STUDIA PRAWNICZE KUL
4 (92) 2022

Principles of the European Cooperative Law from the perspective of Polish legislative challenges

Zasady europejskiego prawa spółdzielczego
z perspektywy polskich wyzwań legislacyjnych

Принципы европейского кооперативного права с точки зрения
польских законодательных вызовов

Принципи європейського кооперативного права з точки зору викликів
польського законодавства

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Summary: The principles of European Cooperative Law (PECOL) constitute an academic project intended as a reference point for the national legislator, e.g. Polish, who is faced with the task of adopting new cooperative law. PECOL consists of five chapters: the concept and subject of a cooperative, governance of cooperatives, financial structure of cooperatives, cooperative audit and cooperation between cooperatives. It does not include division, merger and transformation of cooperatives. The main assumption of PECOL is faithfulness to the goals, values and cooperative principles of the International Cooperative Alliance. These assumptions can be seen in the regulation on two types of goals of cooperatives, the principle of open membership, the non-binding of the member's voting rights to the amount of the contributed capital, the indivisibility of capital, the cooperative audit that verifies the implementation of these assumptions and the obligation of cooperation between cooperatives, etc. PECOL regulates the key issue – transactions with members and persons who do not belong to a cooperative, together with the financial result – particularly carefully. It is the first to distinguish between the "cooperative surplus" and "profit" of cooperatives. PECOL also includes elements derived from the law of commercial companies, e.g. transferability of shares, investor members, and others. Therefore, it constitutes a valuable synthesis of traditional and modern solutions. At the same time, PECOL narrows the statutory freedom of members who cannot, for example, decide on the division of assets remaining after the liquidation of a cooperative.
Key words: cooperative, Principles of European Cooperative Law, cooperative law

Streszczenie: Zasady Europejskiego Prawa Spółdzielczego (PECOL) są akademickim projektem prawa spółdzielczego, który w założeniu ma stanowić punkt odniesienia dla ustawodawcy krajowego, np. polskiego, przed którym stoi zadanie uchwalenia nowego prawa spółdzielczego. PECOL składają się z pięciu rozdziałów: pojęcie i przedmiot spółdzielni, ład spółdzielni, struktura finansowa spółdzielni, audyt spółdzielczy oraz współpraca między spółdzielniami. Rozdziały dzielą się na sekcje, a te na punkty. PECOL nie obejmują podziału, połączenia i przekształceń spółdzielni. Głównym założeniem PECOL jest wierność celom, wartościom i zasadom spółdzielczym Międzynarodowego Związku Spółdzielczego. Założenia te są widoczne w regulacji celów spółdzielni dwóch typów, zasadzie otwartego członkostwa, braku związania prawa głosu członka z wielkością wniesionego kapitału, niepodzielności kapitału, audycie spółdzielczym, który weryfikuje realizację tych założeń, obowiązku współpracy między spółdzielniami itp. PECOL szczególnie dokładnie reguluje kluczową kwestię transakcji z członkami oraz osobami, które do spółdzielni nie należą oraz wynik finansowy, który wskutek tego powstaje. PECOL jako pierwszy rozróżnia między *cooperative refund* i zyskiem spółdzielni. Zawiera także rozwiązania wywodzące się z prawa spółek handlowych, np. zbywalność akcji, członek inwestor itp. PECOL stanowi więc cenną syntezę tradycyjnych

ISSN: 1897-7146; eISSN: 2719-4264;
https://doi.org/10.31743/sp.13665

i współczesnych rozwiązań. PECOL zawęża jednocześnie swobodę statutową członków, którzy nie mogą np. postanowić o podzielności majątku pozostałego po likwidacji spółdzielni.
Słowa kluczowe: spółdzielnia, Zasady Europejskiego Prawa Spółdzielczego, prawo spółdzielcze

Резюме: Принципы европейского кооперативного права (PECOL) – это академический проект кооперативного права, который призван стать ориентиром для национальных законодателей, в том числе и польского, перед которыми стоит задача принять новое кооперативное законодательство. PECOL состоят из пяти глав: понятие и объект кооперативов, управление кооперативами, финансовая структура кооперативов, кооперативный аудит и сотрудничество между кооперативами. Главы делятся на разделы, а разделы – на пункты. PECOL не охватывают вопросы разделения, слияния и преобразования кооперативов. Основной предпосылкой PECOL является верность целям, ценностям и кооперативным принципам Международного кооперативного альянса. Эти предпосылки проявляются в регулировании целей кооперативов двух типов, принципе открытого членства, отсутствии зависимости права голоса члена от размера внесенного капитала, неделимости капитала, кооперативном аудите, проверяющем реализацию этих целей, обязательстве сотрудничества между кооперативами и т.д. PECOL особенно подробно регулируют ключевой вопрос о сделках с членами и не членами кооперативов и получаемом финансовом результате. Проект PECOL первым провел различие между cooperative refund и прибылью кооператива. PECOL также включают решения, вытекающие из права о коммерческих компаниях, например, возможность передачи акций, участник-инвестор и т.д. Таким образом, PECOL представляют собой ценный синтез традиционных и современных решений. В то же время PECOL сужают уставную свободу членов, которые не могут, например, решать вопрос о разделе имущества, оставшегося после ликвидации кооператива.
Ключевые слова: кооператив, Принципы европейского кооперативного права, кооперативное законодательство

Резюме: Принципи Європейського кооперативного права (PECOL) – це академічний проект кооперативного права, який має стати орієнтиром для національного законодавця, наприклад польського, перед яким стоїть завдання прийняти новий кооперативний закон. PECOL складається з п'яти розділів: поняття та предмет кооперативу, управління кооперативами, фінансова структура кооперативів, кооперативний аудит та співпраця між кооперативами. Розділи поділяються на підрозділи, а ті – на пункти. PECOL не включає поділ, злиття та перетворення кооперативів. Основним припущенням PECOL є вірність цілям, цінностям і принципам кооперації Міжнародного кооперативного союзу. Ці припущення видно в регулюванні цілей кооперативів двох типів, принципі відкритості членства, неприв'язності права голосу члена до розміру вкладеного капіталу, неподільності капіталу, кооперативного аудиту, який перевіряє реалізацію цих припущень, зобов'язання співпраці між кооперативами тощо. PECOL регулює ключове питання операцій особливо чітко з членами та особами, які не належать до кооперативу, та кінцевий фінансовий результат. PECOL першим розрізнив кооперативне відшкодування та кооперативний прибуток. PECOL також включає рішення, що випливають із законодавства про комерційні компанії, наприклад, можливість передачі акцій, член інвестор тощо. Тому PECOL є цінним синтезом традиційних і сучасних рішень. У той же час PECOL звужує встановлену законом свободу членів, які не можуть, наприклад, прийняти рішення про поділ майна, що залишилося після ліквідації кооперативу.
Ключові слова: кооператив, принципи європейського кооперативного права, кооперативне право

Introduction

The 100th anniversary of the enactment of the Act of 29 October 1920 on Cooperatives[1] raises the question of the validity of the adoption of new legislation aimed

[1] Journal of Laws [Dziennik Ustaw] 1920 no. 111, item 733.

to replace the currently applicable Act of 16 September 1982 – Cooperative Law,[2] which is no longer adapted to modern times, by the Sejm of the Republic of Poland. Admittedly, for many years, this question has been positively answered in the literature.[3] However, the assumptions of the new cooperative law are currently under discussion. The new act may refer to the principles and values of cooperatives that members are to observe while limiting statutory freedom or, on the contrary, assume far-reaching statutory freedom within which members will independently define the principles and structure of their cooperative.

In the context of the ongoing considerations, the Principles of European Cooperative Law (hereinafter: PECOL)[4] deserve to be known and discussed. PECOL is a set of cooperative legal standards presented as "ideal". They also show the most characteristic features of cooperatives. PECOL is not intended to harmonise national laws on cooperatives but rather to constitute a reference point for the national legislator regulating such matters.[5] It reflects the current state of science in European cooperative law. The article aims to analyse solutions included in PECOL from the perspective of challenges faced by Polish legislation and the purposefulness of including PECOL solutions in the future Polish act on cooperatives.

1. The concept and statute of a cooperative

The definition of a cooperative is not focused on the variability of the composition of personnel and capital, but on the purpose of activities of a given cooperative. PECOL distinguishes two types of cooperatives whose goals differ. The purpose of the first one was defined from the negative side. Cooperatives cannot conduct activities that are primarily aimed at achieving the main objective, which is profit, understood as payment of interest, dividends, etc. On the positive side, the goal has been classified in a standard manner, as a non-profit economic activity that consists

2 Consolidated version: Journal of Laws 2021 item 648.

3 See: K. Pietrzykowski, *Pojęcie i źródła prawa spółdzielczego*, in: *System Prawa Prywatnego*, vol. 21. *Prawo spółdzielcze*, ed. K. Pietrzykowski, Warszawa 2020, p. 27.

4 Study Group on European Cooperative Law (SGECOL), *Draft Principles of European Cooperative Law. Draft PECOL 2015*, https://www.euricse.eu/wp-content/uploads/2015/04/PECOL-May-2015.pdf [access: 6.09.2022].

5 See: ibidem; G. Fajardo, A. Fici, H. Henrÿ, D. Hiez, D.A. Meira, H.H. Münkner, I. Snaith, *The Principles of European Cooperative Law according to SGECOL*, CIRIEC-Espańa. Revista Jurídica 2017, no. 30, p. 2.

of efforts undertaken in the interest of members acting as consumers, suppliers, or employees of a cooperative (Sections 1.1. and 3.3. point 5 of PECOL).[6]

The objective formulated in this way indirectly implies the relation between a cooperative and its members – suppliers, consumers, etc. This indicates that the purpose of cooperatives expresses the classic auxiliary function of a cooperative enterprise towards its members[7] (see Article 3 of Statute for a European Cooperative Society,[8] Article 1 of Genossenschaftsgesetz).[9] Depending on the subject of the cooperative enterprise, it either satisfies the consumption needs (interests) of members in their households or supports their private economic activities in such a way that it collects products and goods produced in the member's farm or business. A cooperative may also operate through a commercial company if this is necessary to meet the interests of the members, who retain ultimate control of the company. There seems to be no obstacle to a cooperative bringing the entire enterprise into a commercial company and thus indirectly continuing its activities in the interest of its members. Under Polish law, the Supreme Court incorrectly ruled out such a possibility as, in its opinion, it precludes a cooperative from continuing its economic activity.[10] This decision also prevented cooperatives from being "transformed" into commercial companies that would no longer pursue cooperative goals.

The definition of the purpose of a cooperative proposed in the Principles is innovative and undoubtedly interesting from the Polish perspective. In Polish law, it is necessary to narrow down the former. The current formula of the cooperative's goal as "activities carried out in the interest of members" is very general and does not reflect the specific nature of its activities (Article 1 of Cooperative Law). On the other hand, some specialised subtypes of cooperatives, e.g. retail cooperatives and cooperative banks, are profit-making. This means that *de lege ferenda*, the goal

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6 I am quoting the PECOL text on the basis of G. Fajardo, A. Fici, H. Henrÿ, D. Hiez, D.A. Meira, H.H. Münkner, I. Snaith, *The Principles*…, p. 4.

7 See: H. Paulick, *Die eingetragene Genossenschaft als Beispiel gesetzlicher Typenbeschränkung zugleich ein Beitrag zur Typenlehre im gesselschaftsrecht*, Tübingen 1954, p. 14; A. Fici, *An Introduction to Cooperative Law*, in: *International Handbook of Cooperative Law*, eds. D. Cracogna, A. Fici, H. Hagen, Heidelberg 2013, p. 24; P. Zakrzewski, *Cel spółdzielni*, Kwartalnik Prawa Prywatnego 2005, no. 1, p. 49; idem, *Legalna definicja spółdzielni*, in: *Państwo, konstytucja, prawo. Księga pamiątkowa poświęcona Sędziemu Trybunału Konstytucyjnego Profesorowi Henrykowi Ciochowi*, ed. J. Przyłębska, Warszawa 2018, pp. 526–528.

8 Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE), OJL 207, 18.08.2003, pp. 1–24.

9 Gesetz betreffend die Erwerbsund Wirtschaftsgenossenschaften (Genossenschaftsgesetz – GenG) [Act of 1 May 1889 on Industrial and Provident Cooperative Societies, as amended up to 16 October 2006 by Section 3 of the Act of 10 November 2006, Federal Journal of Laws I, p. 2230].

10 Resolution of the Supreme Court of 13 December 2000, III CZP 43/00, OSP 2001, no. 12, item 177.

of a cooperative must not only accurately reflect its essence, but also include cooperatives with a profit-making target. Therefore, there will be two types of cooperatives. The first one will pursue non-profit goals consisting of activities for the benefit of members who are consumers, suppliers, etc. In these cases, recourse to the solutions proposed in the Principles will be fully justified. The second type of cooperative will pursue earning goals, which means that they must be formulated in a flexible manner. It seems that a good example of such a broad understanding of the purpose of a cooperative is Article 2 of the Finnish law.[11]

PECOL also distinguishes the second type of cooperative, referred to as a "cooperative of general interests" (Section 1.1. point 4 of PECOL). The purpose of such a cooperative is to carry out mainly economic activities in the general interest of the community. It does not work for the benefit of its members, but for the benefit of the whole society or a certain part of it. For example, it satisfies the needs of inhabitants of a commune classified as having large families, belonging to a minority, etc. This type of cooperative is a legislative novelty. It also deviates from the classic concept of a cooperative presented above. For instance, in literature, it is emphasised that a cooperative is a corporation acting only for the benefit of its members, and not for the achievement of ideal or social goals.[12] This type of cooperative is also foreign to Polish cooperative law, in which even a social cooperative primarily satisfies the interests of its members and the general goals of social and professional reintegration of members are of secondary importance (Article 2 [1–2] of Social Cooperatives).[13] In my opinion, this type of cooperative should not be adopted under Polish law. PECOL aptly reserves the name "cooperative" or the abbreviation "co-op" only for entities established and operating based on the project (Section 1.1. point 5 of PECOL).

The basis for the operation of a cooperative is, similarly to Polish law, the law, statute and resolutions of authorities. However, Polish literature includes debates on whether it is permissible to apply, by analogy, the provisions of law of commercial companies to cooperatives. I believe that this cannot be ruled out if arguments in favour of the corporate nature of a trading company arise. PECOL has a similar view on this issue (Section 1.2. point 3 of PECOL).

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11 Osuuskuntalaki [Co-operatives Act], 1488/2001, https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=62984&p_classification=11 [access: 6.09.2022].

12 P. Zakrzewski, *Cel spółdzielni*…, p. 53.

13 Act of 27 April 2006 on Social Cooperatives, consolidated version: Journal of Laws 2020 item 2085.

2. Cooperative members. Transactions with members and non-members of a cooperative

Modern regulations of cooperative law allow the presence of an investor member. A similar situation is outlined in PECOL. Associate members (natural and legal persons) act as suppliers, consumers, etc. in relation to a given cooperative (Section 1.3. point 2 of PECOL). In addition, non-cooperative members (natural or legal persons), such as investors, volunteers or public bodies, are distinguished. They do not engage in cooperative transactions but are interested in achieving the cooperative's goal. It is a wide group of members, including investors who invest capital in a given cooperative and are attracted by interests or dividends. PECOL does not contain a separate regulation regarding the payment of interest or dividends to investors. It treats investor members as other members who are entitled to a limited interest (Section 3.3. point 5 of PECOL). Since members and investors are interested in the highest (certain) interest rates, such solutions may discourage them from investing capital in cooperatives. In view of the above, it is necessary to consider the proposed solutions. Volunteers and public bodies are members of cooperatives of general interest (Section 1.3. point 3 of PECOL). This solution shows a special feature of this type of cooperative, whose goals are publicly useful and idealistic, which I take a critical view of. Non-cooperating members may join a cooperative only if the statute provides for such a possibility (Section 1.3. point 5 of PECOL).

PECOL excludes any discrimination against candidates who intend to join a cooperative. The statute may not artificially limit the membership (Section 1.3., p. 6). This issue is essential and complex at the same time. There are cooperatives with formally open yet in practice closed membership. It is difficult to reconcile the postulate of open membership with the principle of statutory freedom. The proposals formulated in PECOL are interesting in this regard. They assume soft pressure on cooperatives to fully implement the "open door" principle of the International Cooperative Alliance.[14]

PECOL defines and regulates in detail the rules of transactions between associate members and a cooperative, as well as between non-members and a cooperative. These are innovative solutions that the Polish legislator should take into account. First, they underline the importance of transactions with members to achieve the cooperative's

[14] M. Wrzołek-Romańczuk, *Pojęcie spółdzielni*, in: *System Prawa Prywatnego*, vol. 21. *Prawo spółdzielcze*, ed. K. Pietrzykowski, Warszawa 2020, pp. 39–40; P. Zakrzewski, *Zasady Międzynarodowego Związku Spółdzielczego*, Kwartalnik Prawa Prywatnego 2005, no. 1, pp. 277–296.

goal (Section 1.4. point 1 of PECOL). Second, the maintenance of the correct volume of transactions with members and non-members is assessed during the cooperative audit. Unfortunately, PECOL does not specify whether the legal basis for the member's and cooperative's transactions will be the statute and resolutions of bodies based on such statute or civil law contracts.[15] The principle of equal treatment of members is rightly applied in such transactions (Section 1.4. point 2 of PECOL).

PECOL also establishes a transaction obligation. The statute of a cooperative must contain provisions on the participation of members in transactions with a cooperative, with particular regard to the level of such participation (Section 1.4. point 3 of PECOL). This is a solution that fully meets the non-profit goals of cooperatives. However, from the point of view of associate members, the freedom to use services of a cooperative is more favourable. Therefore, it is appropriate to assume that a transaction obligation may be imposed on a member if the majority of members support it (Article 16 [3] of Genossenschaftsgesetz).

Transactions with non-members of a cooperative consist in the supply of goods and services or work of the same type as that provided to associate members. It is an apt and precise solution. Such transactions are not in line with the purpose of a cooperative. Therefore, if the statute allows them, they are admissible to a limited extent, a cooperative should primarily conclude transactions with associate members (Section 1.5. point 1–2 of PECOL). Their financial result is accounted for separately, and the profit is allocated to the indivisible reserves of a cooperative (Section 1.5. point 4–5 of PECOL). Such a solution meets the goal of the non-profit activity of a cooperative but deprives its members of the freedom to decide about this financial result. I believe that decisions in this regard should be left to the will of the members.

3. Membership acquisition and termination. Rights and obligations of members

PECOL puts a strong emphasis on the implementation of the open membership principle. The examination of a candidate's application for admission to a cooperative is to take place within a reasonable time. Refusal of admission to the cooperative

15 See: V. Beuthien, *Genossenschaftsgesetz. Mit Umwandlungsrecht und Kartellrecht sowie Statut der Europäischen Genossenschaft*, München 2004, p. 259; P. Zakrzewski, *Status prawny członka spółdzielni mieszkaniowej w spółdzielczych stosunkach lokatorskich*, Warszawa 2010, p. 83.

must be justified, and the candidate has the right to appeal against the negative decision to another body of this cooperative. However, PECOL does not grant such a candidate the right to be admitted to the cooperative (Section 2.2. point 1–3 of PECOL). Taking into account the entirety of PECOL, the refusal to accept an associate candidate to a cooperative is justified, especially when he or she cannot participate in transactions with this cooperative. The entity responsible for conducting the cooperative audit and/or responsible for the registration of the cooperative must, however, ensure that the membership is open. An unjustified refusal to admit new members is, therefore, an irregularity that should be communicated to the governing bodies and members of a given cooperative. It is a good combination of the principle of open membership and the autonomy of cooperatives. An introduction of such a solution to Polish cooperatives would significantly change the way they operate. It would also restrict their statutory freedom.

The statute should also establish rules for termination of the membership by a member or a cooperative. In the latter case, the member must have the right to present the case before a decision to terminate, give reasons for such a decision, and appeal the decision to another authority (Section 2.2. point 4–5 of PECOL). Polish solutions fully meet the requirements specified in PECOL (Article 24 of Cooperative Law).

PECOL briefly regulates the rights and obligations of its members. Among those that do not exist in Polish cooperative law, it is worth mentioning the participation of an associate member in transactions with a cooperative, minimum participation in the management of a cooperative, as well as participation in education and training provided to members by a cooperative. Other obligations may be imposed by law or the statute of a cooperative, in particular, the obligation of members to bear additional liability for losses borne by their cooperative.

From the perspective of Polish law, the additional liability of a member for losses incurred by his or her cooperative should be assessed negatively. Initially, it appeared in the legislation on cooperative banks (Article 10 [2] of Cooperative Banks, their Association and Affiliating Banks),[16] and then in savings and credit unions (Article 26 [3] of Cooperative Savings and Credit Unions).[17] On the one hand, the hopes for the strengthening of cooperative capital did not come true. These solutions proved to be burdensome for members in the event of bankruptcy of a credit union or cooperative bank, and discourage them from joining a cooperative.

16 Act of 7 December 2000 on the Operations of Cooperative Banks, their Association and Affiliating Banks, consolidated version: Journal of Laws 2018 item 613. The legislator then waived the additional liability of members of cooperative banks.

17 Act of 5 November 2009 on Cooperative Savings and Credit Unions, consolidated version: Journal of Laws 2021 item 1844.

Moreover, the regulation on the members' additional liability for losses of credit unions was rudimentary, which made it difficult to apply the rules in practice.[18] It is, therefore, necessary to search for other instruments that will strengthen the cooperatives by capital. In this respect, the solutions provided for in PECOL are not fully satisfactory. On the one hand, they represent a critical attitude to the solutions present in the law of commercial companies, and on the other, there are no other proposals that are more suited to the specificity of cooperatives.

The obligations of investor members are regulated separately. They are to contribute the subscribed capital. However, they are deprived of any right to participate in the management of their cooperative. They must also respect the boundaries arising from the nature of their membership. This is an appropriate solution that shapes the relationship between different categories of members in a cooperative. In addition, they must accept the fact that their cooperative is controlled by its associate members (Section 2.3. point 2 of PECOL).

An associate member has the right to conclude transactions with a cooperative and receive a cooperative refund, i.e. the return of the surplus exceeding the costs of the cooperative's services (Section 2.3. point 4 of PECOL). This key law constitutes the financial complement to the principle indicating that the cooperative satisfies the interests of its members by offering them services and benefits at a "price" that includes only the cost of their production, with no "profit" margin. That is why if at the end of the year, the cooperative's balance sheet shows that its services to associate members were offered at an inflated "price", the members are entitled to an appropriate cooperative refund. This is the first in Europe, and perhaps in the world, proposal to regulate the institution of a cooperative refund, which is of key importance for cooperatives. It is a proper proposition that should be adapted to Polish cooperative law.

4. Finances of a cooperative

As a rule, a cooperative is established without the minimum capital, unless the law or its statute provides otherwise. A derogation from this rule is that the statute may

[18] P. Zakrzewski, *Gospodarka finansowa kas*, in: *System Prawa Prywatnego*, vol. 21. *Prawo spółdzielcze*, ed. K. Pietrzykowski, Warszawa 2020, p. 972. On the contrary: J. Skoczek, *Źródła obowiązku dopłat z tytułu dodatkowej odpowiedzialności członkowskiej*, in: *Prawo prywatne w służbie społeczeństwu. Księga poświęcona pamięci Profesora Adama Jedlińskiego*, eds. P. Zakrzewski, D. Bierecki, Sopot 2019, p. 286; Resolution of the Supreme Court of 12 December 2019, III CZP 42/19, Monitor Spółdzielczy 2020, no. 2, p. 60.

specify the minimum share capital and the minimum amount of shares of each member. Regardless of this exception, the share capital is always varied. This means that a change in the amount of capital caused by a change in the number of members does not require a change in the statute of the cooperative or disclosure of the amount of capital in the relevant register. However, the lowering of the capital below a certain minimum may result in the dissolution of the cooperative (Section 3.2. of PECOL). In my view, the minimum share capital should also mean that, once a certain minimum level is reached, further reductions in the capital due to the withdrawal of members from the cooperative should be stopped (Article 8a of Genossenschaftsgesetz, Article 3 [4] of Statute for a European Cooperative Society). Regardless of these stipulations, an optional minimum share capital should also appear in Polish cooperative law.

Membership in a cooperative is generally acquired by the applicant's declaration of joining a cooperative and not by taking up shares (Section 3.3. point 1 of PECOL, Article 14 [2] of Statute for a European Cooperative Society). As a rule, each member contributes the same amount of shares but a cooperative may adopt a different criterion that will differentiate these amounts, e.g. in proportion to the value of transactions concluded with a cooperative. In addition, the statute may allow new members to contribute shares of higher value within reasonable limits (Section 3.3. point 2–3 of PECOL). This solution is a departure from members' solidarity and, to some extent, from the principle of equality. However, from the point of view of the existing members, who built the assets of a given cooperative, this is an appropriate solution. In Polish law, a similar function is performed by the entry fee, which is a one-off, non-returnable payment of a person joining a cooperative (Article 19, Section 1 of Cooperative Law). The maximum level of capital involvement of a member of a cooperative is determined by the statute or law (Section 3.3. point 4 of PECOL).

It has been rightly assumed that the main, non-profit objective of a cooperative does not preclude the payment of interest to members, the amount of which, however, may not exceed a reasonable rate necessary to obtain and maintain the capital required to conduct business (see Section 1.1. point 2 of PECOL). It can be concluded that a cooperative may have a secondary gainful objective of a limited extent. However, it is not clear whether the interest is to be paid from the cooperative surplus or profit (Sections 3.6.–3.7. of PECOL), for which I am advocating.

However, the interest rate on the members' capital may vary. It may depend on whether the paid-in share is mandatory or optional, as well as on the category of members who contributed the shares (Section 3.3. point 5 of PECOL). A solution that allows different amounts of interest on the capital contributed to a cooperative raises doubts (not taking into account other rules applicable to investor members),

as the interest rate on the capital is the remuneration that a given member receives in return for contributing capital to a cooperative. Therefore, the principle of remuneration should correspond to the principle of equality. Shares may only be transferable between members or candidates. This is the correct solution. The transfer of shares requires approval by a designated body, and should also meet other conditions set out in the statute of a cooperative. Shares subscribed by investor members are not transferable without the consent of an appropriate body. The shares of members may not be seized by personal creditors (Section 3.3. point 6 of PECOL). The resigning member is reimbursed the contributed share of the nominal value and part of the divisible reserves within reasonable limits specified in the statute (Section 3.3. point 7 of PECOL). This is, therefore, a logical limitation of the principle of the indivisibility of the cooperative's assets during its operation.

The challenge faced by the legislator consists in the reconciliation of the non-capital nature of a cooperative with its capital needs. Unfortunately, PECOL does not propose innovative solutions but rather adopts those that already exist in the legal orders of European countries.[19]

5. Reserve capital and rules for the distribution of the cooperative surplus and profit

The reserve capital is divided into compulsory and voluntary. The former includes the legal reserve and other reserve capital required by laws and the statute, in particular the reserve for cooperative education, training and information. The compulsory capital is indivisible during the operation of a cooperative and after its liquidation. Although this is consistent with the third rule of the International Cooperative Alliance, it is rarely found in the regulations of European countries, e.g. German and Polish (Article 91 of Genossenschaftsgesetz, Article 125 Section 5 of Cooperative Law).

Members should be free to decide on the fate of assets remaining after the liquidation of a cooperative. The legal reserve capital is similar to the Polish mandatory resource fund (Article 78 of Cooperative Law). It is also created based on a part of the cooperative's profit and, like its European counterpart, is used to cover losses

[19] See more: H. Henrÿ, *Trends in Cooperative Legislation. What Needs Harmonising?*, in: Journal of Research on Trade, Management and Economic Development 2018, vol. 5, no. 1 (9), p. 9; M.A. Andrews, *Analiza kapitału spółdzielczego*, Pieniądze i Więź 2015, no. 1.

incurred by a given cooperative (Article 90 of Cooperative Law). It cannot be divided during the term of the cooperative (Article 26 of Cooperative Law, Section 3.1. point 1–4 of PECOL). An example of a compulsory reserve capital is the reserve for education, training and information. It serves the education and technical training of members and bodies of a cooperative. It results from the implementation of the fifth rule of the International Cooperative Alliance. The reserve for education, training and information limits the amount of capital allocated to members of a cooperative for economic activities, thus the decision to create capital for education, training and information should be left to the discretion of the members. Voluntary reserves may be created by a resolution of the General Meeting. Such resolution may also specify the sources of capital, its purpose, liquidation procedure, and whether it is indivisible or divisible.

The literature recognises the existence of the cooperative surplus resulting from the higher amount of revenues compared to costs in transactions between a cooperative and its members. However, it is at best a statutory institution. "Profit" is understood as the advantage of revenues over the costs of a cooperative, which arises in transactions with people who do not belong to this cooperative. The law frequently regulates the financial result of a cooperative but does not deal with the source of its origin, in particular, whether it arose from transactions with its members or not. Thus, the regulations do not distinguish between two key legal institutions of cooperatives – the cooperative surplus and profit. Such a distinction is important as these cooperative surpluses do not constitute income within the meaning of tax law and, therefore, should not be subject to corporate income tax. In practice, this does not happen very regularly, which is a significant barrier to the creation of new and development of existing cooperatives. The distinction of a separate legal institution, which is the cooperative surplus, needs to be advocated. It may facilitate the introduction of necessary tax changes that will exclude cooperative refunds from the scope of income tax.

A great advantage of PECOL consists in the distinction and definition of the "cooperative surplus", "cooperative refund" and "profit" (Section 3.6.–3.7. of PECOL). These solutions are supplemented by the rules governing the division of the cooperative surplus into a divisible or indivisible reserve fund, or a division among associate members according to the quantity or quality of their transactions within a cooperative (cooperative refund). The payment of a cooperative refund may be made in cash or by the allocation of additional shares. Losses on transactions with members are covered from reserves, starting from the voluntary reserve, in proportion to the value of the members' transactions with a cooperative. It seems that these losses should also be covered based on the profit of a given cooperative, which would be favourable from the tax point of view. The profit is allocated to indivisible

reserves. This corresponds to the third principle of the International Cooperative Alliance. However, from the members' perspective, the allocation of profit only to indivisible reserves is a strict solution. It appears that members should be given more discretion in deciding how to allocate profit within a cooperative.

6. Audit

The cooperative audit is included in many European regulations on cooperatives. However, the audit is also subject to criticism, among other things due to the costs that a cooperative has to pay, low efficiency and partial duplication of the results of the cooperative audit and, for example, financial audit (Section 4.1. of PECOL).[20] Potentially, the purpose of an audit may consist in the improvement of the financial, organisational and economic efficiency of a cooperative and/or the assessment of its compliance with regulations, in particular those that define the specificity of cooperatives. The cooperative audit aims to check cooperatives' compliance with the regulations defining their identity, e.g. the achievement of their purpose, the volume of the members' and non-members' transactions with the cooperative, the participation of members in cooperative management, the origin and allocation of financial results, cooperation with other cooperatives, training and education of members (Section 4.1. point 2 and Section 4.2. point 1 of PECOL). In my opinion, the goals of the cooperative audit should be broader and focus on the assessment of the economic and organisational effectiveness of a given cooperative. The aforementioned purposes are certainly well-chosen and allow achieving the assumptions and objectives provided for in PECOL. However, they also limit the statutory freedom of members. Some of them should be optional and depend on whether the members have adopted appropriate solutions in the statute. There are three types of audit: ordinary, extraordinary and necessary. The first one is carried out at regular intervals. The necessary audit is conducted in the event of loss, change of legal form, etc. An extraordinary audit is performed at the request of a certain number of members who also bear its costs if the audit does not detect any irregularities that

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20 See: M. Wrzołek-Romańczuk, *Model nadzoru nad spółdzielniami i ich lustracja*, Zespoły Senackie 2014, no. 22, pp. 35–45; idem, *Lustracja spółdzielni*, in: *System Prawa Prywatnego*, vol. 21. *Prawo spółdzielcze*, ed. K. Pietrzykowski, Warszawa 2020, pp. 344–345; P. Zakrzewski, *Lustracja spółdzielni i kontrola jakości związków rewizyjnych de lege ferenda wraz z projektem przepisów prawnych*, in: *Prawo spółdzielcze. Zagadnienia materialnoprawne i procesowe*, eds. A. Herbet, J. Misztal-Konecka, P. Zakrzewski, Lublin 2017, pp. 151–166.

were the reason for its conduct. This is an appropriate solution. The costs of other types of audits are covered by a cooperative. The results of the audit take the form of a report that may contain guidelines as to how to deal with the detected irregularities. It is available to members (Section 4.2. point 3, Section 4.3.).

7. Cooperation between cooperatives

Cooperatives are also obliged to economically and socially cooperate with other cooperatives to achieve their goals, as well as support other cooperatives, cooperation with other cooperatives and the cooperative business model (Section 5.1. point 1–2 of PECOL). This is a response to the sixth rule of the International Cooperative Alliance, which calls for cooperation between cooperatives. PECOL also encourages national legislators to provide tax support for cooperative cooperation. Such cooperation may take place horizontally, based on contracts concluded between cooperatives, vertically, or by creating the so-called higher-level cooperatives that will work for the benefit of members of associated cooperatives and establishing cooperative groups (Section 5.2. point 1–2 of PECOL). The fulfilment of the obligation to cooperate is not subject to any sanctions. It is only assessed during the cooperative audit (Section 4.2. point 1 of PECOL).

In my opinion, these are largely idealistic solutions that will not be possible to implement in practice. For this reason, I am against including them in Polish cooperative law.

Conclusions

PECOL is a valuable and interesting point of reference for the national legislator, especially the Polish lawmaker, who is facing the task of adopting a new cooperative law. PECOL is strongly committed to the goals, values and principles of the International Cooperative Alliance. However, faithfulness to these aspects comes at a price, which sometimes constitutes a significant restriction on the statutory freedom of members deprived of the capacity to shape internal relations and the structure of their cooperative, e.g. by deciding on the distribution of profit and assets remaining after the liquidation of the cooperative, etc. PECOL refers to traditional cooperatives and new institutions, inspired by the law on commercial companies. It is, therefore, a useful and intriguing synthesis of tradition and modernity.

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