



# LEGAL FRAMEWORK ANALYSIS

## NATIONAL REPORT: GERMANY

### ICA-EU PARTNERSHIP



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**National Expert:** Prof. Hans-H. Münkner

## I. Introduction

Cooperatives benefit from regulations that acknowledge their specificities and ensure a level playing field with other types of business organisations. This research falls within the scope of the knowledge-building activities undertaken within the partnership for international development signed in 2016 between the European Commission and the International Cooperative Alliance (ICA), which aims to strengthen the cooperative movement and its capacity to promote international development worldwide. It demonstrates that the absence of a supportive legal framework for cooperatives, or the presence of a weak or inadequate legal framework, can negatively impact cooperatives and their evolution. In contrast, the existence of supportive regulations can foster cooperatives' creation and strengthening, acting as a driver of sustainable development. For this reason, further knowledge and evaluation of cooperative legislation will become a tool for ICA members, cooperators worldwide, and other key stakeholders such as policymakers and cooperative legal scholars. With greater knowledge and access to a global, country-based legal framework analysis, ICA members can advance their advocacy and recommendations on the creation or improvement of legal frameworks, document the implementation of cooperative legislation and policies, and monitor their evolution.

The main objectives of the legal framework analysis are to:

- provide general knowledge of the national cooperative legislation and of its main characteristics and contents, with particular regard to those aspects of regulation regarding the identity of cooperatives and its distinction from other types of business organisations, notably the for-profit shareholder corporation.
- to evaluate whether the national legislation in place supports or hampers the development of cooperatives, and is therefore “cooperative friendly” or not, and the degree to which it may be considered so, also in comparison to the legislation in force in other countries of the ICA region (or at the supranational level).
- to provide recommendations for eventual renewal of the legal frameworks in place in order to understand what changes in the current legislation would be necessary to improve its degree of “cooperative friendliness”, which is to say, to make the legislation more favourable to cooperatives, also in consideration of their specific identity.

This report was prepared by Hans-H. Münkner, Doctor of Law, retired professor of organization law and cooperative theory of the Department of Economics of Philipps-University, Marburg, who worked for 40 years as lecturer and professor in the 4-year degree-course of Cooperative Economics, offered to students mainly from African and Asian countries (1963 – 2002), Institute for Co-operation in Developing Countries (ICDC). From 1990 – 2000, he was director of the ICDC. He also worked as consultant for international and national organizations and was member of ICA's Commissions on Cooperative Values (1990-1992) and Cooperative Principles (1992-1995).

With respect to the German case, there is a rich literature on cooperative societies and on cooperative law, promoted by a network of ten Cooperative Research Institutes at German, Austrian and Swiss Universities, mainly published in the German language. This literature was used as background material for the present report.<sup>1</sup>

More specifically, in Germany, all registered cooperative societies fall under the Cooperative Societies Act of 1889, based on experience gained with cooperative societies in Germany in the second half of the 19th century. This law was amended several times and in 2006, this general legal framework was completed by a law introducing the European Cooperative Society (SCE) into German cooperative law (SCE-Ausführungsgesetz, SCEAG), based on the SCE Regulation of the European Union of 2003, applicable to SCEs having their registered office in Germany.

## II. National cooperative law: Germany

### i. General Context

The German Cooperative Societies Act (Genossenschaftsgesetz, GenG) applies to all forms and types of cooperative societies.

Nevertheless, a special law for housing cooperatives serving the general interest was in force (Wohnungsgemeinnützigkeitsgesetz, WGG), during the second World War (from 1940 and until 1990), in times of serious shortage of dwellings. The above law exempted housing cooperatives from corporation tax and income tax, if certain rules were respected (Philippowski 1980, Sp. 720, 721). Although, the WGG was revoked since 1990, existing housing cooperatives can still apply for extension of their tax-exempt status (Beuthien 2018, § 1 GenG, RZ 75).

Cooperative banks are also subject to banking law and rural cooperative banks (Raiffeisenbanks) with a commodity branch are subject to special rules.

Moreover, there are special regulations for conversion of cooperatives into other legal form, mergers and splitting up with participation of cooperatives and mergers of cooperative auditing federations: Umwandlungsgesetz, UmwG (Conversion law) of 1994, revised in 2017. The corresponding sections of the Cooperative Law (§§ 93a – 93s GenG) were revoked and transferred to the conversion law.

With regard to the ICA cooperative principles, they are not expressly mentioned in the German Cooperative Societies Act. Implicitly the ICA Cooperative Principles are underlined in several articles of the law. Indirect references to ICA's Cooperative Principles are contained in the definition in § 1 (1) GenG of 2006: voluntary and open membership and democratic member control.

Other articles in which the ICA's Cooperative Principles are expressed or implied are:

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<sup>1</sup> SP = Spalte means number of a column of text on a page subdivided into two columns of text each having its own SP number. This form of quotation is used in Mändle/Winter (1980): Handwörterbuch des Genossenschaftswesens (1980), Wiesbaden. RZ = Randziffer means note on the margin of a page to facilitate quotations of long texts, used in Law Commentaries like Beuthien (2018).

- Self-government – members of the board of directors and of the supervisory council must be members of the cooperative society (§ 9 (2) GenG).
- Cooperation among cooperatives – compulsory affiliation of all registered cooperative societies to a cooperative auditing federation (§§ 11 (2) No. 3 and 54 GenG) (Beuthien 2018, § 1 GenG, RZ 43, 44).

But there are also deviations from these principles, some of which were introduced before and others after the revision of 2006. E.g.

- Cooperative societies with social objects (§ 1 (1) GenG),
- fixed minimum capital (§ 8a GenG),
- different categories of members like investor members not using the facilities or services of the cooperative enterprise (§ 8 (2) GenG),
- transactions with non-members (§ 8 (1) No. 5), and
- voting by proxy (§ 43 (5) GenG).

## ii. Specific elements of the cooperative law

### - Definition and objectives of cooperatives

According to § 1 GenG of 2006, cooperative societies are defined as follows:

“(1) Societies with a variable number of members for the purpose of promoting their members’ personal economic and business interests, or their social or cultural interests, by means of a jointly-owned enterprise (co-operatives), acquire the rights of a ‘registered cooperative society’ under this Act.

(2) Membership of societies and other associations (of individuals), including bodies governed by public law, is permissible if and when they intend to:

- promote their members’ personal economic and business interests, or their social or cultural interests, or
- serve the public interest goals of the cooperative society, without this being the sole or main purpose of the cooperative society.”

Essential elements of the notion of “cooperative society” in line with the ICA’s cooperative principles that are taken as the main legal characteristics and distinguish cooperatives from other forms of business organisations are the following<sup>2</sup>:

- Variable / open membership (§ 1 (1) GenG).
- Variable capital (§ 7a GenG), which since the revision of the law in 2006 may also be fixed (§ 8a GenG).

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<sup>2</sup> For definition of cooperative societies before and after 2006 see also Münkner 2015, pp. 17-21; Münkner 2017b, pp. 262, 263.

- Principal objective of member-promotion (§ 1 GenG).
- Self-help in a group, self-administration (§ 9 (2) GenG) and self-responsibility (§ 87a GenG).
- Identity of owners and users – no purpose transactions with non-members unless permitted in the by-laws of the cooperative society (§ 8 (1) No. 5 GenG).
- Cooperation among cooperatives in a vertically integrated system (Verbund) to which all registered cooperatives have to belong (§§ 11 (1) No. 3; 54 GenG).

Regarding the objective of cooperatives, originally and from the basic concept underlying German cooperative law (and also the ICA's Cooperative Principles), cooperatives are pursuing mainly economic objectives through a jointly owned and managed enterprise, aimed at promoting the economic interests of their members.

Until the revision of the law in 2006, German cooperatives could pursue social or cultural objectives only as a secondary but not as a primary objective (§ 1 (2) GenG; Beuthien 2018 GenG, § 1 RZ 26-32). Since the law reform of 2006 (§ 1 (1) GenG), social or cultural objectives can also be pursued as the main objectives of social or cultural cooperatives (§ 1 (1) GenG) (Münkner 2017b, pp. 272-274).

Cooperatives may also serve public interest goals without this being the sole or main purpose of the cooperative society (§ 1 (2) GenG). In German cooperative law there is no particular type of general interest cooperative, but if the members agree by making by-laws to this effect, the purpose and structure of the cooperative society can be adjusted to this object, e. g. by defining the objectives' clause in the by-laws accordingly and/or by admission of investor and promoting members<sup>3</sup> in a multi-stakeholder cooperative (Münkner 2017b, pp. 274-277, 314, 315).

According to the definition in § 1 (1) GenG of 2006, the objective of cooperatives is defined as “the purpose of promoting their members’ personal economic and business interests, or their social or cultural interests, by means of a jointly-owned enterprise (co-operatives) ...”. This means that cooperative societies should concentrate their activities on promoting their members and, accordingly, should exclude or limit their transactions with non-members. In practice, transactions with non-members are usually justified in two cases: To make use of idle capacities of the cooperative enterprise or to attract new members.

To understand the German discussion on “transactions with non-members”, it is important to distinguish “Zweckgeschäfte” (purpose transactions, i.e. transactions to serve the purpose for which the cooperative society was formed<sup>4</sup>), usually with members and “Gegengeschäfte” (counter-transactions, transactions to make purpose transaction possible<sup>5</sup>), usually with non-members. In German cooperative law, such purpose

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<sup>3</sup> "Promoting members do not come from the typical membership group but rather join the cooperative society in order to become eligible as office-holders (usually admitted due to their professional know-how and experience) or want to promote the cooperative society for other reasons". (Münkner 2013, p.419).

<sup>4</sup> E.g. A cooperative bank accepting savings from and giving loans to members (Münkner 2017b, p. 269).

<sup>5</sup> An example of a counter-transaction in the case of consumer co-operatives is the act of purchasing goods from wholesalers or producers in order to sell them to the members (Münkner 2013, p. 418)

transactions with non-members are prohibited unless expressly allowed in the by-laws (§ 8 (1) No. 5 GenG). However, if allowed, the law does not set any limits.

Cooperatives may operate in any kind of economic activity for the promotion of their members' economic and/or social interests defined in the by-laws, except in the business of insurance (VAG, Law on supervision of insurance enterprises) and in the business of saving for housing, for which special legal frameworks exist (§§ 2 (1) and 18 Gesetz über Bausparkassen, BSpKG, (Law on Saving for Housing Banks); § 7 Gesetz über die Beaufsichtigung von Versorgungsunternehmen, (Law on the supervision of enterprises for social care).

Another relevant field is the offer of legal advice. The cooperative legal form can only be used for offering services of legal advice if officially admitted (Rechtsdienstleistungsgesetz, RDG), (Law on the offer of legal advisory services) (Beuthien 2018, § 1 GenG, RZ 36).

Cooperatives may operate in the business of banking, provided the banking laws are respected. For historical reasons there is the exception of Raiffeisenbanks with an agricultural commodity branch, the number of which has decreased from 14.474 in 1990 to 98 in 2017 (Stappel 2018, p. 46).

### **iii. Establishment, cooperative membership and governance**

#### ESTABLISHMENT

In Germany, new cooperative societies to be officially recognized and to acquire the status of a body corporate must be registered in a special decentralised cooperative register, kept by the local court, where the cooperative society is based (§ 10 GenG). In case of SCEs having their office in Germany, they are registered in the Register of Companies (Art. 11 (1) SCE Regulation 2006). If SCEs employ workers, they can be registered only if an agreement on workers' co-determination<sup>6</sup> has been reached (Art. 11 (2) - (4) SCE Regulation 2006).

The main legal requirements for cooperatives' registration are contained in § 11 GenG, which are the following:

- The by-laws signed by the members,
- a copy of the deeds confirming the appointment of the board of directors and the supervisory council,
- the certificate of an auditing federation affirming that the cooperative society is eligible for admission to the auditing federation and an expert opinion of the auditing federation indicating whether in view of the personal and economic

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<sup>6</sup> Under the German co-determination legislation, the term "workers' co-determination" refers to the right of workers to participate at the management of companies, where they work. This provision is applicable to companies with a large number of workers.



conditions and in particular the financial status of the cooperative society, the interests of the members or creditors of the cooperative society may be jeopardised (pre-registration audit) (§ 11 (2) No. 3 GenG).<sup>7</sup>

#### COOPERATIVE MEMBERSHIP

Following the example of the SCE, where the minimum number of members required to form a cooperative society is 5, residing in at least two EU-member states (Art. 2 SCE Regulation), in German cooperative law, the minimum number of members to form a German cooperative has been reduced from 7 to 3 (§ 4 GenG). In case the number of members falls below the required minimum, the cooperative society must be dissolved by the competent court on request of the society's board of directors (§ 80 (1) GenG).

With respect to the admission of new members, German cooperatives work according to the principle of open membership. However, there is an exception in the case of general interest housing cooperatives, which are obliged to accept persons nominated by the local authorities as tenants and members.

When joining a cooperative society after registration, membership is acquired by a written unconditional declaration of membership and admission through the cooperative society. The member shall be entered into the list of members and be informed accordingly, also of rejection of admission (§ 15a GenG). According to § 15a GenG, the declaration of membership shall contain the obligation to pay share capital and – where applicable – to assume liability.

As a rule, members are free to leave, following the process laid down in the bylaws. However, after the law reform of 2006, with introduction of a minimum capital (§ 8a GenG), repayment of share contributions to retiring members can be delayed, if by such payment the minimum capital would not be preserved (§ 8a (2) GenG).

#### VOTING RIGHTS

Since 1973, voting by proxy has been allowed provided that one proxy does not represent more than two members (§ 43 (5) GenG) (Münkner 2017b, 285).

The general rule is “one member – one vote”. However, since 1973 plural voting is permitted, which has to be regulated in special provisions in the by-laws.

According to § 43 (3) GenG, the by-laws may provide for granting plural voting rights with a maximum of two extra votes, i.e. a total of 3 votes. However, these additional votes can only be given to “persons who further the business of the cooperative society in a special manner” (§ 43 (3) No. 1 GenG). Exceptions apply to cooperatives where more than three quarters of the members are entrepreneurs (§ 43 (3) No. 2 GenG). In this case, an individual member's multiple voting rights shall not exceed a tenth of the votes of the members present and voting at the general meeting. For important decisions at the general meeting, requiring a three-quarter majority, additional votes do not count (Beuthien 2018, GenG, § 43 RZ 25).

In cooperatives with plural voting, the process of recording voting results is complicated. The following must be recorded:

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<sup>7</sup> For more on registration of cooperatives see also Münkner 2013, pp. 423, 424.



- who is attending the general meeting,
- who has how many votes,
- issues on the agenda that do not allow plural voting

“It has to be avoided that members with additional votes may outvote regular members. Appropriate measures shall be put in place to assure that investor members cannot under any conditions outvote regular members” (§ 8 (2) GenG) “and that decisions of a general meeting that require by law or by-laws a majority of at least three quarters of the votes cannot be prevented by investor members. For this purpose, the by-laws may revoke the voting rights of investor members in part or fully”. On the other hand, in secondary cooperative societies (unions and federations) plural voting can be agreed upon without limitations (§43 (3) No. 3 GenG).

#### INTERNAL STRUCTURE OF ADMINISTRATION/GOVERNANCE

Before 2006, general provisions applied to all co-operatives. Special rules for large cooperatives having more than 1,500 members (§ 43a GenG) were introduced in 1973. More specifically, § 43a (2) stipulates who can be elected as delegate and defines that the minimum number of delegates is 50 (§ 43a (3) GenG).

After 2006: general provisions applied to all cooperatives and special rules for large cooperatives having more than 1,500 members (§ 43a GenG), which were made in 1973, were regulated further. Special provisions for small cooperatives with up to 20 members were also introduced.

Overall, the general rule for the internal structure of cooperative societies is the **Dualist Model**: Board of Directors and Supervisory Council plus general meeting or in large cooperatives: meeting of delegates (§ 43a (1) - (7) GenG).

In 2006, special rules for small cooperatives with up to 20 members introduced the **Monistic Model**: Small cooperatives can opt for a simplified structure, working only with a board of directors, even as a one-person board and without a supervisory council (§ 9 (1) GenG).

The general meeting of members or meeting of delegates<sup>8</sup> is the supreme authority in the cooperative society. Delegates are not the agents of those who elected them but have a position in their own right (§ 43a (4) - (6) GenG). Even if a meeting of delegates is stipulated, some basic rights of the general meeting of members remain guaranteed, e. g. to vote on removing the meeting of delegates (Beuthien 2018, GenG, § 43a RZ 2), for which, since 1973, there are very detailed regulations (§ 43a (1) - (7) GenG).

The general meeting of members / meeting of delegates decides all important matters concerning the working and existence of the cooperative society: amendment of by-laws

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<sup>8</sup> In 1973 the meeting of delegates was introduced to allow large cooperative societies (having more than 1,500 members) to hold their meeting of members despite the rule prohibiting voting by proxy (Beuthien 2018, GenG, § 43a RZ 1). In practice, cooperatives worked already since 1922 with meetings of delegates in which the rights of members were exercised by elected representatives. After allowing the members to vote by proxy in 1973, special regulations for meetings of delegates – introduction of indirect democracy by intermediaries – have lost some of their importance.

(§ 16 (1) GenG), election of members of the supervisory committee (§ 36 (1) GenG), decisions on annual return and allocation of annual surplus (§ 48 (1) GenG), merger (§ 13, (1) UmwG); conversion (§ 193 (1) UmwG) and dissolution (§ 78 (1) GenG).

In the by-laws of primary cooperative societies, election of board members is usually delegated to the supervisory committee. Since the amendment of the Cooperative Societies Act in 1973, board members manage the affairs of the cooperative society in their own responsibility and are only bound by the by-laws (§ 27 (1) GenG) (Münkner 2013, p. 422).

#### MEMBER CONTROL

Members can ensure control of their cooperative society by a number of provisions, such as the following:

- by § 9 (2) GenG, according to which Members of the Board of Directors and of the Supervisory Council shall be members of the cooperative society and natural persons. Should legal persons or business partnerships have joined a cooperative society, persons authorised to represent them shall also qualify for membership at the Board of Directors or the Supervisory Council,
- by § 43 (3) No. 1 GenG which stipulates that additional votes do not count for important matters, e. g. decisions on amendment of by-laws regarding the right to vote and in important decisions requiring a three-quarter majority of votes.
- by § 43a (1) - (7) GenG which stipulates if a meeting of delegates is prescribed, certain decisions may be reserved for the general meeting of members.
- by § 43 (3) No. 1 GenG which stipulates a limit of two additional votes (i.e. a total of three votes) in ordinary cooperatives, as well as the limits introduced by § 43 (3) No. 2 GenG for cooperatives of entrepreneurs.
- by § 8 (2) GenG which stipulates that the number of investor members in the supervisory council may not exceed one quarter of its total number.

### - Cooperative financial structure and taxation

#### RULES GOVERNING CAPITAL CONTRIBUTIONS BY MEMBERS

In German cooperative law, financial contributions of members are perceived as obligations resulting from acquiring membership in a cooperative society. More specifically, in German cooperative law members' capital contributions are referred to as "*Geschäftsanteil*". This is the name for a special form of participation certificate linked to membership. Only members may hold cooperative shares. Such shares are part of the capital of the cooperative society for the duration of membership. They are not freely negotiable. There is no market for cooperative shares and accordingly no market price.

Unlike in shareholding companies, where the rule is "one share – one vote", in cooperative societies, voting rights are not granted in proportion to capital contributions but according to the basic cooperative principle "one member – one vote" with some deviations, mentioned earlier.

In 1973, two provisions regarding financial contributions of members were introduced into German cooperative law:

- A declaration of membership has to contain members' obligation to effect payments on the shares in accordance with the law and the by-laws and
- a declaration on the amount of additional contributions or liability (§ 15a GenG). When additional shares are purchased: Members have to sign an unconditional declaration to this effect (§ 15b GenG).

Until 2006, cooperative societies were characterised by their “variable capital”. There was no fixed minimum capital. Since 2006, cooperative societies can introduce a minimum capital (§ 8a GenG). This amendment was made to comply with international standards defining equity capital. Otherwise, cooperative share capital – being variable – would be classified as obligation. This has effects on withdrawal of members and the refund of their share contributions, which can be delayed, when the minimum capital is not guaranteed (§ 8a (2) GenG).

#### SURPLUS/PROFIT ALLOCATION

Distribution of profit/surplus to members can be done in proportion to the capital subscribed as dividend, in proportion to the volume of transactions as patronage refund; profit derived from other sources (e.g. from non-member business transactions) can also be distributed to members (§§ 19 - 21a GenG).

More specifically, in German cooperative law, distribution of profit and losses among members is regulated as follows (§ 19 (1) GenG):

“For the first financial year: proportional to payments made on shareholdings, in each successive year proportional to their credit balance established at the end of the previous financial year. Profit is added to the members' account, as long as the share has not been fully paid. Other criteria can be applied if regulated in the by-laws” (§ 19 (2) GenG). § 21 GenG contains a ban on payment of interest on the credit balance. § 21a contains an exemption from this ban, introduced in 1973. Today, an increasing number of cooperative banks are paying a dividend (interest) on members' credit balance (Berge/Philippowski 1987).

Overall, the decision on the allocation of annual surplus is taken by the members in general meeting. After revision of the Cooperative Societies Act in 1973, cooperatives can not only pay a **dividend** on paid-up share capital but also **interest**, provided a surplus was earned in the current financial year or provisions have been made (§ 21a GenG). The law does not set any limits to dividend or interest on share capital. The typically cooperative way of allocation of surplus to members in form of **patronage refund** in proportion to use made of the services and facilities of the cooperative enterprise is not expressly regulated in the Cooperative Societies Act (Beuthien 2004, § 19 RZ 14, pp. 304, 305), but can be provided for in the by-laws and is decided by the management organ”. (Münkner 2013, p. 421; Münkner 2017b, pp 308-311).

#### INDIVISIBLE RESERVES

Originally, the reserves of cooperative societies were strictly indivisible. In the revision of the Cooperative Societies Act in 1973, cooperative societies were empowered to make

by-laws allowing cooperatives to establish a special reserve fund from which departing members could claim a portion on certain conditions. So far, this power allowing to turn part of their reserves variable is rarely applied by cooperatives. (Münkner 2013, p. 421).

#### OTHER FINANCIAL INSTRUMENTS

For cooperative societies, cooperative law does not provide for particular financial instruments other than “Geschäftsanteile” (shares). Nevertheless, the DZ Bank AG (*Deutsche Zentral-Genossenschaftsbank*) issues “Genussrechte” (participation certificates<sup>9</sup>). These are not regulated by cooperative law, but by general civil law.

#### DISTRIBUTION OF THE COOPERATIVE CAPITAL/ASSETS AFTER LIQUIDATION/CONVERSION

The German Cooperative Societies Act of 2006 prescribes for:

- Prerequisites for the division of assets regulated in § 90 GenG.
- Division of assets regulated in § 91 GenG.
- The issue of indivisible net assets regulated in § 92 GenG.
- Payment obligations of members before dissolution of the cooperative society regulated in § 87a GenG.
- After dissolution, no increase of shares and the amount of liability of members regulated in § 87b GenG.

With respect to the allocation of the remaining assets after liquidation, it is left to be regulated in the by-laws. More specifically, “*upon winding up and during liquidation, the law leaves several options for dealing with reserves:*

- *any surplus in excess of the total credit balances may be distributed among members on a per capita basis (§ 91 (2) GenG),*
- *the by-laws may prohibit any division of assets, or may stipulate different ratios when dividing assets (§ 91 (3) GenG),*
- *the members may vote to keep the reserves indivisible and to transfer the liquidated assets to a “natural or legal person for a specific purpose. The interest of this fund shall go to charity” (§ 92 GenG). (Münkner 2017b, p. 314).*

#### TAXATION

Cooperatives, by their legal form as a corporation holding property in its own right, are treated as merchants under commercial law (§ 17 (1) GenG) and as entrepreneurs, the cooperative society is employer of its own staff (§ 17 (2) GenG).

As corporations, cooperatives are obliged to keep books according to corporation tax law and income tax law. In tax law, cooperatives have basically the same position as companies and associations, but there are some special provisions: according to § 22 (1) No. 1 Körperschaftssteuergesetz, KStG (Corporation tax law), a cooperative society

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<sup>9</sup> “Participation certificates are claims to a portion of the annual surplus but do not confer any further rights (e.g. the right to participate in decision-making)”. H.H. Münkner, T. Kowalak, Annotated Cooperative Glossary, 2005, sec. 299, p. 106

may deduct patronage refund paid to members from its taxable income as ordinary expenditure, while for members this is taxable income.

Surplus earned in transactions with non-members and used to improve conditions of transactions with members is considered illegal (hidden) profit distribution.

For certain groups of cooperatives there are tax-exemptions or reduced tax-rates: Housing cooperatives recognised as general interest organisations, certain types of agricultural cooperatives and social or cultural cooperatives.

For all other taxes, cooperatives are treated in the same way as other taxpayers.

TAX EXEMPTIONS OF PROFIT ALLOCATED TO LEGAL RESERVES OR NON-DISTRIBUTABLE ASSETS.

In the by-laws, distribution of assets can be excluded (Cario 2011, p. 866). Undistributed assets of a cooperative society for which the by-laws do not provide transfer to a physical or legal person, shall be transferred to the community in which the cooperative society has its registered office (§ 92 GenG). For the cooperative society, transfer is subject to corporation tax.<sup>10</sup>

#### iv. Other specific features

##### - Cooperative external control and cooperation among cooperatives

COOPERATIVE EXTERNAL CONTROL

In German cooperative law, there are two basic rules regarding audit:

1. A new cooperative society must be audited before registration (§ 11 (2) No. 3 GenG) as a requirement for registration.
2. Every registered cooperative society must be affiliated to a cooperative auditing federation and must be audited every year or (in case of small cooperatives) in every second year (§ 53 GenG).

For cooperative societies, audit plays an important role from the beginning. Pre-registration audit of new cooperative projects is prescribed before registration as well as certification that the new cooperative society qualifies for admission to an auditing federation (§ 11 (2) No. 3 GenG). The court shall verify, whether the formation and the application for registration conform with the law (§ 11a (1) GenG).

Compulsory audit of registered cooperative societies was already introduced in 1889, more than forty years before compulsory annual audit was prescribed for companies (Schöpflin 2018, GenG, § 53, RZ 1; see also Münkner 2017b, pp. 319-325). Critics of these regulations see pre-registration audit of small cooperatives as a strong disadvantage as compared with other legal forms. Therefore, they recommend that for

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<sup>10</sup> For more information on tax treatment of German cooperative societies see also Münkner 2013, p. 425.



small cooperatives (of the size described in section 267 subsection 1 of the German Commercial Code) compulsory audit including pre-registration audit should be abolished. Instead, commentators suggest that the word “*haftungsbeschränkt*” (with limited liability) should be added to the firm-name to provide protection of the creditors. Furthermore, it is suggested to reconsider the audit monopoly of cooperative auditing federations (Philipps 2015, pp. 68 - 70).

With the introduction of the possibility to form very small cooperatives, with the minimum of three members (§ 4 GenG), this argument gains attraction but a closer look at such small cooperatives (e.g. of tax consultants, architects and medical doctors, reducing cost by organising joint offices or services) shows that it is justified to audit such new organisations in the legal form of cooperative society before registration. This is to prevent registration of false or non-viable cooperatives, to avoid damage for the cooperative name and to assess whether they are fit for being accepted in the cooperative network of the vertically integrated cooperative system. With digitalisation, closeness is no longer a question of geographical closeness. For small cooperatives having less than 20 members, a simplified regime of audit was introduced in 2006 – with audit held only every second year to reduce bureaucracy and to save cost (§ 53 (1) GenG). However, this innovation has reduced auditing costs for small cooperatives only insignificantly (Münkner 2013, p. 424).

A special problem of cooperative audit is how to measure and evaluate effectiveness of member-promotion. Instruments for this purpose have been developed: Promotion Plan – Promotion Report. However, up until now, these instruments are seldom used in practice (Grosskopf/Münkner/Ringle 2016, pp. 156-163; Münkner 2017a, p. 108 FN 24; Münkner 2017b, pp. 292, 293; Beuthien 2018, GenG, § 1 RZ 24. See also Weber, Wilhelm/Brazda, Johann, in Dülfer/Laurinkari 1994, pp. 736-739); Patera, Mario 1990, in Laurinkari et al. 1990, pp. 285-301).

The German law-makers have decided that there is a need for a mix of self-control in the vertically integrated system of cooperatives (*Verbund*) and state control on the auditing federations (§§ 53-55, 63, 63a, 63e-h GenG), special rules of which were already introduced in 1889. More specifically, part IV of the German Cooperative Societies Act of 2006 contains detailed regulations of who carries out the audit (§ 55 GenG), the auditing procedure (§§ 57-61 GenG), the accountability of auditing bodies (§ 62 GenG) and the way in which authority to carry out cooperative audit is granted (§ 63 GenG). Furthermore, there are detailed regulations of the structure and work of a cooperative auditing federation, including the procedure of periodic quality control of auditing federations (every six years) (§ 63e GenG) by a supervising authority (§ 64 GenG) (Schöpflin 2018, GenG, § 53, RZ 1-27).

#### COOPERATION AMONG COOPERATIVES

In the German Cooperative Societies Act, co-operation among cooperatives is deeply entrenched. From 1889, the important role of cooperative federations, the need to build up a vertically integrated system of cooperatives (*Verbund*) and an effective system of cooperative audit has been in focus and has become an essential part of the German cooperative legislation and cooperative practice.

Concerning the enactment of any special provisions applicable to them, a special rule for secondary cooperatives in German cooperative law is that – unlike in primary cooperatives – there are no limits set for plural voting (§ 43 (3) No. 3 GenG).



### III. Degree of ‘cooperative friendliness’ of the national legislation

With regard to the existence of legal obstacles in the German national legislation, as already mentioned above, pre-registration audit and compulsory affiliation to a cooperative auditing federation are considered by some critics as obstacles resulting from cooperative specific regulations (§§ 11 (2) No. 3, 54 GenG), causing relatively high legal and organisation cost for new cooperative projects. This is seen as one reason why relatively few new cooperatives are formed. More specifically: in 2010, the total number of registered cooperative societies was 7,618; in 2016, this number was 7,931 and in 2017, there were 7,819 registered cooperative societies (Stappel 2018, p. 39).

As concerns identifying best practices in Germany, it is highlighted by the firmly entrenched obligation of all registered cooperatives to be part of the vertically integrated cooperative system, called *Genossenschaftsverbund*. This cooperative system exists from the very beginning of modern cooperatives in Germany, based on positive experience of Hermann Schulze-Delitzsch in the 1860s.

Moreover, the main public function for promoting cooperative societies in Germany is to offer a supportive environment for cooperative development including the spread of knowledge about cooperatives and the way in which cooperative societies work in schools, universities and among political leaders, as recommended by the UN guidelines of 2001 aimed at creating a supportive environment for the development of cooperatives, par. 20; the ILO Recommendation 193 of 2002 on the promotion of cooperatives, par. 4 (b), 8 (1) (f) and (k) and the Communication of the European Commission of 2004 on the Promotion of Cooperatives in Europe, par. 2.2.1 and 2.2.2.

With respect to the degree of cooperative friendliness in the German case, if “cooperative friendliness” stands for effectiveness of a legal pattern regulating the practical and legal matters of cooperative societies in a positive way, the German cooperative Societies Act is “cooperative friendly”. It offers a flexible legal framework, allowing new forms of cooperatives to develop, e.g. family cooperatives, community cooperatives, cooperative village stores or village centers and energy cooperatives.

As already mentioned above, the German cooperative law stipulates that all registered cooperatives must be integrated into a strong network of federations and unions with the audit function as an important branch of their activity.

Over the years, some adjustments to practical needs of cooperative work were made, which deviate from the cooperative principles, e. g.

- introducing “investor members”,
- allowing transactions with non-members and
- allowing the formation of cooperative micro-structures by reducing the minimum number of members to three.

Nevertheless, some critics complain that the legal and organisation costs of forming and running small cooperatives is much higher than those of other associations and societies: They in particular criticize the requirement of pre-registration audit (§§ 11 (2) No. 3 and

11a GenG) and compulsory affiliation to a cooperative auditing federation (§ 54 GenG). These critics suggest introducing a new form of small self-help organizations, indicating in their firm name that the liability of members of such organisation is limited (Philipps 2015, pp. 68, 69).

Overall, German cooperative legislation dating from 1889 is among the oldest codes regulating cooperative societies. Around 1900, German cooperative law has served as a source of inspiration for other countries in Europe and Asia (India, Japan).

As already mentioned above, some recent amendments of 2006 based on the European Cooperative Society (SCE) Regulation of 2003, contain deviations from the classical cooperative principles and have made the law more complicated. e.g.

- social and cultural cooperatives (§ 1 GenG),
- investor members (§ 8 (2) GenG),
- minimum capital (§ 8a GenG),
- plural voting (§ 43 (3) GenG) and
- administrative structure of small cooperatives (§§ 9 (1) and 24 (2) GenG).

Currently, the German Cooperative Societies Act needs no further amendments inspired from cooperative law of other countries.

## IV. Recommendations for the improvement of the national legal framework

Efforts should be concentrated on maintaining the clear profile of cooperative societies as self-help organisations for the promotion of their members in accordance with ICA's cooperative principles. It should be avoided to blur the profile of cooperatives further by allowing more deviations from the original model and from ICA's cooperative principles.

In Germany, shortcomings can be found mainly outside the law. There is a deficit in spreading knowledge about co-operation and cooperatives in schools, universities and among politicians and specialists of the consulting-professions (business consultants, lawyers, staff of chambers of commerce and similar organisations). Cooperative studies have not made it into the mainstream of economic and legal studies and remain what is called in German "*Orchideenfach*" (orchid subject or exotic subject) – interesting to only very few scientists, lecturers and students (see Münkner 2018, pp. 447-463).

According to Beuthien, the positive contributions made by the German cooperative movement in the past tend to be forgotten. Beuthien is complaining of a lack of public engagement and pleads for more support of cooperative societies in public discussions (Beuthien 2018, GenG, Einleitung RZ 20).

What could be done to train cooperative experts has been demonstrated by the 4-year degree course of cooperative economics at Marburg University, Department of Economics, 1964-2002, where a total of 220 cooperative specialists mainly from Africa and Asia were trained (Münkner 2016). Most of them returned to their countries of origin and many worked in fields related to their special training. One of them – Suleymane Kibora Ada – served as Director of the ICA Regional Office for Africa from 1989 to 2004 (Kibora 2016, pp. 49-67).

With respect to suggesting improvements in the German cooperative legislation, it is noted that efforts should be made to keep the cooperative law as clear and simple as possible, avoiding to blur the cooperative profile by deviations from the worldwide recognised cooperative principles, instead of allowing exceptions to the rules. The current German Cooperative Societies Act with its rigidity regarding audit has two main effects: a) access to this legal form is linked to clear conditions b) the number of newly formed cooperatives is small. Despite the critiques – as already mentioned above – cooperatives that are integrated in a strong cooperative network are protected against unfriendly take-over and rarely go bankrupt. Considering also any necessary changes in specific sectors or types of cooperatives, experience with offering financial incentives like in the case of solar energy cooperatives should be repeated in other sectors, e. g. forestry, rural revival.

## V. Conclusions

German cooperative legislation dating from 1889 is among the oldest codes regulating cooperative societies. Around 1900, German cooperative law has served as a source of inspiration for other countries in Europe and Asia (India, Japan). The firmly entrenched obligation of all registered cooperatives to be part of a vertically integrated cooperative system, called Genossenschaftsverbund was identified as a good practice of the German national legislation. It is worth highlighting that this cooperative system exists from the very beginning of modern cooperatives in Germany, based on positive experience of Hermann Schulze-Delitzsch in the 1860s.

However, some critics complain that the legal cost and organisation cost of forming and running small cooperatives is much higher than that for other associations and societies: They in particular criticise the requirement of pre-registration audit (§§ 11 (2) No. 3 and 11a GenG), and compulsory affiliation to a cooperative auditing federation (§ 54 GenG). On the other hand, cooperatives that are integrated in a strong cooperative network are protected against unfriendly take-over and rarely go bankrupt.

With regard to the improvement of the German national legislation, efforts should be concentrated on maintaining the clear profile of cooperative societies as self-help organisations for the promotion of their members in accordance with ICA's cooperative principles. It was also noted that shortcomings can be found mainly outside the law: there is a deficit in spreading knowledge about cooperatives at all levels and need for more support of cooperative societies in public discussions.

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