbicki.pl/system-monistyczny-organow-w-spolce-akcyjnej/> [access: 1.11.2021]; I. Jarosz, *One-Tier Board Structure in Polish Corporate Law? The Simple Joint Stock Company and Its Board Model*, Przegląd Prawno-Ekonomiczny 2019, no. 48, pp. 46-64; P. Piniór, *Monistic System in the Simple Joint-Stock Company*, Business Law Journal 2020, no. 2, pp. 2-7.

provisions of this Act on the one-tier model, relatively few), or/and according to the regulatory model adopted for

- 2) an SJSC – which seems a legal solution for further consideration – for the reasons indicated above in paragraphs 2 and 3 of this article, but on the other hand, due to the very coherent and transparent legislative method adopted in the SJSC, provisions on the management of this company (including e.g. the distinguishing of general provisions concerning all governing bodies and then separate provisions referring to the board of directors), it is not altogether pointless and could be very interesting from the theoretical and legal perspective, and useful in the practice of legal and economic transactions. It should also be borne in mind that in the area of property relations (including, in particular, share capital detached from shares), the SJSC differs from classic Polish companies, which may constitute an element of similarity with a cooperative operating under the general rules of Polish law in the perspective of comparing the SJSC and this cooperative with the SCE, SE or other companies established under Polish national law (limited liability company and joint-stock company) and may also constitute an auxiliary argument for referring in the process of making regulations of the one-tier model in cooperatives under national law operating pursuant to the provisions of the Law on cooperatives also to the Polish regulations on the SJSC as these have the advantages mentioned above (including, inter alia, orderliness, comprehensiveness and clarity).

Seventh, in view of the above, as regards also companies governed by national law in which it is now impossible to opt for a one-tier model (and thus in relation to a limited liability company and joint-stock company), the need for including such a legal possibility as a governance option for those companies under relevant provisions in the articles of association is more and more seen and expressed in business practice.²⁷

Eighth, it should be noted that if the one-tier model was introduced as one of the options in the area of governance in a joint-stock company, this option would relate *mutatis mutandis* under Article 161 of the Act on Insurance and Reinsurance Activities²⁸ also to mutual insurance (and mutual reinsurance) companies. It would additionally, as if automatically extend the scope of the one-tier model of governance in the Polish legal system.

Ninth, it should be borne in mind that in the above-mentioned case of the introduction of the one-tier model as one of the options of governance in a joint-stock

²⁷ See *ibidem*, as well as comments presented in note 29.

²⁸ Act of 11 September 2015 on insurance and reinsurance activities, consolidated text: Journal of Laws 2021 item 1130 as amended (hereinafter AIRA).

company, this option could potentially also apply *mutatis mutandis* to the limited joint-stock partnership (LJSP) which, as in the above-mentioned case could, to some extent automatically, extend the range of application of the one-tier model of governance in the Polish legal system. This refers to the implementation by the legislature of the hypothetical legislative assumption of a “parallel” (in relation to the regulation of Article 97 CCPC concerning the professional partnership [PP]) introduction into the LJSP – as a result of the reform of its organisational structure providing for the situation in which the supervisory board is established in this partnership (by operation of law or under the articles of association, pursuant to Article 142 CCPC) – of the possibility of establishing the management board, similarly as for the management board in a professional partnership (pursuant to Article 97 CCPC), to which provisions on the management board in a joint-stock company would apply *mutatis mutandis*.

Tenth, it is also quite obvious that the one-tier model, although primarily in the area of operation of companies, operates successfully in other countries of the world, including Western European countries, or is used with even greater enthusiasm in countries whose legal systems are based on the Anglo-American model, where this management system originates from, e.g. in the UK or USA.²⁹

²⁹ Analyses carried out by foreign researchers show that apart from its application in the area of operation of the Societas Europaea and the European Cooperative Society, the one-tier model is provided for as one of the governance options in some foreign legal systems, not only for companies under national law (see, for example, the official government press release of the Ministry of Justice and Security of the Netherlands of 28 September 2012 – *The Business Community Benefits from the One-Tier Model*, <https://www.government.nl/latest/news/2012/09/26/the-business-community-benefits-from-the-one-tier-model> [access: 1.11.2021], as well as the provisions of the Dutch Civil Code (*Burgerlijk Wetboek*”), <http://www.dutchcivillaw.com/civilcodebook022.htm> [access: 1.11.2021] but also in relation to cooperatives established under national law, excluding, for example, the German legal system and legal systems strongly derived from the Germanic culture (tradition) of national cooperative law (as opposed in particular to the legal systems of Great Britain, the United States and those based on their elements, including the structure of legal systems, as well as the legal systems of France and those directly derived from the Romanic culture (tradition) of national cooperative law – in this regard, see especially the examples of legal regulations relating to the operation of cooperatives under national law in selected different foreign legal systems presented in a comparative legal study entitled *International Handbook of Cooperative Law*, eds. D. Cracogna, A. Fici, H. Henry, New York 2013 including, in particular, the rules provided for in the cooperative law of Austria (authors of the fragment): G. Miribung, E. Reiner, pp. 231-250; Belgium (author of the fragment): A. Coates, pp. 251-269; France (author of the fragment): D. Hiez, pp. 393-411; Germany (author of the fragment): H.H. Münkner, pp. 413-429, Italy (author of the fragment): A. Fici, pp. 479-501; the Netherlands (author of the fragment): G.J.H. van der Sangen, pp. 541-561; Portugal (author of the fragment): R. Namorado, p. 635-652; Spain (author of the fragment): I. Gemma Fajardo García, pp. 701-718; the United Kingdom (author of the fragment): I. Snaith, pp. 735-757, or the United States (authors of the fragment): B. Czachorska-Jones, J. Gary Finkelstein, B. Samsami, pp. 759-778.

Eleventh, it should also be borne in mind that since in the area of admissibility of application and legal structure for the introduction of the possibility of using means of remote communication, including means of electronic communication in a cooperative established under Polish national law (in the area of its activities conducted through governing bodies), the legislature made it convergent to commercial partnerships and companies as a result of the introduction of so-called facilitation (improvement) of action (which can also be described as “new options of action” during the time of constraints imposed on operation due to the COVID-19 pandemic³⁰), it seems that this “convergence” should also be implemented in the context of the one-tier governance model, all the more so since, from the perspective of such constraints (of action), this one-tier model in governance can also be seen as a specific, very important improvement (facilitation) of action that can reduce the risk of spread of the COVID-19 pandemic in its various mutations.

Twelfth, in reference to the previous argument, it seems that it may be reasonable to “attach” the issue of introducing the regulation of the one-tier model as one of the governance options for a cooperative operating under general rules (on the basis of the regulations provided for in the Law on Cooperatives of 1982) to the “package” of provisions constituting the so-called anti-crisis shield introduced and extended (by way of an amendment) in connection with the COVID-19 pandemic, with the reservation of the possibility of applying these regulations also after the pandemic. It would also seem reasonable to add the issue of introducing the regulation of the one-tier model in a limited liability company and joint-stock company to that “package”, thus combining the legal reform of cooperatives and companies in this respect, which would be an expression of a certain consistency in the legislature’s

³⁰ Improvements or new possibilities of action provided for in the acts introducing the so-called ‘anti-crisis shield’ (a package of laws proposed by the Government of the Republic of Poland, adopted by the Parliament of the Republic of Poland and signed by the President of the Republic of Poland in March 2020, which allows the implementation of special solutions and a set of actions aimed at counteracting the negative economic and social effects of the COVID-19 pandemic caused by SARS-CoV-2, including in the activities intended to be analysed, evaluated and supplemented on a permanent basis – see Explanatory note to the bill of 16 April 2020 on special support instruments in relation to the spread of SARS-CoV-2, [Sejm papers no. 330, p. 1]), i.e. primarily in the Act of 31 March 2020 amending the Act on Special Solutions Related to Preventing, Counteracting and combating COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them and Some Other Acts (Journal of Laws 2020 item 568 as amended) as well as the Act of 16 April 2020 on Special Support Instruments in Relation to the Spread of SARS-CoV-2, consolidated text: Journal of Laws 2021 item 737 as amended. For more detail on this issue, see e.g. G. Kozieł, *New Possibilities of Operation for Entities Other than Commercial Partnerships/Companies Provided for in the So-Called Anti-Crisis Shield*, Teka Komisji Prawniczej PAN - Oddział w Lublinie 2021, vol. 14, no. 2, pp. 249–271 and the papers referred to therein.

action, despite taking legislative action at a considerable pace resulting from the need to adapt the law to the pandemic situation.

From a legislative perspective, the one-tier model in a cooperative established under national law may be introduced, taking into account the above specific considerations, by:

- 1) a reference to the Polish regulations on the one-tier model in the SCE contained in the Act on the SCE (ASCE) as indicated above;
- 2) drafting an autonomous regulation of the one-tier model in a cooperative governed by national law based on the EU and Polish legislation on the SCE,
- 3) drafting an autonomous regulation of the one-tier model in a cooperative governed by national law based on the EU and Polish legislation on the SJSC,
- 4) drafting an autonomous regulation of the one-tier model in a cooperative governed by national law based partly on the EU and Polish legislation on the SCE and partly on the Polish regulation on the SJSC.

Any of the four variants mentioned above may be the subject of discussion on how to apply the proposed change. In the author's view, however, based on the considerations and arguments set out above, three of these variants deserve particular attention: the first, second and fourth one.

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