

## **COOPERATIVE AND (CAPITAL) MARKETS – MEDIATION OF MEMBERS' SHARES BY AN ONLINE-PLATFORM**

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In Austria, the idea of crowdfunding has been linked to a cooperative: CrowdCoopFunding eG (eG: eingetragene Genossenschaft, i.e. registered cooperative) – a crowdfunding platform (<https://crowdcoopfunding.at>) – emerged from an initiative of the Austrian Association of Cooperatives (Schulze-Delitzsch) (Binder, 2015), which offers its members the opportunity to raise equity capital. This is realized by mediation, which is advertised as a form of investment with the invitation “buy shares”. The platform is addressed to existing cooperatives to expand the group of members as well as to new cooperatives (start-up-coops).

This idea opens up an interesting perspective with regard to also a misunderstanding of cooperative membership within a generally observable “market orientation” (e.g. Dreher, 2014).

For a better understanding and clarification of the typical character of membership in a registered cooperative it is helpful to argue on the basis of the current situation of Cooperative Law. The paper concentrates on German Cooperative Law (G-GenG, Genossenschaftsgesetz – GenG) and takes additionally the Austrian Cooperative Law (A-GenG) into account.

### **Membership in a cooperative**

Membership is always based on a legal framework (“constitution”), in particular on the company agreement or on the by-laws, and on the general legal basis (e.g. cooperative law). Membership results from individuals forming a group and promising to pursue jointly and responsibly the purpose of the group or the corporate purpose in a joint and responsible manner (Lutter, 1980).

As a permanent legal relationship, membership is limited in time only by its beginning and its ending. This is legally equivalent to the acquisition and loss of membership: in the case of a new cooperative membership is established from the outset with the company contract and the registration of the cooperative in the cooperative register. If the cooperative already exists, it is possible to join at any time, as an expression of the principle of open membership of the cooperative, which is followed by the variability of part of the capital. Membership is acquired by means of a written declaration of acceptance and approval by the cooperative (Art. 15 (1) G-GenG). Responsibility for approval usually lies with the Management Board (Lang, Weidmüller, 2016, 192, No. 11). The cooperative's membership is recorded in the list of members (Art. 15 (2) G-GenG), which since the end of 1993 is no longer at the registering court but exclusively at the cooperative (Art. 30 (1) G-GenG, Lang, Weidmüller, 2016, 368, No. 1).

## How to become and remain a member

In principle, there is no claim to admission: a person's membership is a legal relationship based on private and autonomous decisions (Lutter, 1980, 97).

Membership expires when the number of members is lower than three (Art. 80 (1) G-GenG), on a liquidation decision (Art. 78 G-GenG), or with the expiry of a certain period of time, provided that the cooperative has been limited to a certain period of time (Art. 79 G-GenG). If the cooperative continues, membership can

- voluntarily end on the initiative of the member (resignation), which takes place at the eG by means of termination (Art. 65 G-GenG), or
- at the instigation of the cooperative (expulsion) (Art. 68 G-GenG).

In both cases the membership of the person concerned ends. While resignation and expulsion are also characteristics of e.g. associations, such a general rule is not envisaged in the case of a corporation. This is an expression of the fixed capital of the corporation. The cooperative is characterized in contrast by open membership (1<sup>st</sup> principle of ICA – International Co-operative Alliance).

## Membership and member's share

As a matter of principle, each member has to take over at least one member's share. The member's share doesn't constitute membership. It is a result of becoming a member that the member pays in capital on their share. The member's share is defined in the German GenG as "an abstract factor to be defined in the Articles of Association which specifies the maximum amount of the contribution - irrespective of the possibility of acquiring several shares" (Lang, Weidmüller, 2016, 123, No. 2). The statutes stipulate in more detail when payments have to be made (with a minimum of one-tenth of the member's share) and how much has to be paid (Art. 7 (1) G-GenG); instalment payments are possible.

Total capital paid up (or due to be paid up) on a member's shares defines the limit of the member's liability, the amount is never higher than the total nominal value of the shares individually held by a member (Lang, Weidmüller, 2016, 124, No. 5, cf. the concept in the law, in particular Art. 19, 22 G-GenG). A cooperative may adopt in its by-law further details of the membership with regard to its economic needs and the financial capacity of their members.

Due to the potentially unlimited number of members, a cooperative can increase its capital at any time – assuming a corresponding interest by (new) members – it has a kind of "permanent emission right" (Hofinger, 1991, 5). However, the cooperative must be able to respond in the opposite direction when members wish to leave the cooperative and get back the capital they paid up on their shares.

### **Distinction of membership**

The differences in transferability influence the understanding of membership as a legal category. In jurisprudence, it is disputed whether membership is (a) a legal relationship from which arise (subjective) rights and obligations, or whether it is (b) to be understood as a subjective right, on which individual rights could be constituted.

There is agreement on the understanding that membership as a permanent relationship creates rights and obligations for members and their association. This so called “bundle” of rights and obligations characterizes the legal position of each member in relation to the company within its specific legal form.

As an independent subject, which combines the sum of rights and obligations of a member in a company taking a particular legal form, the manifold phenomena of concrete membership become marketable, e.g. in the case of the share, and legally clear and easily manageable (Lutter, 1980, 100). This concept, represented in (b), is already very close to the economic theory of property rights (Kramer, 1996) because “rights” are the focus. However, a legal approximation is made more difficult because the concept of private-law ownership in the Anglo-Saxon jurisdictions, in which the theory originates, is wider than the equivalent concept e.g. in Germany or Austria, despite legal regulations being regarded as property rights.

In the case of a cooperative, membership is expressly excluded from case (b) because “the legal order excludes transferability in general and independently of the will of the association and its members” (Lutter, 1980, 101). There is also a fundamental difference between a legal norm, its economic analysis and its historical dimension with its social requirements in both the past and the present.

### **Cooperative membership is not transferable**

Stable capital is achieved by the cooperative by allowing a transfer of all or part of the capital paid in on one or more members' shares (Art. 76 G-GenG). Corporations are instead based on the free transferability of their shares. Here, by contract with a former shareholder, his / her ownership can be taken over completely by a third party, for example, by the acquisition of shares of the seller (derivative acquisition). Membership in an association is non-transferable and irrevocable (Art. 38 German Bürgerliches Gesetzbuch – G-BGB (Civil Law)), insofar as the articles of association do not specify otherwise (Art. 40 G- BGB). Similar to G-BGB, membership in the registered cooperative neither can be transferred in principle nor can it be interpreted as transferable according to general principles. It is highly personal, and thus cannot be sold or traded (Großfeld, 1975, 9).

While Beuthien describes the lack of a solution in the German GenG close to the transferable shares of a private limited company as a “dogmatic structural gap” (Beuthien, 2000, 1163), Steding sees that “any fraudulent or unconsiderate violation of ... [the cooperative] principles ... would bring the legal form of the cooperative constructed by Schulze-Delitzsch from their balance into a misery (Steding, 1998, 46) (see for the area of conflict already Münkner, 1996). However, legislation apparently responded in 2006 insofar as the transfer of part of member's share capital was permitted (Art. 76 (1) G-GenG, Lang, Weidmüller, 2016, 924f., No 1).

Nevertheless, the personal character of co-operative membership is underlined by the strict rule that a legal successor (heir) becomes a member automatically only for the rest of the financial year but continued membership by an heir is possible (Art. 77 (1) and (2) G-GenG).

### **Members' shares and crowd funded capital**

There are circumstances in which a specific amount of capital needs to be collected in a short period of time. Crowdfunding, based on a platform and thus a broader market solution, provides an opportunity to raise capital. Nevertheless, an online-offer inevitably negates the local or regional character of a cooperative because persons who have no relation to the cooperative society and its business are considered as members – better being called: investors. In this case, it is advisable to use the possibility introduced in 2006 to allow investing members to be admitted (Art. 8 (2) G-GenG) but they always have to remain a minority.

Also for this purpose the platform provides electronic support (a membership book), similar to the share register of a company that has issued registered shares. If the platform data of many cooperatives are bundled and administered, they will gain a superior insight into existing participations, which are now available to credit institutions within the framework of the safe custody of securities. With respect to these aspects the cooperative member's share converges to shares of a corporation, characterized by the element of participation in total assets and the transferability of shares on a capital market, i.e. a stock exchange.

As a compromise, each cooperative being interested in funding capital by members' shares installs its own platform and – additionally – its cooperative association offers a platform indicating these cooperatives that use such a platform by themselves and links to it.

### **Participation in cooperative assets?**

Perspectively, an online-platform also works in the direction that Hofinger (1991, 1992) had designed for members' shares with general participation in cooperative assets in Austria at that time. The German GenG has set considerably narrower limits on the extent of divisible reserves in accordance with 3<sup>rd</sup> principle of ICA since at least 1974 (Art. 73 (3) G-GenG) whereas the Austrian Cooperative Law offers a greater freedom of design (Art. 55 (3) and 79 (2) A-GenG).

In no case would membership be transferred, but the capital paid in on a member's shares or parts thereof would be transferred to another member or would be taken over by a person who becomes a member and who credits this capital as payment to his / her member's share(s).

In the case of a transfer, both parties could agree on a higher value than the nominal one, so that for the transferring member part of the reserves would be realized by the transferee member taking the shares without the need for agreement by the cooperative without expanding the legal rights of membership in the cooperative.

However, this could give rise to or continue an expectation that future growth in assets' value could be realized. The general view on the cooperative character could move from personal to capitalistic elements. The cooperative wouldn't value its reserves having grown over several generations in the present or at any time but 'the market' for the takeover of existing members' shares would do so. This could only make sense if the direct way to become a member by paying in nominal amount on member's share is no longer possible or only possible to a limited extent but in this case the cooperative is not open any longer and converges also in this respect to a corporation.

## Conclusion

The idea of an online-platform for members' shares seems to come into conflict with at least two principles that characterize a cooperative: the principle of open membership and the principle of (partly) indivisible reserves which is equivalent with the issuance of shares by nominal value (Blisse, 2015, 187).

It would be unproblematic in terms of freedom of contract but would be unfortunate in terms of future prospects for the cooperative model if cooperatives moved closer to the structure of corporations (joint-stock companies) (see Taisch & Troxler, Switzerland), 2013). The registered cooperative would lose its distinctiveness, as such developments would resemble conversion into a corporation. Even if this were done by cooperative associations, it would send a negative signal, because it would reduce the range of economic forms characterized by their different legal forms. That would impoverish our economic system, by reducing differences and choices – the constituting characteristics of an ecologically and socially responsible market economy.

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