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ACQUISITION OF A SHARE IN THE COOPERATIVE.
COMPARATIVE INTERPRETATION
OF POLISH COOPERATIVE LAW

I. INTRODUCTION

The aim of this article is to discuss specific problems that relate to the acquisition of a share in a cooperative. The article analyzes the concept of a cooperative share, the fulfillment of an obligation to cover it, the consequences of complying with such an obligation for the cooperative member's assets, and the limitation of the cooperative's and its member's claims that arise from declaring of the share (cooperative's claim) and covering of the share (member's claim). The analysis is carried out bearing in mind problems occurring under Polish law. However, those issues are addressed using comparative interpretation, also taking into account legal systems different from the Polish one, in particular German and French law. The result of the analysis is, first and foremost, the clarification of issues related to the acquisition of the share in the cooperative that arise under Polish law. At the same time, the comparative interpretation makes it possible to achieve the second objective of this article, which is to outline the concept of the cooperative share also in the legal systems other than Polish law.

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II. SHARE IN THE COOPERATIVE

The concept of a cooperative share is not defined by Polish law¹. The legal nature of such shares should therefore be determined through an analysis of the provisions requiring that the share be declared by a cooperative member and specifying the legal consequences of such an obligation occurrence and fulfillment. It should be noted that the obligation to declare shares results from the principle of member economic participation in the cooperative. This principle is one of the Rochdale Principles set forth in the Statement on the Cooperative Identity adopted by the International Cooperative Alliance in Manchester in 1995². According to this principle, members of the cooperative contribute equitably to the property of the cooperative and control it democratically. Members of the cooperative can receive small compensation for contributing assets to the cooperative as a condition of acquiring membership. Members decide on the allocation of the balance surplus produced by the cooperative for the following purposes: creation of a financial reserve for the development of the cooperative, part of which will be indivisible between members, payment made to members of the cooperative in proportion to the number of their transactions with the cooperative, use of the balance surplus for other purposes agreed by the membership. It should be noted that the possibility of finding a source of raising capital by cooperatives alternative than members' contributions

¹ Cooperative shares should not be confused with cooperative stocks which are legally defined in a similar way to corporate stocks. Stock is not acquired as a result of the fulfillment of an obligation arising from membership of a cooperative. Cooperative stocks exist in Finnish law. However, this financial instrument is not popular in cooperatives (see: H. Henry (in:) *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Cambridge–Antwerp–Portland 2017, pp. 155–157).

² The International Cooperative Alliance (ICA) is an organization associating cooperatives, cooperative organizations and other organizations controlled by cooperatives or conducting activities related to the development of the cooperative movement (Article 6 of the ICA Articles of Association and Bylaws [ica.coop/en/basics/alliance-rules-and-laws, accessed 12.02.2019]). International Cooperative Principles were expressed in the Statement on the Cooperative Identity, adopted by the 21st Congress of the International Cooperative Alliance in Manchester in 1995. The Statement on the Cooperative Identity contains the definition of cooperatives, cooperative values and Rochdale Principles on which cooperatives should base their activities. The definition of cooperatives, cooperative values and Rochdale Principles are set out in the ICA Bylaws (Articles 5, 6 and 7 of the International Cooperative Alliance Bylaws [ica.coop/en/basics/alliance-rules-and-laws, accessed 12.02.2019]). Therefore, cooperatives are the only entrepreneurs in the world with agreed international operating rules. On the subject of the International Cooperative Principles, see: A. Kurimoto, J. Draperi, J. Bancel, S. Novkovic, M. Wilson, L. Shaw, E.L. Cheney, D. Cracogna: *Guidance Notes to the Co-operative Principles*, Brussels 2015, *passim*; J. Birchall (in:) *Co-operative Governance Fit to Build Resilience in the Face of Complexity*, Brussels 2015, pp. 25–35; P. Zakrzewski: *Zasady Międzynarodowego Związku Spółdzielczego [Principles of the International Cooperative Alliance]*, Kwartalnik Prawa Prywatnego 2005, No. 1, p. 277; H. Cioch: *Zasady rochdalejskie i ich realizacja w praktyce [Rochdale Principles and their Practical Application]*, PAN Oddział w Lublinie. Teza Komisji Prawniczej, Vol. II, Lublin 2009, p. 29; D. Bierecki: *Spółdzielnia europejska w świetle prawa polskiego [European Cooperative Society in the Light of Polish Law]*, Sopot 2017, pp. 88–113. However, it should be noted that the International Cooperative Principles are not legal norms. They are neither international law norms nor international agreements. Those standards are not universally binding. Therefore, it should be assumed that they are the standards of conduct within the organization. The only sanction that can be applied in the case of non-compliance with these principles is the removal of a specific cooperative organization from the ICA.

cannot result in the members losing control over the cooperative in economic terms (e.g. control over the means of production)³.

However, Polish law is an example in which non-share cooperatives can also operate. The 2017 amendment to the Polish Housing Cooperatives Act of 15 December 2000⁴ abolished a member's obligation to contribute shares to a housing cooperative. Thus, housing cooperatives became non-share cooperatives. The financing of their operations is now based only on fees paid by members for the maintenance of cooperative buildings and for costs related to social, educational and cultural activities conducted by the cooperatives. However, these fees should not be regarded as the cooperative capital⁵.

The concept of the cooperative share is not uniformly understood in the Polish legal doctrine. Under the Polish Cooperatives Act of 29 October 1920⁶, the share in the cooperative was interpreted as a corporate right of a member, containing all the member's rights and obligations (Art. 16, 21, 27, 45, 54, 57, 72, 73 of the Polish 1920 Cooperatives Act)⁷. This assumption is not acceptable under the applicable law. In accordance with the applicable Polish Cooperatives Act of 16 September 1982⁸ (PCA), the rights and obligations of the member result from the membership, which relationship should be regarded as having a non-pecuniary nature⁹. The obli-

³ See: J. Bancel (in:) *Guidance Notes...*, *op. cit.*, pp. 39–40.

⁴ Polish Journal of Laws [Dz. U.] of 2018, item 845, as amended.

⁵ See: P. Zakrzewski: *Spółdzielnie mieszkaniowe po zmianach z 2017 r. [Housing Cooperatives after the Changes of 2017]*, *Kwartalnik Prawa Prywatnego* 2018, No. 1, p. 225.

⁶ Polish Journal of Laws [Dz. U.] of 1920, No. 111, item 733.

⁷ See: J. Dzierżanowski: *Ustawa o spółdzielniach. Rozporządzenie o własności lokali [Act on Cooperatives. Ordinance on the Ownership of Premises]*, Warsaw 1938, p. 34; M. Gersdorf (in:) *Ustawa o spółdzielniach i ich związkach. Komentarz [Act on Cooperatives and their Unions. Commentary]*, Warsaw 1963, p. 50.

⁸ Polish Journal of Laws [Dz. U.] of 2018, item 1285, as amended.

⁹ See: K. Pietrzykowski: *Powstanie i ustanie stosunku członkostwa w spółdzielni [Establishment and Termination of Membership of the Cooperative]*, Warsaw 1990, p. 59; A. Jedliński: *Członkostwo w spółdzielczej kasie oszczędnościowo-kredytowej [Membership of the Credit Union]*, Warsaw 2002, p. 170. The private law approach to the nature of the cooperative membership has a complex genesis. Under the Cooperative Act of 29 October 1920, the Polish Supreme Court acknowledged the private law nature of membership of the cooperative (the Supreme Court judgment of 2 March 1936, III OC 692/34, *Orzecznictwo Sądów Polskich* 1937, item 164). However, after World War II, it was even questioned whether a contract could give rise to membership of the cooperative. It was considered whether membership of the cooperative arose from a unilateral act of the cooperative (see: W. Jaśkiewicz: *Prawny stosunek pracy w polskich spółdzielniach pracy [Legal Employment Relationship in Polish Labor Cooperatives]*, Warsaw 1955, p. 106; H. Świątkowski, H. Skiba: *Podstawowe zagadnienia spółdzielczości w Polsce [Basic Problems of Cooperatives in Poland]*, Warsaw 1967, p. 18; A. Stelmachowski: *Komentarz do orzeczenia Sądu Najwyższego z dnia 25 lipca 1968 r., III PRN 25/68 [Commentary on the Supreme Court Judgment of 25 July 1968, III PRN 25/68]*, *Przegląd Spółdzielczego Instytutu Badawczego* 1968, item 1). Moreover, a concept was developed, according to which the solutions of cooperative law were presented in isolation from private law constructs (see: B. Słotwiński: *Zagadnienia prawne samorządu spółdzielni [Legal Issues of the Cooperative Self-Government]*, Warsaw 1973, *passim*; *idem*: *Z teoretycznych zagadnień prawa spółdzielczego [Theoretical Issues of Cooperative Law]*, Warsaw 1973, *passim*). This concept was criticized by S. Grzybowski: *Prawo spółdzielcze w systemie porządku prawnego [Cooperative Law in the System of Law]*, Warsaw 1976, p. 99, and M. Gersdorf: *Prawne zagadnienia samorządności spółdzielni [Legal Issues of the Cooperative Self-Government]*, *Spółdzielczy Kwartalnik Naukowy* 1974, No. 1, p. 21. Pursuant to the other concept, the cooperative and the member concluded a *sui generis* contract (see: R. Bierzanek: *Prawo spółdzielcze w zarysie [Outline of Cooperative Law]*, Warsaw 1984, p. 106). However,

gation to declare a share is an element of the membership relation. This obligation is derived from the acquisition of membership of the cooperative.

As the law now stands, the Polish legal doctrine distinguishes four ways of understanding the cooperative share. First of all, the share in the cooperative should be considered to be a member's debt to the cooperative¹⁰. The other three ways of understanding the cooperative share are based on an analysis of how a cooperative member's obligation is created and fulfilled. Therefore, a distinction should be made between (1) a declared share constituting an obligatory form of the member's commitment to the cooperative, (2) payment for shares made due to the member's performance for the cooperative, and (3) a contributed share determined in accordance with the value of the member's participation in the cooperative capital¹¹. This distinction refers to the German understanding of the cooperative share. In German law a share in the cooperative is regarded in two ways. Firstly, the share (*Geschäftsanteil*) in the cooperative is considered an amount up to which a member can participate in the cooperative (§ 7 para. 1 of the German Cooperatives Act — GCA¹²)¹³. Secondly, the share (*Geschäftsguthaben*) in the cooperative is treated as the legal and financial basis of membership which is significant for the distribution of profits and losses, settlements related to reimbursement for an outgoing member, liquidation, as well as organizational transformation of the cooperative (§ 19 para. 1, § 21 para. 1, § 73 para. 2, § 76 para. 4, § 87a paras 1–2, § 91 para. 1 of GCA)¹⁴. Generally, it can be said that also in Polish law the cooperative share plays a role in the settlements with an outgoing member, distribution of losses, liquidation and organizational transformation of cooperatives. The share can also matter in the case of distribution of profit (balance surplus) of the cooperative, if the articles of association of the cooperative make the amount of the profit attributable to the member dependent on the number of his/her shares (Art. 77 § 2 of PCA). However, it should be noted that the member's claim (*Anspruch*) for payment of the cooperative profit is a right

it has been pointed out in the literature that such a term does not explain the specific nature of this contract that would distinguish it from other private law contracts (see: B. Błażejczak: *Powstanie stosunku członkostwa w spółdzielniach budownictwa mieszkaniowego [Establishment of the Membership Relationship in Housing Cooperatives]*, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1975, No. 2, p. 21).

¹⁰ K. Pietrzykowski: *Spółdzielnia a spółka handlowa [A Cooperative and a Commercial Company]*, *Przegląd Ustawodawstwa Gospodarczego* 1991, No. 6, p. 70; *idem*: *Spółdzielnie mieszkaniowe. Komentarz [Housing Cooperatives. Commentary]*, Warsaw 2013, p. 332.

¹¹ A. Herbet (in:) *Spółdzielcze kasy oszczędnościowo-kredytowe. Komentarz [Credit Unions. Commentary]*, Warsaw 2014, p. 85; P. Zakrzewski (in:) *ibidem*, pp. 150–154; *idem*: *Majątek spółdzielni [Cooperative Capital]*, Warsaw 2003, pp. 39–69; *idem* (in:) *System prawa prywatnego*, Vol. XXI: *Prawo spółdzielcze [Private Law System, Vol. XXI: Cooperatives Law]*, ed. K. Pietrzykowski, Warsaw 2021, pp. 135–141.

¹² *Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften (Genossenschaftsgesetz)* (www.gesetze-im-internet.de, accessed 9.01.2021).

¹³ See: P. Zakrzewski (in:) *System prawa prywatnego*, Vol. XXI..., *op. cit.*, p. 135.

¹⁴ H. Meyer, G. Meulenbergh, V. Beuthien: *Genossenschaftsgesetz mit Umwandlungsrecht [Cooperative and Conversion Law]*, Munich 2000, p. 128; G. Schiemann: *Kündigung und Übertragung des Geschäftsanteils nach neuem Genossenschaftsrecht [Termination and Transfer of the Share According to the New Cooperative Law]*, *Zeitschrift für das gesamte Genossenschaftswesen* 1976, No. 1, pp. 16, 29.

derivative from the membership of the cooperative but from not the cooperative share.

Therefore, under neither Polish nor German law is the share in the cooperative understood as a subjective member's right of a transferable nature¹⁵. However, German law allows transfer of shares between cooperative's members (§ 76 para. 1 of GCA)¹⁶. On the other hand, the rule in Polish law is the lack of the possibility of transferring shares in the cooperative *inter vivos*¹⁷. An exception to this rule are farmers' cooperatives. The transfer of the share in the farmers' cooperative is possible for a resigning member or a person indicated by the deceased member to be returned the shares by the cooperative (Art. 11 paras 4 and 6 of the Act on farmers' cooperatives of 4 October 2018¹⁸). Such a situation can arise before the shares are returned due to termination of membership by notice or death. Another exception is the European Cooperative Society (*Societas Cooperativa Europaea* — SCE), in which case it is possible to transfer a share to a member or a person acquiring membership, based on Art. 4 para. 11 of the Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)¹⁹. Acquisition of a share by a non-member results in a claim for acquiring membership of the SCE. Shares in the farmers' cooperative and the SCE are subjective rights existing next to the cooperative membership. However, those rights are temporary, and the occurrence of a legal event in the form of termination of membership (SCE) or approval of the financial statements for the year in which membership has terminated (farmers' cooperative) causes its transformation into a claim for reimbursement of the member's shares²⁰.

¹⁵ The central issue of the Polish doctrine of private law is the subjective right understood as the subjective possibility (*Gelegenheit*) of acting by the entitled in the manner defined by this right, guaranteed by legal norms and protected by the state. See: A. Wolter, J. Ignatowicz, K. Stefaniuk: *Prawo cywilne. Zarys części ogólnej* [Civil Law. Outline of the General Part], Warsaw 2001, pp. 129, 371; M. Pyziak-Szafnicka (in:) *System prawa prywatnego*, Vol. I: *Prawo cywilne — część ogólna* [Private Law System, Vol. I: Civil Law — General Part], ed. M. Safjan, Warsaw 2012, pp. 780–817; M. Błachut: *Pojęcie prawa podmiotowego we współczesnej liberalnej filozofii prawa* [The Concept of Subjective Right in the Contemporary Liberal Philosophy of Law], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 2002, No. 1, pp. 35–52.

¹⁶ See: P. Zakrzewski (in:) *System prawa prywatnego*, Vol. XXI..., *op. cit.*, p. 136.

¹⁷ According to Art. 16a of PCA, transfer of shares *mortis causa* is effective only if the inheritor is or becomes a member of the cooperative. The acquisition of shares by the inheritor is possible by virtue of law under Art. 922 § 1 of the Polish Civil Code (Act of 23 April 1964: Civil Code, Polish Journal of Laws [Dz. U.] of 2018, item 1025, as amended; hereinafter referred to as PCC) or by *mortis causa* transfer based on the testament. See: P. Zakrzewski: *Dziedziczenie udziału zmarłego członka spółdzielni* [Inheritance of the Share of the Deceased Member of the Cooperative], *Przegląd Prawa Handlowego* 2018, No. 11, pp. 28–33; judgment of the Polish Constitutional Court of 16 June 2015, K 25/12, OTK-A 2015, No. 6, item 82; judgment of the Warsaw Court of Appeal of 14 November 2018, I Aca 505/18, LEX No. 2592953.

¹⁸ Polish Journal of Laws [Dz. U.] of 2018, item 2073.

¹⁹ Official Journal of the European Union, 18.08.2003, L 207/1.

²⁰ See: D. Bierecki: *Spółdzielnia europejska...*, *op. cit.*, p. 269; *idem*: *Zbycie udziału w spółdzielni rolników* [Disposal of Shares in a Farmers' Cooperative], *Pieniądze i Więż* 2019, No. 1, pp. 86–87. A subjective temporary right occurs when the components of a complex factual state, which — according to the hypothesis of a legal norm — give rise to the subjective right, occur successively, and the legal system combines certain legal effects with the

The possibility of transferring (e.g. selling) shares under Polish law only in the case of selected cooperatives does not correspond with foreign solutions where the principle is the transferability of cooperative shares. The possibility of transferring shares between members of cooperatives is allowed by a number of foreign laws, including Austrian²¹, German²², French²³, Italian²⁴, Spanish²⁵ and Finnish²⁶ legislation²⁷. Also, the transferability of shares in the cooperative does not violate the International Cooperative Principles²⁸. In addition, it should be noted that foreign legal systems (in contrast to Polish law) also provide for different categories of shares: shares belonging to users-members, i.e. members benefiting from the activities of the cooperative or providing goods for it or buying goods from it, and shares owned by investing members. The institution of an investing member is present in German²⁹, Austrian³⁰, French³¹, English³², Portuguese³³, Hungarian³⁴ and Finnish³⁵ law.

The capital of cooperatives in the above-mentioned foreign legal systems seems to be shaped in a similar way as in Polish law. The changeability of the cooperative's

elements that have already arisen (see: K. Gandor: *Prawa podmiotowe tymczasowe (ekspektatywy) [Temporary Subjective Rights]*, Ossolineum 1968, p. 88).

²¹ G. Miribung, E. Reiner (in:) *International Handbook of Cooperative Law*, eds. D. Cracogna, A. Fici, H. Henry, Berlin–Heidelberg 2013, p. 241.

²² H.-H. Münkner (in:) *Principles...*, *op. cit.*, p. 307.

²³ D. Heiz (in:) *International...*, *op. cit.*, p. 402.

²⁴ A. Fici (in:) *International...*, *op. cit.*, p. 489.

²⁵ G. Fajardo (in:) *International...*, *op. cit.*, p. 711; *Spain Company Laws and Regulation Handbook*, Washington, D.C. 2012, pp. 218–219.

²⁶ The possibility of transferring shares was guaranteed by the 2001 Finnish Cooperative Act (see: *Prawo o spółdzielczości ogłoszone w Helsinkach 28 grudnia 2001 r. [Law on Cooperatives Published in Helsinki on 28 December 2001]*, Warsaw 2002, pp. 62–63). Under the applicable law, i.e. the 2014 Finnish Cooperative Act, shares are also transferable (see: H. Henry (in:) *Principles...*, *op. cit.*, p. 155). On the evolution of Finnish cooperative law, see: V. Pönkä: *Are Cooperative Societies Transforming into Cooperative Companies? Reflections on the Finnish Cooperatives Act*, *European Business Law Review* 2019, No. 1, pp. 81–84.

²⁷ The possibility of transferring shares is also provided for under Portuguese law. However, Portuguese cooperative law does not separate ownership of shares from the status as a cooperative member (see: D. Meira (in:) *Principles...*, *op. cit.*, pp. 453, 470).

²⁸ The transferability of a share in a cooperative is also allowed under the Principles of European Cooperative Law, developed as a model of cooperative legislation and expressing the characteristics of cooperatives adopted in the International Cooperative Principles. See: G. Fajardo, D. Meira (in:) *Principles...*, *op. cit.*, p. 78.

²⁹ See: H.-H. Münkner (in:) *Principles...*, *op. cit.*, p. 268; R. Kober: *Das „investierende Mitglied“ — Wer und vor allem was steckt dahinter? [The “Investing Member” — Who and, Above all, What is Behind it?]*, *Zeitschrift für das gesamte Genossenschaftswesen* 2010, Vol. 60, No. 1, pp. 37–49.

³⁰ G. Miribung, E. Reiners (in:) *International...*, *op. cit.*, p. 239.

³¹ See: D. Hiez (in:) *Principles...*, *op. cit.*, pp. 180–182; M. Wrzolek-Romańczuk, B. Zdziennicki: *Przyszłość prawa spółdzielczego w Polsce [The Future of Polish Cooperative Law]* (in:) *Prawo spółdzielcze. Zagadnienia materialnoprawne i procesowe [Cooperative Law. Substantive and Procedural Issues]*, eds. A. Herbet, J. Misztal-Konecka, P. Zakrzewski, Lublin 2017, p. 34.

³² See: I. Snaith (in:) *Principles...*, *op. cit.*, p. 686–687.

³³ See: D. Meira (in:) *Principles...*, *op. cit.*, p. 430. On the Portuguese regulation on cooperative capital, see also: *idem*: *The Most Relevant Trend Lines of Cooperative Share Capital Regime in the New Portuguese Cooperative Code*, *International Journal of Cooperative Law* 2018, No. 1, pp. 15–28.

³⁴ See: M. Re'ti (in:) *International...*, *op. cit.*, p. 440.

³⁵ In Finland, cooperatives may issue investor shares based on a board decision even regardless of their bylaws (see: V. Pönkä: *Are Cooperative Societies Transforming into Cooperative Companies? ...*, *op. cit.*, p. 92).

share capital expressed in the increase or decrease of its value in connection with the accession or removal of members from the cooperative is present in all of the legal systems referred to (including Polish law)³⁶. Such nature of the cooperative's capital results from its essence as an organization with open membership³⁷. In general, it can be concluded that membership relationship in a cooperative is the source of both members' rights and obligations, including an obligation to acquire a share in the cooperative³⁸.

Therefore, it should be concluded that introduction of the possibility of transferring shares between members in every type of cooperatives (not only in farmers'

³⁶ However, it should be noted that Polish law provides also for a cooperative with a minimum share capital of EUR 30,000. Such a cooperative is the SCE. Yet this kind of cooperative exists in all of the European Union countries (see: A. Fici (in:) *International...*, *op. cit.*, pp. 144–146; D. Bierecki: *Spółdzielnia europejska...*, *op. cit.*, pp. 292–293; V. Beuthien: *Genossenschaftsgesetz mit Umwandlungs und Kartellrecht sowie Statut der Europäischen Genossenschaft [Cooperative and Conversion Act and the Statute of the European Cooperative Society]*, Munich 2004, p. 1216). The possibility of establishing the minimum share capital of a cooperative is also provided for in German law (see: H.-H. Münkner (in:) *Principles...*, *op. cit.*, p. 303; *idem: Ten Lectures on Cooperative Law*, Zurich 2016, p. 100). The capital of the SCE and some cooperatives under German law is changeable yet has its minimum value. In such cases, redemption of the share with respect to a former member of the cooperative may be limited by the obligation of the cooperative to maintain the minimum share capital. In France, the minimum capital of a cooperative depends on nature of a legal entity that becomes a cooperative (see: D. Hiez (in:) *Principles...*, *op. cit.*, p. 211). In France, the cooperative is not a separate type of legal entity. The form of the cooperative may be adopted by a limited liability company, a joint stock company or a simplified joint stock company (see: Art. 19-5 Loi n° 47-1775 du 10 septembre 1947 portant statut de la coopération [www.legifrance.gouv.fr, accessed 15.03.2019]); on cooperatives in France, see also: A. Suchoń: *Wpływ polityki i prawa Unii Europejskiej na rozwój spółdzielni rolniczych w wybranych krajach członkowskich [The Impact of European Union Policy and Law on the Development of Agricultural Cooperatives in EU Selected Member States]*, Przegląd Prawa Rolnego 2015, No. 1, pp. 105–108). A cooperative is not a separate legal entity in Italian law, either. In Italian law, the cooperative is a type of company regulated by the provisions of the Italian Civil Code (*Il Codice Civile Italiano*), special laws on particular types of cooperatives and, to some extent, by regulations on joint-stock companies and limited liability companies (see: A. Fici (in:) *Principles...*, *op. cit.*, pp. 348–350). On the other hand, in Polish and German law, as well as in Austrian and Swiss law, a cooperative is a legal entity different from an association and a company (e.g. a limited liability company or a joint-stock company) (see: P. Zakrzewski: *Z zagadnień konstrukcji prawnej spółdzielni [On the Legal Construct of a Cooperative]*, Rejent 2004, pp. 121–125; *idem: Legalna definicja spółdzielni [Legal Definition of a Cooperative]* (in:) *Państwo — Konstytucja — Prawo. Księga pamiątkowa poświęcona Sędziemu Trybunału Konstytucyjnego Profesorowi Henrykowi Ciochowi [State — Constitution — Law. A Commemorative Book Dedicated to Professor Henryk Cioch, Judge of the Constitutional Tribunal]*, Warsaw 2018, pp. 526–528). A cooperative is also a separate legal entity in Portuguese law (see: D. Meira (in:) *Principles...*, *op. cit.*, pp. 413–415).

³⁷ The voluntary and open membership is one of the fundamental cooperative principles expressed in legal definitions of a cooperative around the world and by the 1st Rochdale Principle. On application of the voluntary and open membership principle due to racial discrimination in the New York City, see: R. Maldonado, R.D. Rose: *The Application of Civil Rights Laws to Housing Cooperatives: Are Co-ops Bastions of Discriminatory Exclusion or Self-Selecting Models of Community-Based Living?*, Fordham Urban Law Journal 1996, Vol. 23, No. 4, pp. 1245–1282.

³⁸ Under Polish law, membership of the cooperative should be considered a combination of three different types of related subjective rights. First of all, it is as a right of membership itself, i.e. affiliation to the cooperative. Secondly, these are entitlements of corporate nature, such as: the right to vote at the general assembly of the cooperative (Art. 18 § 2 para. 1 of PCA), active and passive electoral rights to the cooperative bodies (Art. 18 § 2 para. 2 of PCA) or the right to appeal to the general meeting against a decision of another cooperative body (Art. 24 § 6 para. 1 of PCA). Thirdly, these are private law rights related to membership, such as a claim for share reimbursement or, in most cooperatives, the right to participate in the distribution of the balance surplus (see: D. Bierecki: *Spółdzielnia europejska...*, *op. cit.*, pp. 254–255).

cooperatives and SCEs) into Polish law will not undermine in any way the legal nature of the cooperative. The legal nature of the cooperative is not affected by the recent introduction of the possibility of selling shares in farmers' cooperatives, to which general provisions on cooperatives apply. It seems that regulations allowing the transfer of shares in farmers' cooperatives and in SCEs should be used as a model for solutions that would allow transfer of a share in other types of cooperatives. Therefore, the provision on the transfer of a share in the cooperative introduced to Polish law should result in defining a share as a member's temporary subjective right.

III. COVERING A SHARE IN THE COOPERATIVE

As indicated (see II above), using the term of payment for shares is one of the ways of applying the concept of a cooperative share. As a result of a member's declaration of the share, the cooperative acquires the right to claim payment which should be met within the time limit specified in the cooperative's articles of association (Art. 5 § 1 para. 3 of PCA)³⁹. An obligatory relationship arises, which should be complied with by the cooperative's member in accordance with the provisions on the fulfillment of obligations (Art. 450–470 of PCC). The member's failure to fulfill this obligation may result in the *ex contractu* liability under the PCC provisions (Art. 471) in the amount in which the consequence of such failure defined in the cooperative's articles of association does not cover of the cooperative's damage (Art. 5 § 1 para. 3 of PCA).

Polish legal doctrine accepts a general, unformulated principle of causality of legal activities that lead to an increment for another party⁴⁰. Therefore, the payment to cover the declared share (an increment of the cooperative) is made by a cooper-

³⁹ In German law, the date of payment for shares may be indicated by the cooperative's articles of association or stipulated in the resolution of the cooperative's general assembly (§ 50 of GCA).

⁴⁰ The causality principle in relation to incremental legal activities is derived from Roman law (on the historical development of the principle of causality in contract law, see: T. Breckamp: *Causa. Der Zweck als Grundpfeiler des Privatrechts [Causa. The Purpose as a Cornerstone of Private Law]*, Berlin 2008, pp. 23–143; E.G. Lorenzen: *Causa and Consideration in the Law of Contracts*, Yale Law Journal 1919, Vol. XXVIII, No. 7, pp. 621–646; L. van Vliet: *Iusta Causa Traditionis and its History in European Private Law*, European Review of Private Law 2003, No. 3, pp. 342–375). The Polish legal doctrine has developed two theories of causality: a subjective *causa*, according to which the *causa* is a legal objective or a legal basis for increment (see: W. Czachórski: *Czynności prawne przyczynowe i oderwane w polskim prawie cywilnym [Causal and Abstract Legal Acts in Polish Civil Law]*, Warsaw 1952, p. 36.; S. Grzybowski (in:) *System prawa cywilnego*, Vol. I: *Część ogólna [Civil Law System, Vol. I: General Part]*, ed. S. Grzybowski, Ossolineum 1985, pp. 504–506; M. Pyziak-Szafnicka: *Uznanie długu [Recognition of Debt]*, Warsaw 1996, pp. 82–89; A. Wolter, J. Ignatowicz, K. Stefaniuk: *Prawo cywilne...*, *op. cit.*, p. 270) and an objective *causa*, according to which the *causa* is part of the contractual content (see: E. Drozd: *Przeniesienie własności nieruchomości [Transfer of Ownership of Immovables]*, Cracow 1974, pp. 98–99, 107; Z. Radwański (in:) *System prawa prywatnego*, Vol. II: *Prawo cywilne — część ogólna [Private Law System, Vol. II: Civil Law — General Part]*, ed. Z. Radwański, Warsaw 2008, p. 1 98; A. Szlęzak: *Przewłaszczenie na zabezpieczenie rzeczy przyszłych, rzeczy oznaczonych co do gatunku oraz nieruchomości [Transfer of Ownership to Secure*

ative member *causa solvendi*, as fulfillment of an obligation that stems from declaring the share in the membership declaration drawn up in writing *ad solemnitatem* (Art. 16 § 1 of PCA) or an obligation resulting from subsequent declaration of the share in writing *ad probationem* (Art. 16 § 2 of PCA). It seems that such an obligation arises as a result of an agreement concluded between the cooperative and its member, in the case of which the written form is required solely to determine the member's will. Membership of the cooperative is acquired by way of an agreement on joining the cooperative between a member and the cooperative. The membership declaration, which specifies the number of shares declared by the member, constitutes an offer to conclude the contract, accepted by the cooperative body stipulated in the articles of association (Art. 16 § 1 and 17 § 4 of PCA). It should be assumed that an offer as a form of concluding a contract applies also to the contract for subsequently declared shares, after the acquisition of the membership. It seems that the increment depends in this case on the consent of the cooperative (this is laid down *expressis verbis* in German law, under § 15b para. 3 of GCA). It cannot be claimed that membership of the cooperative provides the right to declare further shares. An obligation to declare other shares after the acquisition of membership may arise only from the cooperative's articles of association. However, in such a case, this obligation would constitute the content of the agreement on joining the cooperative. The cooperative's articles of association become part of the private law relationship resulting from such a membership agreement⁴¹.

Therefore, if the declared share is the member's debt to the cooperative, the validity of the contribution made by the member to the cooperative depends on the validity of the obligation arising from the declaration of such share. The invalid-

Future Goods, Generic Goods and Immovables], Rejent 1995, No. 5, p. 116; A. Szpunar: *Zabezpieczenia osobiste wierzycielności [Personal Security for Claims]*, Sopot 1997, p. 34).

⁴¹ A cooperative is formed as a result of the founders' agreement to establish the cooperative, concluded pursuant to a special procedure stipulated in Art. 6 § 1 of PCA, and the articles of association are part of this agreement (see: K. Pietrzykowski: *Powstanie i ustanie...*, *op. cit.*, p. 95, 101; S. Szer: *Prawo cywilne. Część ogólna [Civil law. General Part]*, Warsaw 1967, p. 262; S. Grzybowski: *Sytuacje prawne w toku tworzenia spółdzielni oraz odpowiedzialność założycieli [Legal Situations in the Course of Forming a Cooperative and Obligations of the Founders]*, *Spółdzielczy Kwartalnik Naukowy* 1987, No. 2, p. 25; B. Błażejczak: *Lokatorskie prawo do spółdzielczego lokalu mieszkalnego [A Member's Right to the Cooperative Flat]*, Poznań 1979, p. 41; R. Longchamps de Berier: *Studia nad istotą osoby prawniczej [Study of the Nature of a Legal Person]*, Lviv 1911, p. 187; M. Wrzolek-Romańczuk: *Rejestr spółdzielni. Zagadnienia materialnoprawne i procesowe [Register of Cooperatives. Substantive and Procedural Issues]*, Warsaw 1986, p. 91). However, some authors classify the agreement establishing a cooperative as a *sui generis* civil partnership contract (see: A. Miączyński: *Prawo spółdzielcze*, Vol. I: *Zarys wykładu części ogólnej [Cooperatives Act, Vol. I: Overview of the General Part]*, Cracow 1981, p. 53; Z. Żabiński: *Charakter prawny statutu spółdzielni [Legal Nature of the Cooperative's Articles of Association]*, *Spółdzielczy Kwartalnik Naukowy* 1976, No. 1, p. 80; R. Bierzanek: *Prawo spółdzielcze...*, *op. cit.*, p. 68). After the cooperative is registered, its articles of association are transformed into a contract binding the cooperative with its individual members (see: K. Pietrzykowski: *Powstanie i ustanie...*, *op. cit.*, p. 102). Consequently, it should be stated that after the cooperative's registration, its articles of association become an element of specific membership relationships in the cooperative. They are part of the cooperative membership, arising, in the case of its founders, from concluding an agreement establishing the cooperative and its registration, and in the case of other members, from the cooperative's acceptance of a membership declaration.

ity of such obligation may be due to failure to observe the written form of the membership declaration (Art. 16 § 1 of PCA and Art. 73 § 1 of PCC) or from the invalidity of the agreement establishing the cooperative. The invalidity of the obligation resulting from the declared share will always lead to the obligation of the cooperative to return the payment made by the member as an undue contribution (*condictio sine causa*, Art. 410 § 2 of PCC). The provisions of the cooperative's articles of association, or a separate agreement, cannot stipulate a different solution that would maintain the validity of the increment despite the invalidity of the obligation. In Polish law, there is no rule corresponding to the German principle of separation (*Trennungsprinzip*) which makes it possible to sever the validity of the increment from the validity of the obligation (*Abstraktionprinzip*)⁴².

It should also be pointed out that the obligation to pay for the share arises *solo consensus* from the share declaration. The member's declaration and its acceptance by the cooperative (hence the contract for admission to the cooperative) cause the obligation by virtue of the declared share. Although the object of the performance may be money or other generic goods, the obligation does not arise after *traditio corporalis*. Article 155 § 2 of PCC, which defines the real nature of the contractual obligation to transfer ownership of generic goods, shall not apply⁴³. This conclusion also results from Art. 77 § 3 of PCA, according to which the cooperative can deduct a part of the balance surplus acquired by the member to cover the declared but unpaid shares.

⁴² In accordance with the principle of separation (*Trennungsprinzip*), the transfer of property requires the conclusion of a separate contract (*Verfügungsgeschäft*) from the one stipulating an obligation to transfer property (*Verpflichtungsgeschäft*). The invalidity of the obligation (*causa*) does not affect the validity of the contract resulting in the transfer of property as it has an abstract nature (*Abstraktionprinzip*). See: L. van Vliet: *Iusta Causa Traditionis...*, *op. cit.*, pp. 376–378; *idem*: *Transfer of Property Inter Vivos*, Maastricht 2017, pp. 11–14, 20–22; M. Gutowski: *Nieważność czynności prawnej [Invalidity of the Legal Activity]*, Warsaw 2012, pp. 353–354; K. Sadowski: *The Abstraction Principle and the Separation Principle in German Law*, *Przeegląd Prawniczy Uniwersytetu im. Adama Mickiewicza* 2014, Vol. 4, pp. 237–243.

⁴³ In Polish law, the transfer of ownership rules were adopted after French civil law (on the global influence of French civil law, see: X. Blanc-Jouvan: *Worldwide Influence of the French Civil Code of 1804, on the Occasion of its Bicentennial Celebration*, Cornell Law School Berger International Speaker Papers 2003, Paper 3 [http://scholarship.law.cornell.edu/biss_papers/3, accessed 15.03.2019]). In both Polish and French legal systems, the rule is that the transfer of ownership is effective *solo consensu*. However, the transfer of generic goods and future goods requires *traditio corporalis* (see: L. van Vliet (in:): *Comparative Property Law. Global Perspectives*, eds. M. Graziadei, L. Smith, Cheltenham, UK — Northampton, MA, U.S. 2017, pp. 151–152, 156; G. Hellinger: *The Proprietary Effects of Contracts* (in:): *The Code Napoléon Rewritten. French Contract Law after the 2016 Reforms*, eds. J. Cartwright, S. Whittaker, Oxford–Portland, Oregon 2017, pp. 210–211; W. Borysiak: *Transfer of Property in Polish Law: Causality and Abstraction*, *Studia Iuridica* 2013, Vol. LVI, pp. 65–68). On the other hand, it should be concluded that in the abstract-*traditio* system of property transfer applicable under German law, the transfer of property to a cooperative as a share contribution always requires *traditio corporalis* (see: L. van Vliet (in:): *Comparative Property Law...*, *op. cit.*, pp. 154–155, 160; K. Sadowski: *The Abstraction Principle...*, *op. cit.*, p. 238). The abstract-*traditio* system of property transfer is applied also under the South African law (see: P.J.W. Schutte: *The Characteristics of an Abstract System for the Transfer of Property in South African Law as Distinguished from a Causal System*, *European Journal of Comparative Law and Governance* 2013, pp. 1–22).

The cooperative's articles of association should determine the amount of a member's declared share (Art. 5 § 1 para. 3 of PCA). The cooperative's articles of association may also define the method in which the member's shares should be covered. In the absence of such a provision, the share may be covered in cash or in kind. However, a separate contract is required to cover the share in kind as the declared share gives rise to a cash obligation⁴⁴. In this case, the member's performance should be through *datio in solutum*, when the obligation to cover the share remains in force but the form of the member's performance resulting from this obligation is different (Art. 453 of PCC)⁴⁵. A separate agreement between the member and the cooperative is required (*pactum de in solutum dando*) which results in *facultas alternativa* to cover the share in cash or in kind. In this case, the transfer of ownership will be based on a contract performed *causa solvendi*, the effect of which is solely the disposition (proprietary contract) but not the creation of an obligation⁴⁶. The *causa* of this proprietary contract results jointly from the contract that gives rise to the obligation (to cover the declared share) and the *pactum de in solutum dando*⁴⁷. As indicated by the Polish Supreme Court, in the case of transfer of ownership of the real estate through *datio in solutum*, the form of the notarial deed is required only for a proprietary contract in which the *causa* of ownership transfer should be stipulated (Art. 158 of PCC)⁴⁸.

In addition, it should be noted that under the 1920 Polish Cooperative Act, the case law acknowledged that shares in a cooperative can be covered by issuing a bill of exchange⁴⁹. It seems that there is such a possibility also under the law as it stands. However, it should be remembered that even if a share in the cooperative is covered in a non-pecuniary manner or by a bill of exchange, the reimbursement of the share is always made in cash (Art. 26 § 1 and Art. 27 § 1 of PCA).

⁴⁴ On the other hand, in German law, a share in the cooperative can be covered in kind only if the cooperative's articles of association allow this (§ 7a para. 3 of GCA). See: H.-H. Münkner (in:) *Principles...*, *op. cit.*, p. 304.

⁴⁵ On the topic of *datio in solutum*, see: P. Franceschetti, M. Marasca: *Le Obbligazioni [Law of Obligations]*, Dogana (Repubblica di San Marino) 2008, pp. 167–171. See also: the Polish Supreme Court judgment of 15 September 2005, II CK 68/05, LEX No. 479353.

⁴⁶ See: P. Drapała: *Świadczenie w miejsce wykonania (datio in solutum) [Provision in Place of Performance (Datio in Solutum)]*, Państwo i Prawo 2003, No. 12, pp. 30–34.

⁴⁷ A. Sylwestrzak: *Świadczenie w miejsce wypełnienia. Glosa do wyroku Sądu Najwyższego z dnia 3 lipca 2008 r., IV CSK 149/08 [Provision in Place of Performance (Datio in Solutum). Commentary on the Supreme Court Judgment of 3 July 2008, IV CSK 149/08]*, Gdańskie Studia Prawnicze — Przegląd Orzecznictwa 2009, No. 3, p. 54.

⁴⁸ Polish Supreme Court judgment of 3 July 2008, IV CSK 149/08, Biuletyn Sądu Najwyższego 2008, No. 10, p. 13.

⁴⁹ See: K. Pietrzykowski: *Prawo spółdzielcze. Ujednolicone teksty ustaw. Orzeczenia Sądu Najwyższego [Cooperative Law. Consolidated Laws. Decisions of the Supreme Court]*, Zielona Góra 1995, p. 36.

IV. SURROGATION OF A COOPERATIVE MEMBER'S ASSETS

A member's debt, that is a declared share, is correlated with the cooperative's claim to make payment for the share. On the other hand, the member is entitled to claim reimbursement of the share (share redemption) in the event of termination of cooperative membership. This situation is common in cooperatives around the world⁵⁰. The acquisition of a claim by the member in exchange for property transferred to the cooperative is typical of the principle of subrogation (*Singularsurrogation*) established in some cases by legal norms to secure the person's assets. The assumption behind the principle of subrogation is the substitution of property, which results from a single legally relevant event⁵¹. The substituted assets may have a similar or different nature as long as they are pecuniary subjective rights of the same value. This situation occurs when a share is covered (not just declared) as the cooperative's member acquires a reimbursement claim in exchange of contributed property.

Based on the principle of subrogation, the value of substituted property may be determined subjectively, when the exchange takes place according to the will of a person who benefits from that principle (e.g. property substitution for the person's separate assets⁵²). On the other hand, if the exchange occurs regardless of the person's will, the value should be defined in an objective way. Payment for the cooperative share is always made according to the will of the member expressed in the membership declaration or the declaration of subsequent shares. However, in cooperative law, the value of the claim for share reimbursement is determined on the basis of the share value specified in the cooperative's articles of association. This value determines the value of the reimbursement claim also when the share is covered in kind rather than in cash. The cooperative's performance relative to the member's claim is also compliant with the principle of subrogation as it always takes place in cash, regardless of whether the share has been covered in cash or kind⁵³. Therefore, the presence of the principle of subrogation applicable to the cooperative member's assets should be noted in Polish cooperative law as the acquisition of a claim for share reimbursement takes place in exchange for the member's property acquired by the cooperative to cover the share. This situation should be considered

⁵⁰ See: H. Henry: *Guidelines for Cooperative Legislation*, Geneva 2012, p. 78; H.-H. Münkner: *Ten Lectures...*, *op. cit.*, p. 100; A.M. Andrews: *Analiza kapitału spółdzielczego [Analysis of Cooperative Capital]*, Sopot 2015, p. 17; *The Process for the Redemption of Shares in Co-operative Banks in Different EU Member States. A Comparative Overview*, Brussels 2012; M. Lund: *Cooperative Equity and Ownership: An Introduction*, Madison, Wisconsin 2013, pp. 31–32.

⁵¹ On the surrogation principle in Polish, French and German law, see: E. Kitłowski: *Surogacja rzeczowa w prawie cywilnym [Substantive Surrogation in Civil Law]*, Warsaw 1969, pp. 5–43.

⁵² In the German legal doctrine, this kind of surrogation is referred as *Universalsurrogation* (*ibidem*, p. 13).

⁵³ It should be also noted that under Polish law the entitlement to a claim for payment of the cooperative balance surplus cannot be considered a consequence of the principle of surrogation of the cooperative member's assets as this claim is a right derived from membership of the cooperative and not from holding a share in the cooperative.

subrogation that occurs regardless of the existence of a person's separate assets (*Singularsurrogation*)⁵⁴.

The moment when a member acquires the right to claim reimbursement of a share is defined equivocally in the Polish legal doctrine. Some authors argue that in Polish law a reimbursement claim in relation to the share arises as a consequence of termination of membership of the cooperative or cancellation of subsequent (not obligatory) shares (Art. 21 of PCA)⁵⁵. Others, however, claim that the share reimbursement claim arises still during membership of the cooperative⁵⁶. I regard the first approach as appropriate. Termination of membership or cancellation of a subsequent share results in cessation of the share understood as a legal title to the cooperative's increment. This gives rise to a claim for reimbursement of payment made to cover the share. However, it could be argued whether before such termination a member of the cooperative is entitled to a temporary claim (subjective temporary right), which emerges the moment that the member covers the share and is transformed into a fully-fledged reimbursement claim in the event of considered termination⁵⁷. This approach would correspond with the discussed principle of subrogation of the cooperative member's assets as the reimbursement claim for payments made for shares arises due to a single legally relevant event (the member's contribution to cover the share). Moreover, this view coincides with an argument raised under the German cooperative law, according to which a claim (*Anspruch*) for share reimbursement arises as a conditionally suspended right upon payment for the share⁵⁸. It should be also noted that the Polish legislator treated similarly the legal nature of shares in farmers' cooperatives since they are shaped as temporary claims (subjective temporary rights) for reimbursement of payments made to cover the shares. Also shares in the SCE should be regarded as temporary claims.

⁵⁴ For instance, such situation is present also in Polish law in the regulation on unjust enrichment. In the event of disposal of the obtained benefit, the settlement by the unjustly enriched person can be made in cash even if the unjust enrichment has taken place in kind (Art. 406 of PCC).

⁵⁵ See: R. Bierzanek: *Prawo spółdzielcze...*, *op. cit.*, Warsaw 1984, p. 133; H. Cioch: *Zarys prawa spółdzielczego [Outline of Cooperative Law]*, Warsaw 2007, p. 50; M. Gersdorf (in:) *Ustawa o spółdzielniach...*, *op. cit.*, p. 51; *idem* (in:) *Prawo spółdzielcze...*, *op. cit.*, p. 78.

⁵⁶ See: L. Stecki: *Prawo spółdzielcze [Cooperative Law]*, Warsaw 1979, p. 49; K. Stefaniak: *Prawo spółdzielcze. Ustawa o spółdzielniach mieszkaniowych. Komentarz [Cooperative Law. Housing Cooperatives Act. Commentary]*, Warsaw 2014, pp. 74–75.

⁵⁷ P. Zakrzewski: *Majątek...*, *op. cit.*, p. 196.

⁵⁸ See: K. Müller: *Kommentar zum Gesetz betreffend die Erwerbs und Wirtschaftsgenossenschaften. Zweiter Band (§ 43–93) [Commentary on the Law on Trade and Business Cooperatives. Second Volume (§ 43–93)]*, Bielefeld 1980, p. 646; H. Meyer, G. Meulenbergh, V. Beuthien: *Genossenschaftsgesetz...*, *op. cit.*, pp. 673–674; R. Schubert, H.K. Steder: *Genossenschaftshandbuch. Kommentar zum Genossenschaftsgesetz, den steuerlichen und wettbewerbsrechtlichen Regelungen sowie Sammlung einschlägiger Rechtsvorschriften [Cooperatives Handbook. Commentary on the Cooperatives Act, Tax and Competition Regulations as well as the Collection of Relevant Legislation]*, Berlin 1973, § 73, No. 10; P. Pöhlmann (in:) *Genossenschaftsgesetz. Kommentar zu dem Gesetz betreffend die Erwerbs und Wirtschaftsgenossenschaften und zu umwandlungsrechtlichen Vorschriften für Genossenschaften [Cooperatives Act. Commentary on the Law on Trade and Business Cooperatives and on Legislation on Conversion of Cooperatives]*, Munich 2001, p. 348 (quotation after P. Zakrzewski: *Majątek...*, *op. cit.*, p. 195, reference no. 79).

V. LIMITATION OF THE COOPERATIVE AND MEMBER CLAIMS

Polish cooperative law stipulates the three-year limitation period for a member's claim for share reimbursement (Art. 29 § 1 of PCA). On the other hand, the PCA does not contain provisions limiting the cooperative's claim for covering a share. Therefore, it is necessary to apply the general PCC provisions on limitation of claims. These regulations, included in the general part of the PCC, are applicable to all types of civil law claims, except for the exceptions explicitly laid down in the law. The scope of these regulations embraces both the length of the limitation periods for certain claims, as well as the effects of the lapse of these time limits. The standard limitation period for a claim is six years, unless the claim concerns a periodic settlement or is related to business activity, because then it elapses after three years (Art. 118 of PCC). A claim related to payment for a share is not a claim for periodic settlement, as its maturity does not recur over time. Such claim is not related to the cooperative's business activity, either, since an event that gives rise thereto (acquisition of membership of the cooperative, declaration of a share by a member) does not involve services provided by the cooperative, sale or purchase of goods traded by the cooperative or production organized by the cooperative. Therefore, the cooperative's claim against the member for payment for a share is subject to a six-year limitation period. The limitation periods cannot be modified by a legal activity (Art. 119 of PCC)⁵⁹.

As the law currently stands, GCA does not provide for a limitation period for a member's claim for the reimbursement of a share. The repealed § 74 of GCA stipulated that the member's claim for share reimbursement was subject to a two-years limitation period⁶⁰. Like the Polish law, GCA does not specify a limitation period for the cooperative's claim to cover a declared share. Therefore, in both cases it is necessary to refer to general provisions on limitation in German law. The standard in German law is a three-year limitation period (*Verjährungsfrist*), as provided for under § 195 of *Bürgerliches Gesetzbuch*⁶¹ (BGB). However, if the share is covered by way of the transfer of property ownership, the limitation period for the cooperative's claim is ten years (§ 196 of BGB)⁶². It should be also noted that German law allows modifications of limitation periods (*a contrario* § 202 (1) and (2) of BGB).

⁵⁹ As an exception, under Polish law, the modification of the limitation period is possible in the case of claims regulated by the Maritime Code (Art. 8 § 1 of the Act of 18 of September 2001: Maritime Code, Polish Journal of Laws [Dz. U.] of 2018, item 2175, as amended). However, as a rule the modification of limitation periods is not allowed (Art. 119 of PCC).

⁶⁰ See: J. Lang, L. Weidmüller: *Genossenschaftsgesetz (Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften)* [*Cooperatives Act (Law on Trade and Business Cooperatives)*], eds. H. Baumann, E. Metz, W. Kessel, Berlin–New York 1974, pp. 384–385.

⁶¹ www.gesetze-im-internet.de, accessed 9.01.2021.

⁶² On limitation periods in German law, see: F. Pardey: *Berechnung von Personenschäden [Calculation of Personal Injury]*, Heidelberg 2010, pp. 129–130.

In Polish private law, the principle is that as a result of the limitation of a claim the debtor is able to evade the obligation to make a settlement to the creditor. The debtor's evasion of the obligation takes place by raising the limitation *exceptio* (Art. 117 § 2 of PCC). This *exceptio* is of a substantive and *peremptoriae* nature. In judicial proceedings, if such *exceptio* is raised, the court acknowledges a motion to dismiss the claim. Having raised the limitation *exceptio*, the creditor cannot take advantage of the state's coercion measure to protect their right, i.e. court protection and enforcement of the claim. The debtor's obligation loses its private law nature and becomes a natural obligation. However, the last year amendment to PCC⁶³ resulted in the application of these general rules to legal and natural persons, except when those persons should be recognized as consumers (*Verbraucher*) in private law relations. In the case of a limitation period for a claim with respect to the consumer, the creditor cannot bring an action against the consumer in court. The conversion of the consumer's private law obligation into a natural obligation takes place *ex lege* as a result of the limitation period for the claim. The lapse of the limitation period for a claim against the consumer should result in the court's decision to dismiss a case *ex officio* (Art. 117 § 2¹ of PCC). The consumer does not have to raise the limitation *exceptio* in order to evade the obligation to settle the claim with the creditor⁶⁴. However, Polish regulations on the limitation period for claims against consumers should be considered unique compared to foreign legal systems⁶⁵. In German law, the limitation period in the case of all types of claims means that the debtor may evade the obligation to settle the claim with the creditor by raising the limitation *exceptio* (*Verjährungseinrede*) (§ 214 (1) of BGB).

As the law now stands, according to Art. 22¹ of PCC a consumer is a natural person who undertakes a legal activity together with an entrepreneur, which activity is not directly related to his/her business or professional activity. Therefore, there should be no doubt that the possibility of being considered a consumer occurs only in a private law relationship arising from a legal activity conducted together with the entrepreneur. Such activities are certainly contracts concluded by consumers with entrepreneurs.

To be recognized as an entrepreneur (*Unternehmer*), a cooperative must conduct economic activity on its own behalf (Art. 43¹ of PCC). However, even if a member joining the cooperative concludes a contract of membership, he/she cannot be regarded as a consumer in a membership relationship formed with the cooperative,

⁶³ Polish Journal of Laws [Dz. U.] of 2018, item 1104.

⁶⁴ See: P. Machnikowski: *Nowelizacja przepisów kodeksu cywilnego o przedawnieniu roszczeń* [Amendments to Civil Code Provisions on Limitation Periods for Claims], *Przeгляд Sądowy* 2018, No. 9, pp. 7–19; D. Bierecki: *Nowe regulacje przedawnienia roszczeń* [New Regulations on Limitation Periods for Claims], *Rejent* 2018, No. 10, pp. 9–24.

⁶⁵ See: S. Osing, F. Neumeier: *Limitation Periods in Construction Law: an International Overview and Comparison, Exemplified by Common and Civil Law Jurisdictions*, *Construction Law International* 2012, Vol. 7, No. 3, pp. 35–41.

even considering his/her debt arising from the declaration of a share. The recognition of cooperative members as consumers (as provided for under Art. 22¹ of PCC) would not correspond with the *ratio legis* of the membership relationship in a corporation⁶⁶. It would also lead to distinguishing members of the cooperative since founders of the cooperative cannot be considered consumers when they undertake a legal activity that results in establishing the cooperative (Art. 6 § 1 of PCA)⁶⁷.

Therefore, the limitation period for the cooperative's claim against its member in relation to the settlement of his/her share is subject to Art. 117 § 2 and not Art. 117 § 2¹ of PCC. In the event the limitation period for such claim lapses, the member can evade the obligation to make the payment to the creditor (cooperative) by raising the limitation *exception*, i.e. by arguing the claim is time barred. Consequently, the court cannot dismiss the case against the member *ex officio* as the limitation period for the cooperative's claim does not result in the *ex lege* conversion of the member's private law obligation into the natural obligation.

However, even greater doubts arise in the event of *facultas alternativa* as a result of the conclusion of *pactum de in solutum dando* between the cooperative (entrepreneur) and its member, which entitles the member to fulfill his/her obligation to cover the declared share in a form other than cash (see III above). Such contract (*pactum de in solutum dando*) is concluded by a member of the cooperative in a scope not directly related to his/her business activity. It could seem that in this case the cooperative member should be considered a consumer. However, the conclusion of *pactum de in solutum dando* results in a modification of the existing civil law relationship, and in not creating a new such relationship. The *facultas alternativa* entitlement arises but the original obligation remains as part of the cooperative membership. By virtue of the nature of such a membership relation, it is not possible to recognize a member of the cooperative as a consumer. In addition, since the member's debt, and thus the cooperative's claims correlated with it, remain unchanged, *pactum de in solutum dando* does not affect the running of the limitation period.

⁶⁶ See: P. Zakrzewski: *Status prawny członka spółdzielni mieszkaniowej w spółdzielczych stosunkach lokatorskich* [Legal Status of a Member of the Housing Cooperative in Housing Cooperative Relations], Warsaw 2010, p. 225.

⁶⁷ However, members of a cooperative may be recognized as consumers (Art. 22¹ of PCC) in private law relationships resulting from contracts concluded with the cooperative due to benefiting from its economic activity. Those contracts give rise to private law relationships separate from membership of the cooperative. If members of the cooperative benefit from its economic activity due to transactions not related with their business or professional activity (like in the so-called consumer cooperatives), those members should be recognized as consumers pursuant to Art. 22¹ of PCC. In the Polish legal doctrine, this view relates to legal activities undertaken by housing cooperatives to fulfill members' housing needs (*ibidem*, pp. 225–226; K. Królikowska: *Członek spółdzielni mieszkaniowej jako konsument w relacji ze spółdzielnią mieszkaniową* [Housing Cooperative Member as the Consumer in Relations with the Housing Cooperative] (in:) *Prawo spółdzielcze...*, *op. cit.*, pp. 289–310). On the other hand, members should be considered entrepreneurs in private law relationships that arise from transactions with the cooperative if they conduct business or professional activity on their own behalf (Art. 43¹ of PCC). These members (natural persons) can be regarded as consumers only if their transactions with the cooperative are not related directly to their business or professional activity (Art. 22¹ of PCC).

However, it should be noted that the legal relationship of the entrepreneur (cooperative) and the consumer, resulting from the contract concluded by the cooperative and its member, is present in the case of renewal of the member's obligation (*novatio*), the consequence of which is the expiry of the existing obligation (to make payment for the declared share) and the creation of a new obligation (Art. 506 § 1 of PCC). Of course, the member can be recognized as a consumer if the concluded contract is not directly related to his/her business or professional activity (Art. 22¹ of PCC).

It should be also observed that if the claim for payment for the declared share is time barred due to the member's raising of the limitation *exceptio*, the cooperative cannot satisfy the claim for the declared yet unpaid share by deducting a part of balance surplus acquired by the member (Art. 77 § 3 of PCA). It seems that if the cooperative covers the declared share out of such balance surplus, the member will be entitled to compensation claims *ex delicto* (Art. 415 of PCC). A claim in relation to undue payment (unjust enrichment under Art. 410 § 2 of PCC) does not arise. The fulfillment of the obligation to make payment is always dependent on the debtor's will⁶⁸. This will is not acknowledged when the cooperative deducts balance surplus acquired by the member to cover the declared share. For this reason, Art. 411 para. 3 of PCC, according to which the claim related to undue payment does not arise when the payment has satisfied the time barred claim, should not apply, either.

VI. Conclusions

Cooperative regulations in Polish and foreign legal systems, especially German law, concern similar problems regarding the acquisition of a share in the cooperative. These problems are resolved in a similar way under the cooperative provisions. The cooperative share is not considered a subjective right, separate from the membership of the cooperative. The share may be covered in cash or in kind, however, this possibility is differently shaped under Polish and German law as concerns the cooperative's articles of association. In line with the principle of subrogation, due to covering of the share, the cooperative's member acquires the right to the reimbursement claim. On the other hand, differences in relation to the discussed problems result from the general regulation on the increment system (causal-consensual versus

⁶⁸ The Polish and German legal doctrine does not provide a uniform interpretation of whether the fulfillment of an obligation is a separate agreement (legal activity) or just a legal fact (see: A. Szpunar: *Charakter prawny wykonania zobowiązania [Legal Nature of the Fulfillment of Obligation]*, Rejent 1998, No. 5, pp. 11–17). However, according to the majority of the Polish legal commentators, payment is a legal activity. See: A. Ohanowicz: *Glosa do wyroku SN z dnia 23 kwietnia 1976 r., III CRN 46/76 [Commentary on the Supreme Court Judgment of 23 April 1976, III CRN 46/76]*, Orzecznictwo Sądów Polskich 1977, No. 2, item 29; Z. Żabiński: *Próba nowoczesnej cywilnoprawnej konstrukcji pojęcia pieniądza i zapłaty [An Attempt to Formulate a Modern Civil Law Concept of Money and Payment]*, Państwo i Prawo 1972, No. 8–9, pp. 140–141; J. Pisuliński (in: *Wykonanie i skutki naruszenia zobowiązań [Performance and Effects of Breach of Obligations]*, Cracow 2009, p. 181; A. Szpunar: *Charakter prawny...*, *op. cit.*, p. 18. On the other hand, payment as a legal fact is discussed by T. Dybowski, A. Pyrżyńska (in: *System prawa prywatnego, Vol. V. Prawo zobowiązań — część ogólna [Private Law System, Vol. V: Law of Obligations — General Part]*, ed. E. Łętowska, Warsaw 2013, pp. 240–244.

abstract *traditio*) and periods of limitation. However, in cooperatives operating in foreign legal systems, issues involving capital are resolved in a more modern way than in Polish law. This conclusion allows one to propose *de lege ferenda* solutions for Polish regulations on cooperatives. The transferability of cooperative shares should be adopted as a principle in Polish cooperative law. The provision on the transfer of a share in the cooperative as introduced to the Polish law should result in defining the share as a member's temporary subjective right. The possibility of introducing minimum share capital to the cooperative's articles of association should also be considered under Polish law as it could become an instrument increasing the cooperative's financial security⁶⁹. However, transposition of such solution, which is appropriate for corporate law, should be considered bearing in mind the structural differences between cooperatives and companies. The adoption of the cooperative minimum share capital cannot disregard its changeability and the principle of subrogation of the cooperative member's assets⁷⁰.

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⁶⁹ In financial cooperatives, like credit unions, this could also lead to increasing the asset-to-capital ratio. On the capital in credit unions, see: *Credit Union Shares as Regulatory Capital Under Basel III*, Washington, D.C. 2012 (www.woccu.org, accessed 18.03.2019).

⁷⁰ There is a trend in the legislation on cooperatives worldwide to adopt solutions appropriate for corporate law. This phenomenon has been described as "companization" of cooperative law (see: V. Pönkä: *Are Cooperative Societies Transforming into Cooperative Companies?....*, *op. cit.*, pp. 77–99).

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Tytuł w języku polskim: Nabycie udziału w spółdzielni. Wykładnia komparatystyczna polskiego prawa spółdzielczego

Słowa kluczowe: majątek spółdzielni, przeniesienie własności, przedawnienie, wykładnia komparatystyczna.

DOMINIK BIERECKI

ACQUISITION OF A SHARE IN A COOPERATIVE.
COMPARATIVE INTERPRETATION
OF POLISH COOPERATIVE LAW

S u m m a r y

The article analyzes legal issues related to the acquisition of a share in a cooperative. The article presents the concept of a share in a cooperative in Polish and foreign legal systems, also as regards new capital measures in cooperatives. The article analyzes also the legal situation of a cooperative and its member resulting from declaring and contributing towards a share in a cooperative. In this respect the article concerns specific ways of contributing towards a share in a cooperative, as well as consequences of such action on the assets of a member of a cooperative. The transfer of property to a cooperative due to fulfillment of an obligation to cover a share is also analyzed against the background of different transfer of property models that are in force in European countries.

Keywords: cooperative share capital, transfer of property, limitation period, comparative interpretation.