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„Principles of Cooperative Law in Austria Based on the PECOL Project's Methodology"

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Abstract (English)

The PECOL (Principles of European Cooperative Law) Project brought together a group of legal scholars who developed a methodology to describe a national cooperative law, which also divides the law into five chapters. The guidelines for each chapter made by the group's members also provide a uniform structure for the national reports. The result of the group's work was the study that was published in 2017 under the same name, which also includes seven national reports (Finland, France, Germany, Italy, Portugal, Spain, and the UK).
The goal of this work was to create a national report of the Austrian cooperative law principles based on the methodology developed by the project's group. The literature research was based on the PECOL project study itself, which served as a base of the work, as well as Austrian cooperative law including auxiliary laws, commentaries on the laws, handbooks, articles, and scientific papers. At the same time, the national report answers the research questions about the current state and the future direction of cooperative law in Austria.

Abstract (German)

Das PECOL-Projekt (Principles of European Cooperative Law) brachte eine Gruppe von Rechtswissenschaftlern zusammen, die eine Methodik zur Beschreibung eines nationalen Genossenschaftsgesetzes entwickelten, die das Gesetz auch in fünf Kapitel unterteilt. Die von den Mitgliedern der Gruppe erstellten Leitlinien für jedes Kapitel bieten auch eine einheitliche Struktur für die nationalen Studien. Das Ergebnis der Arbeit der Gruppe war die Studie, die 2017 unter demselben Namen veröffentlicht wurde und sieben Länderberichte umfasst (Finnland, Frankreich, Deutschland, Italien, Portugal, Spanien und das Vereinigte Königreich).
Ziel dieser Arbeit war es, auf Basis der von der Projektgruppe entwickelten Methodik eine Länderstudie zu den österreichischen genossenschaftsrechtlichen Prinzipien hinzuzufügen. Die Literaturrecherche stützte sich auf die PECOL Studie selbst, die als Grundlage der Arbeit diente, sowie auf das österreichische Genossenschaftsrecht einschließlich der Nebengesetze, Gesetzeskommentare, Handbücher, Artikel und wissenschaftliche Arbeiten. Zugleich beantwortet der nationale Studie die Forschungsfragen nach dem aktuellen Stand und der zukünftigen Ausrichtung des Genossenschaftsrechts in Österreich.

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List of Abbrevations

AG – Aktiengesellschaft - Stock Company

APAB – Abschlussprüferaufsichtsbehörde - Auditor Supervision Authority

ArbVG – Arbeitsverfassungsgesetz - Labor Constitution Act

BGBl – Bundesgesetzblatt - Federal Law Gazette

BSpG – Bausparkassengesetz - Building Societies Act

BWG – Bankwesengesetz - Banking Act

CRD IV – Eigenkapitalrichtlinie - Capital Requirements Directive

CRR – Kapitalanforderungsverordnung - Capital Requirements Regulation

EAG - Erneuerbaren-Ausbau-Gesetz - Renewable Energy Expansion Act

e.Gen - Eingetragene Genossenschaft - Registered cooperative

ESAEG - Einlagensicherungs- und Anlegerentschädigungsgesetz - Deposit Guarantee Schemes and Investor Compensation Act

ESt – Einkommensteuer - Income Tax

EStG – Einkommensteuergesetz - Income Tax Act

EU-GesRÄG - EU-Gesellschaftsrechtsänderungsgesetz - Companies Amendment Act

EWR - Europäischer Wirtschaftsraum - EEA European Economic Area

f. - folgende Seite - following page

ff. - auf den nächsten Seiten - on the next pages

FMA – Finanzmarktaufsichtsbehörde - Financial Market Authority

GenG – Genossenschaftsgesetz - Cooperatives Act

GenIG – Genossenschaftsinsolvenzrecht - Cooperatives Insolvency Act

GenRevG – Genossenschaftsrevisionsgesetz - Cooperatives Revision Act

GenRevPV – Genossenschaftsrevisorenprüfungsverordnung - Cooperative Auditors Examination Regulation

GenRevRÄG – Genossenschaftsrevisionsänderungsgesetz - Cooperatives Revision Law Amendment Act

GenSpaltG – Genossenschaftsspaltspaltungsgesetz - Cooperatives Demerger Act

GmbH & Co KG - Die Gesellschaft mit beschränkter Haftung & Compagnie Kommanditgesellschaft - Limited Partnership with a Limited Liability Company as General Partner

GmbH - Gesellschaft mit beschränkter Haftung - Limited liability company

GmbHG - Limited liability - Company law

HypBG – Hypothekenbankgesetz - Mortgage Bank Act

ICA - International Cooperative Alliance

ICAAP - Internes Kapitaladäquanzverfahren - Internal Capital Adequacy Assessment Process

ILO - International Labour Organization

ImmoInvFG - Immobilien-Investmentfondsgesetz - Real Estate Investment Fund Act

InvFG – Investmentfondsgeset - Investment Fund Act

KartG – Kartellgesetz - Antitrust law

KÖSt – Körperschaftsteuer - Corporate Income Tax

KStG – Körperschaftsteuergesetz - Corporate Tax Act

KWG – Kreditwesengesetz - The German Banking Act

l. – Zeile - Line

n. – Notiz - Note

ÖGV - Österreichischer Genossenschaftsverband - Austrian Cooperative Association

ÖRV - Österreichischer Raiffeisenverband

OGH - Der Oberste Gerichtshof - The Supreme Court

p. – Seite - Page

PKG – Pensionskassengesetz - Pension Fund

pp. – Seiten - Pages

RL – Richtlinie - Directive/Guidline

Rz – Randziffer - Paragraph/Point/Mariginal number/

SCE - Societas Cooperativa Europaea - Europäische Genossenschaft

SpaltG – Spaltungsgesetz - Demerger Act (of Stock Companies)

SpG – Sparkassengesetz - Saving Bank Act

UGB – Unternehmensgesetzbuch -Commercial Code

UmgrStR – Umgründungssteuerungsgesetz - Reorganization Tax Act

UmwG – Umwandlungsgesetz - Reorganization Act

URÄG – Unternehmensrechtsänderungsgesetz - Corporate Law Amendment Act

VAG – Versicherungsaufsichtsgesetz - Insurance Supervision Act

VwGH – Verwaltungsgerichtshof - The Supreme Administrative Court

WGG – Wohnungsgemeinnützigkeitsgesetz - Housing Non-Profit Act

1. Introduction

1.1. An Introduction about Cooperatives

The banking and global economic crises in the last 15 years have increased doubts about the success model of the stock companies. Belief in the pure profit-maximizing growth, dominance of the economy and unrestricted pursuit of profit at the stake of destroying the nature and exploitation of the scarce and natural resources (which is leading to a serious threat to the opportunities of future generations) are reaching their limits. (cf. Münkner 2013, p. 32) More and more people are becoming conscious about the environmental problems and the idea of sustainability is winning on the importance. We live in the age of digitalization and digital transformation with the very fast progress in technology. At the same time the world is facing many problems with the raising questions and attempts to deal with the climate change. With the post-pandemic situation and the war in Ukraine and other wars in the world, along with the energy crisis, many people are looking for alternative solutions regarding those problems that would help to solve them. We need to emphasize that people are an integral part of the interconnected and interdependent universe, and that respect for nature and life in all its expressions is inseparable from human dignity and respect for the worth of every person. (cf. Münkner 2013, p. 32) The economy should serve the people, not the other way around (cf. Münkner 2013, p. 22) Cooperatives offer a business model that has been tried out and tested millions of times over 160 years worldwide, but which is also a way of life and thinking. Through personal commitment and responsible cooperation with like-minded people, every individual can contribute to improving the conditions in our world and do business in a different and a better way, from what the main trend has been for a long time. (cf. Münkner 2013, p. 32f.) According to Münkner (2013), "cooperative purpose and organization serve as a stabilizer of current economic trends. Cooperatives can be leaders of change, forming partnerships with like-minded organizations as they serve the needs of their members rather than return on investment for shareholders and their shares are not traded on increasingly dysfunctional capital markets. Cooperatives are collective problem solvers whose structures allow people to make important decisions at their workplace." (p. 43)

According to the Statement on the Cooperative Identity, a cooperative is defined as "an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise." ("International Cooperative Alliance", n.d.)

From this definition, we can derive that cooperatives are people-centred enterprises, where their members are the ones who own, control and run a cooperative, in order to achieve their common economic, social, and cultural goals and desires and fulfil their needs. It is a democratic way of the organization having the accent on equality.

Cooperatives are managed by the “one member, one vote” rule, regardless of the status the members, be it customers, employees, users or residents. They all have equal voting rights no matter what amount of capital they put in the cooperative. (“International Cooperative Alliancem”, n. d.) Cooperatives are not for-profit only organizations, but also value-driven businesses. The value of the business purpose of cooperatives - meeting the needs of members and the community - cannot be overstressed. Cooperative values have a unifying effect across religious, linguistic, ethnic and social differences, as they are based on the organizational values of solidarity, justice, equality and mutual assistance and the member values of honesty, openness, social responsibility and concern for others (International Cooperative Union (ITUC) Declaration on Cooperative Identity), which are the basic values that all the people of the good will in this world share, no matter of their different backgrounds. By adopting the cooperative form of organisation, it is expected to follow the cooperative principles: Voluntary and open membership; democratic control by members; economic participation of members; autonomy and independence; education and information; cooperation between cooperatives and concern for the community and that those principles are guided in their work by organisational and personal cooperative values. (cf. Münkner 2013, p. 41) Voluntary and open membership identifies cooperatives as open to all people making them able to use their services and keen to accept the responsibilities of membership, without any sort of discrimination. Democratic member control applies that it is members of cooperatives who participate in policy and decision-making process. Nominated representatives are responsible to the membership. Member economic participation means that members contribute to the capital of their cooperative, but they receive limited reimbursement, or sometimes none, as surpluses are usually used to either develop the cooperative, set up reserves (partly indivisible), supporting other actions of the cooperative. Autonomy and independence imply that cooperatives as self-help, autonomous organizations, that are controlled by their members, always maintain their autonomy and ensure democratic control by their members, even when they do business with other organizations, governments or raise capital from external sources. Cooperatives provide education and training for their members so they can help their organization grow and inform general public about the nature and benefits of cooperatives. Through cooperation among cooperatives the cooperative movement gets stronger, which is achieved by working together through local, national, regional and international setups and that way cooperatives serve their members most effectively. Concern for community is reflected in a way that cooperatives always align their work to the policies approved by their members in order to achieve the sustainable development of their communities. As cooperatives are not owned by shareholders, it allows them to keep both social and economical profits within the community, and profits are usually reinvested or distributed to the members. At least 12% of the world's population is a part of cooperatives, and there are around 3 million cooperatives on earth. ("International Cooperative Alliance", n. d.)

1.2. The PECOL Project

The PECOL (Principles of European Cooperative Law) Project gathered a group of around ten scholars who have their focus on the cooperative law from the EU Member States with the leading cooperative traditions like Germany, France, Italy, Spain, Portugal, as well as UK and Finland. (cf. Hiez 2017, p. 2)

Due to its' small size, the work of the group went smooth and the PECOL Project created its set of principles in four years, after seven meetings. The main support was provided by Euricse and by the University of Luxembourg, as well as the University of Valencia and the Italian cooperative movement. (cf. Hiez 2017, p. 3)

The PECOL find its motivation in primarily national jurisdictions. The diversity of the national jurisdictions is a characteristic of national cooperative laws. Cooperative regulation varies from a country to a country. Some countries contain constitutional provisions for their national cooperative law; there are countries that compromise a code, whereas some of them do not even have cooperative regulations. In most of the countries cooperative policy is poor. This makes the formation of European principles hard, as there are not many people getting specialized in cooperative law, and as the national laws differ, it needs to rely on some major ones. The cooperative principles of the International Co-Operative Alliance (ICA) are one of the main pillars as they serve as a basic orientation. When it comes to the drafting of European principles, having the opposition between common and continental law is usually what causes difficulties, but in the establishment of PECOL it did not make significant difficulties. Even though there are differences in the different national traditions of the cooperative laws - they did not cause problems in concepts and practical solutions. (cf. Hiez, 2017, p. 4)

Even though in the PECOL Project's scope the consideration of non-European legislation was limited, in a globalised world we live in today, it is not possible to strictly differentiate what should and should not be included in the concept of European cooperative law, especially in academic work. (cf. Hiez, 2017, p. 5)
According to Hiez (2017), "the PECOL deals with the organisation of cooperatives, that means with substantial cooperative law" (p. 5). Questions arising from the relationship between cooperative law and other branches cannot be included in the general conclusion, as there are too dependent on the national jurisdictions. However, it is possible to include them in the national reports using the PECOL Project's concept, especially laws related to taxation of cooperatives (cf. Hiez, 2017, p. 5), which is also part of this work. (cf. chapter 4.4.)

1.3. The PECOL Project's Methodology and the Model Explanation

The PECOL Group divides the law of cooperatives into five sections, each one serving as a separate chapter of PECOL:

1. Definition and objectives
2. Governance
3. Financial structure
4. External control
5. Cooperation among cooperatives.

The PECOL Project's members then made guidelines according to each separate chapter, which also gives a uniform structure for the national reports. In the creation of national reports, the development, and the current state of national cooperative law of the country is taken into the consideration. (cf. Hiez 2017, p. 6)
According to Hiez (2017), "the purpose of such structure is to focus on the main questions raised by cooperative law. (p. 7)
The first section represents the base of any legal concept, like its definition and regarding an organization, its objective. In our case, it enables us to distinct the scope of a cooperative from other legal forms of organizing.
The second and the third section are about governance and financial structure of cooperatives. In cooperatives, these structures are very different from the ones in other company forms. Those explain the everyday functioning of cooperatives. The last two sections are about external control and cooperation among cooperatives. In this work, the

fourth section is named ‘’Control of Cooperatives’’, as it provides some insights about the internal control as well.

This five-chapters-division is not inspired by the cooperative principles of the ICA mentioned at the beginning of this paper, nor by any existing structure of any national or European regulation, which makes it unique. However, at the same time, they do not oppose any of the ICA principles, which served as the inspiration for the five chapters and all of them are part of the national and European legislation. The PECOL Project’s Group believes it is the most optimal method to describe the cooperative law. (cf. Hiez, 2017, p. 7)

Even though this methodology divides the cooperative law into five chapters, the chapters cannot be read separately from the other chapters, as they do not represent a whole on their own, just together with all other chapters.

This methodology provides the reader a comprehensive picture of the national cooperative law. (cf. Hiez 2017, p. 8)

Making a national report of Austrian cooperative law based on this methodology will help us to answer our research questions:

- What is the current state of the Austrian cooperative law?
- What is the assumption of the future direction of cooperative law in Austria? (see chapter 7)

Research methodology is the literature research based on the PECOL Project study itself, which is used as a base for the method, as well as Austrian cooperative law including auxiliary laws, commentaries on the laws, handbooks, articles, papers etc.

1.4. A Brief History of Cooperative Law Principles

The first successful modern cooperative business is the Rochdale Equitable Pioneers Society, also known as Rochdale Pioneers. It got established by 28 artisans in 1844, that worked together in the cotton mills in Rochdale, a small city close to Manchester in the north of England. They are seen as the model of the modern cooperative society and founders of the cooperative movement. It is a story about honest group of people, who created a world organization from the poorest of circumstances. (cf. Pomper 2022, p. 3)

It is a story about the group of people, that wanted in the middle of industrial revolution, where manufacturers had money and dealers had stocks, to become their own factory and mill owners, merchants and producers. Without experience, knowledge and funds, they wanted to do business themselves in order to help themselves. And it all has started with a capital of 28 pounds. (cf. Pomper 2022, p. 4)

The working conditions in the cotton fields were miserable, and the wages so low, that the weavers working there could not afford the prices of food and household goods. They decided if they put their work and resources together, they could get basic goods at a lower price. There were only four goods that they sold: butter, flour, sugar and oatmeal. The Pioneers treated customers with respect, honesty and openness, and decided that they should be able to share the profit that their custom brought and they should have democratic right in their business. At the beginning the shop was open for only two nights a week, but just after three months, it was open five days a week, as it has grown so much. Every customer became a member and had a true stake in the business. (International Cooperative Alliance) They would become members through paying a membership fee. (cf. Hofinger & Weiß 2018, p. 377)

The Pioneers created the further principles that are still to this day anchored in the Principles of the International Cooperative Alliance (ICA):

- Membership should be voluntary and open
- Decision-making should be done democratically by the members
- Members should contribute economically
- Ensuring autonomy and independence
- Promotion of further education, training and information
- Cooperation with other cooperatives
- Provision for the community of the cooperative; (cf. Hofinger & Weiß 2018, p. 378)

Apart from the Pioneers, in Germany, another cooperative model in the 19th century was developed by Friedrich Wilhelm Raiffeisen and Franz Hermann Schulz-Delitsch. They formed credit unions in 1862. The model has grown into other sectors and has been an inspiration of financial cooperatives all over the world. (International Cooperative Alliance, n. d.)

What Rochdale Pioneers was for the industrial workers, Raiffeisen meant for the rural population released from the manorial system and Schulze-Delitzsch for the craftsmen who dealt with the new competition of the labour-division based industrial companies. (cf. Pomper 2022, p. 7)

‘’We must help ourselves
All the conditions to do so are avaiable,
all means and forces are plenty at our disposal.
We only need to apply them.

It is not at all necessary to look for help from others.
This is even bad and only has a paralysing effect on our own powers.
which must be strained to the utmost,
if better conditions are to be better conditions are to be brought about''
(Friedrich Wilhelm Raiffeisen, at Association Day 1879; cf. Pomper 2022, p. 7)

The self-help of the formative social groups in a time of dramatic social and economic change shows that society can find the "third way" between communism and unlimited capitalism with the help of the cooperative idea. It happens through the combination of community property and economic principles. (cf. Jagschitz & Rom 2017, p. 27)

I would also call this "third way" the middle way.

Cooperatives realized very early on that their approach to economic activity was unique, that is why there was a need to better define and promote the use of their unique economic approach. Therefore, cooperators created a body so they can discuss the proper organization and functioning of cooperatives.

That is how, in 1895, the International Cooperative Alliance (ICA) was created. One of the main goals of ICA was to make a common identity for the cooperatives around the globe. ICA adopted and published a variety of principles mostly based on The Rochdale Pioneers, that we have mentioned before in our work. (cf. Hiez 2017, p 9.)

However, the cooperative design was changing over the last century, and it went through various changes. The last version got adopted in 1995 and remains as a pillar for cooperatives in the whole world. (Macpherson, 1996; cf. Hiez 2017, p 9.)

In 2015, ICA shared the Guidance Notes on the Cooperative Principles, which serve as a detailed guidance and advice on the practical application of the principles to cooperative enterprise. Their goal is to help cooperators to run their cooperatives more efficiently and effectively. They also aim to state ICA's understanding of the application of the principles in the modern terms in the times we live today. (International Cooperative Alliance n. d.)

Through all those changes, the function of ICA has also changed throughout the history, and not only its content of the principles.

As some of ICA Principles were obligatory or considered to be the defining criteria for a cooperative enterprise, like in 1937, for example, where on the other side, a few later years some of them became barely relevant. (cf. Hiez 2017, p 9.)

One of the main characteristics of the ICA Principles is their international significance. They are a reference set of Cooperative Principles for the international community.

Even though it is not binding, the International Labour Organization (ILO) in 2002 adopted "Recommendation 193 on the Promotion of Cooperatives", which refers to those principles. ("International Labour Organization", 2002)
This represents a significant contribution to the growing body of international cooperative law. (cf. Henry 2013, p. 98)
We can conclude that ICA Principles represent universally accepted cooperative principles.
Here it is important to make a small differentiation regarding our work. The PECOL describes cooperative law norms, meaning it does not attempt to describe the organization or management of cooperatives, but the various regulations which govern cooperatives, including regulations of their organization and management, while the ICA Principles describe the actual way in which cooperatives function. (cf. Hiez 2017, p. 11)

1.5. Historical Development of the Legal Basis for Cooperatives

According to Münkner (1994), "from their origin, co-operative societies are not a legal form of organization, but rather a social and economic phenomenon." (p. 543) There is a part of history, where co-operative societies existed, while there were no co-operative laws. That means the co-operatives societies are older than the co-operative law itself. As such, the first modern co-operatives were functioning without legal basis or patterns for such organizations. It was a principally a socio-economic way of people working together and doing business, and not a legal form. At an international level, there are two definitions of co-operative societies, which do not force the national lawmakers to create the national laws based on these definitions, but rather serve as references and a guide that determined to a great degree the profile of the co-operative society as a legal form.

These definitions are:
- the list of Co-operative Principles of the ICA as approved by the ICA congress in 1966, and
- the definition contained in the ILO Recommendation number 127 of 1966, concerning the role of cooperatives in the economic and social development of the developing countries.

They were used as guidelines for many national lawmakers, as many lawmakers have used ICA Co-operative Principles. (cf. Münkner 1994, p. 543)
There are various ways in which lawmaker provide the framework for co-operative activities, differing from special legislation for all types of cooperatives societies as a separate legal form (e.g., Germany and Austria), to the total nonexistence of specific co-operative

legislation. (e.g., Denmark). Between these two extremes there are numerous forms in-between like special co-operative laws for special types of cooperative societies (France, Japan, South Korea etc.), as well as special chapters or provisions on co-operative societies in general regulation such as the civil code (e.g., Switzerland, Italy), the commercial code (e.g. Belgium) the labour code (France) or the agricultural or rural code (eg. France, Panama). (cf. Münkner 1994, p. 547)

According to Münkner (1994), "due to the shared conceptual base considered in co-operative principles of the ICA and the specificity of the cooperative structure, there are similarities and common features which characterize the contents of co-operative laws all over the world." (p. 547)

By the definition of the ICA Cooperative Law Committee (CLC), cooperative law includes all legal rules that shape a cooperative enterprise and regulates its operation - international law, law on cooperatives, national constitutions, court decisions and jurisprudence, administrative acts, and all other source of law that has an impact on the operations or the structure of cooperatives.

What also has an impact on cooperatives are laws on labour, taxation, competition, banking, accounting and prudential standards, audit, bankruptcy, procurement, as well as land laws.

Cooperative law played an important role from the beginning of cooperatives. It was one of the most important topics at the Third ICA Congress in 1897 in Delft, Holland. The Congress passed a resolution asking governments not to disrupt co-operators and to help them grow by sharing the knowledge about the different ways of joining up together and supporting them with suitable legislation.

In 1904, at the Sixth Congress in Budapest, Hungary, the Congress came up with its first resolution on legislation and on cooperation in less developed countries, which has become an important part of the ICA's policy.

When the International Labour Organization's (ILO) Cooperative Unit in 1920 was created, cooperative law got an international dimension.

At the tenth Cooperative Congress in 1921 in Basel, Switzerland, a paper on the Policy of International Cooperation was presented by the Albert Thomas, who was the first Director General of the ILO. He also stated that cooperatives should be against all type of wars, including trade wars, and condemned competition if it weakened association among nations.

In 1969, At the 24th Congress in Hamburg, Germany, "the ICA's Declaration on International Cooperative Day made an evaluation of UN Resolution 2459 and the collaboration of the ICA with the UN Specialised Agencies and other Organisations, particularly in South East Asia and Africa". ("International Cooperative Alliance", n. d.)

In 2017, the ICA coordinated review and reports on 60 national legislations through research that was done by the ICA-EU Partnership on Cooperatives in Development in collaboration with regional offices.

The ICA Cooperative Law Committee was created in 2019 to serve as advisory body to the ICA. ("International Cooperative Alliance", n. d.)

2. Definition and Objectives of Cooperatives

2.1. Introduction: Cooperative Law in Austria

In Austria, a cooperative is regulated in the Cooperatives Act (das Genossenschaftsgesetz – GenG).

In addition, special laws are applicable to the cooperative:

the Cooperatives Revision Act (das Genossenschaftsrevisionsgesetz – GenRevG) – it is the act about the external audit of the cooperative by the cooperative auditor, that has to be done at least every two years;

the Cooperatives Revision Law Amendment Act (Genossenschaftsrevisions-änderungsgesetz - GenRevRÄG) – the act regulates requirements for the cooperative audit;

the Cooperatives Merger Act (das Genossenschaftsverschmelzungsgesetzt – GenVerschmG) – the law regulates the merger of cooperatives;

and the Cooperatives Insolvency Act (das Genossenschaftsinsolvenzrecht – GenIG) – which regulates the special provisions under insolvency law for cooperatives (cf. Artmann & Rüffler 2017, p. 571);

and from 1.1.2019 the Cooperatives Demerger Act (Genossenschaftsspalt-spaltungsgesetz – GenSpaltG). (cf. Dellinger & Schellner 2019)

The history of cooperatives in Austria formally began when the House of Lords (Das Herrenhaus des Parlaments) and the House of Deputies (Das Abgeordnetenhaus) voted on 8th and 26th of March 1873 for the act on the business and economic cooperatives, after the first cooperatives were already formed according to the association patent from 1852. (cf. Schediwy 1992, p. 5) The Cooperative Act was proclaimed on 9th of April of the same year. (Dimmel 1950, pp. 9f.) Despite numerous amendments and a number of subsidiary laws (e.g., the Cooperative Revision Law), to this day it is the crucial source of law. (cf. Schediwy 1992,

p. 5)
Essentially, only the legal basis was created for a movement that had started much earlier, as in this point, over 1500 cooperatives already existed in the Austrian part of the Austro-Hungarian Dual Monarchy. The oldest among them were established 200 years before, but their legal basis was unreliable. After the association patent of 1852 (Vereinspatent) their free growth was hindered, as the state approval was mandatory and were subject to broad public supervision. The position under private law was not regulated at all and civil law was not designed to the special requirements of the cooperatives. With the resolution of a separate law, the long-awaited basis for the further improvement of the cooperatives was established. (cf. Tomanek 2014, p. 2)
The law, a result of short political liberalism, was based on the Prussian model of 1867, but adjusted it in the sense of the laissez-faire principle. The Austrian law, with its very flexible provisions, made possible multiple voting rights, partial termination and participation in the reserves, which only accrued to the more restrictive German law with the 1973 amendment. (cf. Schediwy 1992, p. 5)
According to Kastner (1986), “the liberal basic orientation of the legislature of 1873, which did not restrict the design freedom of the statutes, also meant that cooperative practice was always against an overall reform.” (p. 117ff.)
Up until the First World War there was rapid development in all areas of the cooperatives, since from 1890 to 1914, the number of cooperatives increased from 2,000 to 19,000. Around two thirds of them were established according to the Schulze-Delitzsch system. (cf. Baltzarek 1986, p. 16)
From 1887 onwards, this flourishing of the cooperatives constantly sparked discussions about a general reform of cooperative law, which were conducted in the Chambers of Commerce and Industry (Handels- und Gewerbekammern), in the ministries and in the House of Deputies, what even lead to full draft laws, with the first one in 1897. (cf. Dimel 1950, p. 12)
In particular, the introduction of a mandatory revision was demanded, which, however, was not introduced as a part of an overall reform of the cooperative law, but agreed as a special law of June 10th, 1903, RGBI. No. 133. Since then, the cooperatives are obliged to do an audit every two years. The Revision Act was supplemented by the Cooperative Register Regulation from 14. Mai 1873, RGBI. Nr. 71, and Revision Regulation from 24. Juni 1903,
RGBI. No. 134. (cf. Dimmel 1950, pp. 69f.; pp. 97f.) It is an important law, which was inspired by the compulsory revision in Germany in 1889 with the 2 years cycle. The law stimulated the association’s division of the cooperative sector into its 4 main divisions

(separation of consumer cooperatives from the General Association by the direction of Schulze Delitzsch). (cf. Schediwy 1992, p. 5)

The question of liability was meant to be regulated by drafts in 1908 and 1911, but the drafts were not passed on to a parliamentary resolution. Only in 1918, when the end of the First World War was already expected, it became clear that many cooperatives would have to deal with significant financial difficulties. To ease the greatest hardship of unlimited liability on March 21, 1918, the government issued an ordinance on bankruptcy (Der Konkurs), the assertation of liability, and the composition procedure (Das Ausgleichsverfahren) for cooperatives. In it, creditors' direct access to unlimited liability was abolished and replaced by an obligation to make additional payments (Nachschusspflicht). (cf. Tomanek 2014, pp. 4 f.)

With the fall of the Danube monarchy, the Austrian economy and with it the entire cooperative system had to adapt to a completely changed political and economic situation. Of the almost 20,000 cooperatives that had existed throughout the monarchy, only around 3,600 were to be found in the rest of Austria. (cf. Ruppe 1970, p. 27)

The cooperative act was significantly changed by the amendment of July 15, 1920, StGBI. No. 328. Easier and more precise provisions about changing the type and amount of liability, the introduction of share liability for consumer cooperatives and the possibility of the general assembly as a delegate assembly were the most important points of the amendment. The amendments of 1934 and 1936 embraced to the corporatist trend of the time, however it cannot be spoken of compulsory association (Verbandszwang), since dispensation options remained open. (cf. Schediwy 1992, p. 5)

Cooperative act - including the revision act - stayed unaffected between 1938 and 1945. However, radical changes were brought about by German corporate tax law, which ended the period of tax exemption for agricultural and business cooperatives and credit cooperatives. (cf. ÖRV 1986, p. 366)

Amendment of the Cooperative Act 1974

After 100 years of legitimacy, the outdated cooperative act shows a need for reform. As an adaptation to modern environment, an amendment was given at the end of January 1974, which came into force on July 1st. (cf. Kastner 1986, pp. 127ff.)

- According to the new formulation, the purpose of the cooperative in essence had to serve to promote the members, so that transactions with non-members were also permitted.

- The acceptability of participation by the cooperative in companies with a different legal form, if this serves to fulfill the constitutional purpose, was embedded in the law, which had earlier been acknowledged by the judiciary.
- The establishment of a supervisory board was mandatory for cooperatives with at least 40 employees, which matched the regulation of the Labor Constitution Act.
- The declining number of participants at the General Assemblies was considered with the introduction of the waiting time for the quorum regardless of the number of members present. (cf. Tomanek 2014, pp. 10f.)

The legal definition of the cooperative is limited today, after the repeal of the disputed identity concept of customers and members (1974) on the non-closed number of members and the funding mandate. (cf. Schediwy 1992, p. 5)

In addition to the change in the cooperative law, the introduction of the trade regulations in the same year was of lasting significance for the goods cooperatives.

The introduction of the Banking Act in 1979 brought important changes for the credit cooperatives, some of which as well affected the provisions of the cooperative law. By 28th of February 1982, at least two managers had to be appointed in all credit cooperatives, who had to work full-time from January 1, 1985. This caused a wave of mergers of many small credit unions, which previously had often only employed part-time bookkeepers or a managing director in the best-case scenario. Furthermore, the annual audit of the annual financial statements was made compulsory by the Banking Act and the scope of the audit for credit cooperatives was considerably increased, which brought new requests for the auditing associations.

The Cooperative Merger Act of 1980 enabled the merger of cooperatives through universal succession (Gesamtrechtsnachfolge), apart from liquidation. (BGBI 1980/223) (cf. Tomanek 2014, p. 11)

According to Schediwy (1992), "the amendments of 1974 and 1980 show a tendency towards alignment with AG and GesmbH as well as the requirements of business practice (e.g., enabling mergers through new formation). At the same time, however, individual fiscal concessions for cooperatives were also reduced." (p. 5)

The Cooperative Revision Law Amendment Act (GenRevRÄG) was passed in 1997, which indicated the requirements of the revision and reinforced the position of the auditor.

A small reform of cooperative law brought about the Cooperative Law Amendment Act 2006 (GenRÄG), the provisions of which came into force on August 18, 2006. (BGBI I 2006/104) (cf. Tomanek 2014, p. 12)

The initiation for this was the EU Council regulation on the European cooperative society (Societas Cooperative Europea - SCE). (VO (EG) Nr 1435-2003 des Rates v 22.7.2003, ABI EG 2003 L 207-1) In close functional similarity to the regulation on the European stock company, a new legal form of the cooperative society was created, which should be easier to manage to become transnational active the European domestic market. Article 1 of the GenRÄG 2006 initially contains the needed implementation law (SCEG) for the EU regulation. In addition, Art 2 includes some changes to the Cooperative Act, for which the EU regulation also eventually gave the initiation.
The SCEG places the European Cooperative, whose members must come from at least two different EU countries, together with the Cooperative under the Cooperative Act.

Change in the Cooperative Law

Even if the desired overall reform did not come, the GenRÄG 2006 brought some substantial reforms to the Cooperative Act.
A newly added § 5a (2) l. 1 enables the inclusion of investing or non-using members, which is only the legal approval of a practice that is already common.
§ 5a (2) l. 2 offers possible solutions to the problem of how the accounting deals with share capital. According to the International Accounting Standards IAS 32, shares are generally not reported as equity because they must be reimbursed when a member leaves. Since this opposes the UGB and BWG, the Austrian legislature has only very unwillingly adopted the international regulation into national law and limited itself to the minimum scope of EU law, but with GenRÄG 2006 it also uses the possibility of counting shares as equity secured if the cooperative has the right to refuse reimbursements in whole or in part. Reimbursements can be restricted by voluntarily setting a minimum amount in the cooperative agreement, which must not be undercut by reimbursements (Sockellösung). Other regulations are also possible, such as the resale of shares via a clearing house or a waiver of termination with a binding obligation to a legal successor.
In § 27, the minimum number of members for the statutory implementation of the General Assembly as a delegate assembly (Delegiertenversammlung) is reduced from 1000 to 500.
§ 32 reduces the waiting time, after which the General Assembly has a quorum regardless of the number of members present, to half an hour.
Other changes associated to the reinforcement of penalties for accounting falsifications and the repeal of outdated or impractical detailed regulations. (cf. Tomanek 2014, p. 13)

Company Law Amendment Act 2008

With the Company Law Amendment Act 2008 (URÄG), provisions of the Cooperatives Act were adapted to the company law, essentially regarding the supervisory board:

- For cooperatives that where a supervisory board is a must (that means with at least 40 employees), the obligation for the management to set up an internal control system was introduced, as it has been the case for corporations since 1997. Until the URÄG 2008, this could at best be obtained from the general duty of care (Sorgfaltspflicht) in larger cooperatives.
- In § 24c (3) GenG, the basic acceptability of circular resolutions in the supervisory board was clarified, but at the same time made dependent on the existence of a corresponding regulation in the articles of association of the cooperative.
- In § 24c (5) GenG, the URÄG 2008 explicitly attached the admissibility of committees for the first time. It is clearer than in corporation law that it is possible to grant the committee its own decision-making powers. In the case of credit cooperatives, the granting of the legally required approval for large loans (according to Art. 387 ff CRR) and for corporate transactions (according to §§ 28 (1) & (3) BWG) can also be assigned to the committee.
- Since the URÄG 2008, a cooperative has also had to set up an audit committee if it meets the criteria of § 271a (1) UGB. In § 24c (6) l. 1 GenG, however, an exception was made for the financial expert, to the principle that the members of the supervisory board must come from the group of cooperative members, which should make it easier to find appropriate people.
- To standardize cooperatives in German-speaking countries, company law has only allowed the term "e.Gen.", - as an abbreviation for registered cooperative, since 2008 for newly founded cooperatives. To prevent misunderstanding, the already existing cooperatives were also renamed to “e.Gen.”. In contact with customers, however, a liability notice must be present. (cf. Tomanek 2014, pp. 13f.)

2.2. Cooperative Governance and Austrian Company Law

The reasons for establishing a company and carrying out an activity within its’ scope are different.

The existence according to the opinion of experts is defined:

- Justification by legal transaction

- Emergence of a legal community
- Association of at least two people
- Pursuit of a common purpose through organized cooperation within the scope of the company's purpose. (cf. Rieder & Huemer 2019, p. 36)

Company law is understood as “private cooperation law”, which includes both corporately organized legal entities (cooperative, stock company, company with limited liability), as well as partnerships and is lex specialis in relation to private law. (cf. Rieder & Huemer 2019, p. 35)

Company law - as the law of private-law associations of people that are established through a legal transaction to achieve a specific common purpose - offers a range of corporate forms that are not always straight away suitable for the purpose pursued and the actions associated with it. Sometimes the possibility of doing a certain activity is also related to compliance with certain legal forms. New forms of society cannot be created autonomously (“numerus clausus of corporate forms”, “form coercion - Typenzwang”). One must be chosen from the available forms, but there is freedom of choice among offered legal forms. (cf. Rieder & Huemer 2019, p. 43)

That means the person that is subject to the law can choose the legal form suitable for the purposes of his company ("legal dress") and sometimes combine them (e.g., the limited partnership with a limited liability company as general partner – GmbH & Co KG).

Restrictions in the freedom of choice can also result from special legal requirements. Not all company forms are available for every activity. For example, credit institutions can only be operated in the form of corporations, cooperatives, or savings banks (§ 5 (1) Z 1 BWG). For the company forms, there are therefore various conditions for the organization of the company (organizational law), which are regulated separately and differently in the individual (special) private law substantive laws depending on the objective and conceptual orientation. The more detailed the level of regulation in the law, the less freedom of choice there is within the context of private autonomy. (cf. Pomper 2022, p. 34)

When decide on the legal form, however, the areas of law related to company law, such as corporate and tax law, must not be ignored, given that these are linked to the chosen legal form, especially in the context of corporate law activities (e.g., reorganizations). (cf. Rieder & Huemer 2019, p. 43)

In practice, the legal-organizational-requirements to be complied with differ significantly depending on the legal form, with regards on the activity being taken. The choice of a corporate form also has an impact on the costs related to founding and managing the company and the amount of company funds (nominal capital) to be raised, as well as the liability to which the shareholders are exposed. (cf. Rieder & Huemer 2019, p. 55)

Company law is special private law, the primary starting point is the company, the subject of the regulations are the legal relationships between the members, their legal relationships with the company and the legal position towards third parties, particularly concerning their contractual partners and creditors. (cf. Schauer 2017, Rz 1/63.)

There are many touchpoints with public law, for example, in accounting law, company register law, or tax law. Cross-sectional matters, that include both private law and public law elements, are dependent on the objective of the company and activity carried out. (cf. Mösenbacher 2014, pp. 60ff.)

According to Dellinger, in Austrian corporate law, cooperatives enjoy a funding privilege, that means organizations with a cooperative structure and funding activities must use this legal form and only these have access to the legal form of the cooperative. (cf. Dellinger 2014, p. 53)

However, that cooperatives have an actual monopoly in the sense of a type of compulsion for companies, which pursue a promotional purpose, cannot be derived from this. Stock companies can also take on funding tasks. Similarly, association regularly offer their members not only non-material opportunities, but often also significant economic services at advantageous (monetary) conditions. (cf. Krejci 2002, p. 27)

The promotion privilege of cooperatives, which is affirmed by the prevailing doctrine, already results from the scope of the cooperative law, which applies to all associations of persons that aim to promote the business or the economy of their members. This importance that the legislature applies is stated in § 91 (2) GenG. According to § 91 (2) GenG, old associations, that means associations that were formed based on Association Act before the GenG 1873 came into force and which have a funding purpose according to § 1 (1) GenG, can only change their statues to adapt them to the GenG and subsequently by entering them in the commerical register to achieve the application of the GenG as a cooperative. (cf. Pomper 2022, p. 34)

Earlier uncertainties about the merchant status and its legal consequences were eliminated with the HaRÄG 2005, co-operatives within the meaning of the GenG are entrepreneurs by virtue of their legal form according to § 2 UGB. The GenG takes precedence over the provisions of the UGB as lex specialis. (cf. Pomper 2022, p. 35)

As a formal entrepreneur according to § 2 UGB, the cooperative is subject to the UGB, the legislator orders this because - since it is limited to the funding mandate - it often does not operate its own company within the meaning of § 1 (2) UGB and would therefore fall outside the scope of the UGB. The cooperatives under public law are to be distinguished from the commercial and economic cooperatives according to the GenG. These are corporations under public law. These are to be classified as corporations under public law and are therefore not formal entrepreneurs according to § 2 UGB, but according to § 343 (1) UGB they fall within the scope of Book Four of the UGB. (cf. Ratka 2020, p. 468)

For the area of accounting, cooperatives are equal to corporations according to § 22 GenG, only for small cooperatives within the meaning of § 221 (1) UGB (apart from the credit area) only the general part of the third book applies. (cf. Nowotny 2017, Rz 5/17.) The cooperative must run a company, according to § 2 Z 6 FGB, this must be entered in the company register. In addition to the general entries (§ 3 FGB), the special entries listed in § 6 FGB must be made. Also, the provisions of the WiEReG must be observed. (see § 1 (2) Z 5 WiEReG)

For credit cooperatives, the provisions of the BWG are particularly relevant. Special provisions for housing cooperatives result from the WGG. (cf. Pomper 2022, p. 35)

Touchpoints with other substantive laws are therefore diverse, in addition to the above areas, depending on the purpose of the company and the activity performed, capital market law or competition law should also be mentioned. (cf. Mösenbacher 2014, pp. 60 ff.) The implementation of the cooperative promotion order as the primary goal of this type of company also requires the limitation of the scope of action of the business partners and thus has a restrictive effect on competition. However, co-operatives also provide essential impulses aimed at stimulating competition. Acceptability and functionality must not be called into question by antitrust law. (cf. Mösenbacher 2014, p. 60)

2.3. Definition of Cooperative Society

According to § 1 (1) of the Austrian Cooperatives Act (Genossenschaftsgesetz - GenG) a cooperative is defined as an association with an unlimited number of members, primarily founded for the purpose of the promotion of the acquisition or the economy of its members. ("EUR-Lex", n. d.)

Cooperatives are distinguished from other companies with a general purpose by their restriction to a promotional mandate: § 1 (1) GenG requires that the cooperative "in essence serves the promotion of the acquisition or the economy of its members". Means of promotion can also be the participation of the cooperative in legal entities of the corporate, cooperative and association law, as well as in registered partnerships active in business, if this participation serves the fulfilment of the purpose of the cooperative according to the articles of association and not predominantly the realisation of income from the contribution (§ 1 (2) GenG). Furthermore, participations in companies are only permissible with a corresponding provision in the cooperative contract (§ 5a (1) l. 2 GenG).

According to § 1 (3) GenG, cooperatives can be directed towards the same purpose as European cooperatives (in particular, "social activities"; see Art 1 (3) SCE Regulation).

However, the purpose of the cooperative must not be purely idealistic, as this would not be sufficient to fulfil the basic mandate of promotion.

In addition, there are certain prohibitions on activities under special law.

Cooperatives are not permitted in:

- Insurance business (§ 8 (1) VAG);
- Mortgage banking business (§ 2 HypBG);
- Investment transactions (§ 2 (3) InvFG);
- Real estate fund transactions (§ 2 (3) ImmoInvFG);
- Operation of a building society (§ 5 (1) no 1 BSpG); or
- Pension fund (§ 6 (1) PKG).

The restriction to the promotion mandate does not mean, however, that transactions with third parties are completely excluded: Transactions that are necessary for the fulfilment of the cooperative's purpose ("countertransactions") and transactions that are necessary for the business operations of the cooperative ("auxiliary transactions") are of course permissible. (cf. Ratka 2020, pp. 470. f.)

The legal definition of the cooperative therefore has two characteristics:

- No closed number of members; and
- Promotion of the members. (cf. Nowotny 2017, Rz 5/2.)

2.4. Non-Closed Membership

The essential characteristic of non-closed membership means that the cooperative must remain accessible to the change of members. The open, loose number of members differentiates the cooperative from partnerships and corporations and is an expression of the self-help association based on solidarity.

While in corporations the number of members is limited by a fixed nominal capital and the admission of new members, the withdrawal of existing members and the corresponding payment flows with regard to the company's assets are only possible with a capital increase (under exclusion of subscription rights) or capital reduction, in the case of cooperatives there is no fixed capital. Neither the entry of new members, the issue of new shares to (existing) members nor the cancellation of a share (and payment of the credit balance after the end of the blocking period according to § 79 (1) GenG) require an adjustment of the cooperative contract. Members number and deposit amounts therefore vary. (cf. Dellinger 2014, pp. 20f.; Keinert 1988, Rz 109.; Nowotny 2017. Rz 5/4.)

Each member must therefore take over a share in the business but can also leave again by transfer or termination as well as by exclusion for good cause or death. (cf. Nowotny 2017. Rz 5/4.)

Nevertheless the non-excludable change of members, the cooperative contract can specify a maximum or minimum number of members. Also, membership can be limited to a group of people defined according to criteria - for example, according to activity or local criteria of the existing qualifications (e.g., farmers of a certain municipality/region or certain tradesmen). (cf. Pomper 2022, p. 38)

Such restrictions do not undermine the legally required open number of members, as this allows the admission of new members within the specified context. (cf. Dellinger 2014, p. 21.; Keinert 1988, Rz 110; Nowotny 2017. Rz 5/4.)

However, a legal right to admission cannot be derived from the required openness (nor can there be any obligation to join without a contractual obligation to do so). Thus, the cooperative is not compelled to admit every applicant, especially if the applicant does not meet the conditions defined in the cooperative agreement. (cf. Dellinger 2014, p. 21.; Keinert 1988, Rz 112; Nowotny 2017. Rz 5/4.)

Even if the applicant meets or does not meet the conditions (set out in the cooperative agreement), the cooperative is not necessarily obliged to admission of the applicant. However, an obligation to admit all or at least all candidates qualified in a particular way may result from a corresponding bylaw. In this case, the board of directors is obliged to accept proper applicants. (cf. Dellinger 2014, p. 22.; Keinert 1988, Rz 112; Nowotny 2017. Rz 5/4.)

An obligation to contract may also happen in individual cases from a legitimate interest of the applicant if he or she is dependent on the services of the cooperative and his or her needs cannot be covered otherwise or in a reasonable manner. (cf. Dellinger 2014, p. 22.; Keinert 1988, Rz 112.)

A compulsory admission is affirmed, for example, if the applicant is otherwise unable to practice his or her profession. In this context there is a prohibition of arbitrariness where the applicant has a substantial legitimate interest which exists to the extent that "the cooperative has the character of a monopoly-like supply company”. (cf. Keinert 1998, Rz 112.)

2.5. Cooperative Social Objective - Promotion of the Members

The essential criterion of the cooperative is the legally required promotional order.
The cooperative must "primary serve to promote the acquisition or business of its members" (§ 1 (1) GenG).
The GenG differentiates between acquisition cooperatives and business cooperatives. Yet, this distinction does not have any legal impact, both types are handled equally. (cf. Dellinger 2014, p. 29.; Keinert 1988, Rz 119; Nowotny 2017. Rz 5/7.)
It is also irrelevant whether the cooperative supports its members by increasing their income or decreasing their expenses, since economically the result is an improvement of the members' earning situation. (cf. Dellinger 2014, pp. 29f.; Keinert 1988, Rz 120.)
However, it is the cooperative itself that defines the promotional mandate in its statues, this is not set by law. While common in practice, the mere repetition of the legal text “promotion of the acquisition or the economy of its members” within the statute is not a proper substitute for a clear definition of the promotion mandate. The mere reproduction of the text of the law misses the opportunity to concretise a promotional mandate specially designed to the cooperative. (cf. Dellinger 2014, pp. 29f.)

2.5.1. Promotion of Members Compared to Other Company Forms

The promotion of the members is not specific to the cooperative per se, since other company forms also regularly want to "promote" their members, usually by profit-making. However, what is typical of cooperatives is the way it is done, namely by means of natural promotion of business dealings. Unlike in the case of corporations, the funding mandate should not be based solely on dividend payments. The cooperative must therefore not be primarily profit-oriented in the sense of the promotion purpose. The main purpose should rather be that the cooperative provides its services more cost-effectively for the members and so fulfils the funding purpose. (cf. Keinert 1988, Rz 128.)
Stock companies can also be set up for different purposes, but they are only very suitable for promoting the acquisition or the economy of their members. Although this can be provided within the context of the constitution of the corporations that they are not aimed at making a profit but towards promoting the shareholders (see § 6 (4) GmbHG), the prohibition on the

hidden return of contributions restricts the possibilities of natural promotion of the members. (cf. Krejci 2002, p. 28)

Significant differences in legal form to corporations are therefore:

- the anchored promotion mandate,
- the not closed number of members,
- from that resulting loose nominal capital and
- the stronger personalistic structure

The personalistic structure is expressed above all by the (dispositive) right to vote according to § 27 (2) GenG, by the requirement of the origin of board of directors and supervisory board members to come from among the members of the cooperative according to §§ 15 (1) & 24 (1) GenG, through the general assembly’s right to issue instructions in management members according to § 34 (1) GenG and through the limited transferability of membership according to § 83 (1) GenG. (cf. Pomper 2022; p. 41; Dellinger 2014, p. 20)

2.5.2. Participations as funding instruments

According to § 1 (2) GenG, means of promotion can also include participation of the cooperative in legal entities under company, cooperative and association law, as well as in registered partnerships engaged in entrepreneurial activities.

Participation as a promotional mandate is therefore generally permissible, but is subject to the proviso that this "serves to fulfill purpose of the cooperative according to the statues and not primarily in realization of income from the contribution."

In any case, the use of participations within the scope of the funding mandate requires explicit standardization within the framework of the statutes in accordance with § 5a (1) l. 2 GenG.

An interpretation of the paragraph 2 holds that only participations that serve as a funding instrument would suggest the admissibility of holdings held by the cooperative for other reasons.

The functional connection between participation and member promotion must be close. That means the affiliated company must either provide support services itself or be economically connected to the cooperative support operation. The acquisition of shares or holdings that have no connection with the promotion of the members would be prohibited if the income from this capital investment is to be distributed to the members as a dividend (inadmissible "dividend cooperative"), or if the business sector, in which holding company is active, should distribute profits to the cooperative, which are used by this to finance their promotional operations.

The acceptance of silent partners in the cooperative must be distinguished from participations in the cooperative. According to Dellinger, “the participation of non-members in the profits of the cooperative by issuing typical or atypical silent participations is allowed if the contributions of the silent partners are from an advantage for the members in terms of the purpose of their promotion.” For example, the capital input can help to keep up the existing business operations or to extend them. In the case of atypical silent participations, the silent partners do not control the management of the cooperative to the extent that this interferes with the performance of the promotional mandate and that mere profit maximization and disclosure replace it. (cf. Dellinger 2014, pp. 35-38)

2.6. Promotion of Social Activities

With the URÄG 2008 (BGBI I 2008/70), a new paragraph 3 was added to § 1 expanding the range of possible cooperative purposes. Cooperatives should also be permitted to pursue the purposes specified in Article 1 (3) of the statute of the European Cooperative Society (SCE). An extension of the purpose of the cooperative, which was previously oriented towards economic promotion through business operations, results in specific from the possibility contained in Art. 1 (3) SCE to promote the "social activities" of the members. Before the amendment this was possible as a secondary purpose in addition to economic promotion (keyword "Corporate Social Responsibility"), but the main purpose had to be the economic promotion stated. If a cooperative primarily wanted to pursue social goals, this had to be presented as economic support, in that the members save themselves expenses in private households, for example for education and/or social and health care, due to the services of their cooperative. Since the amendment, this indirect way is no longer required and the people that benefit from the social activity of the cooperative no longer need to become members, since the cooperative can be directly established with the purpose of helping others. The characterization as a self-help organization is of course inappropriate with such a purpose. (cf. Dellinger 2014, p. 32)

According to Münkner (2017), “in profit-oriented companies, Corporate Social Responsibility is often used as a marketing tool. In cooperatives, member-promotion is the legally stated purpose and concern for the community is a matter of a cooperative principle (7th cooperative principle of the ICA). Some large cooperatives increasingly operate like their profit-oriented competitors. They focus more on CSR than on member promotion and present promotion reports which are actually reports on allocations of surplus to CSR projects, like sponsoring associations in the region.” (p. 327)

3. Cooperative Governance

3.1. Introduction – The Need for Cooperative Governance

Every political, social and economic organization can face governance problems. (cf. Hirschman 1974, p. 1) Accordingly, governance is generally defined as "the exercise of authority, direction and control". (cf. Zingales 1998, p. 497) The function of good corporate governance (regardless of the legal form) is to create an efficient system of decision-making and control mechanism for the company concerned. (cf. Lutter 2002, pp. 83f.; cf. Rieble 2010, p. 805; cf. Ulmer 2002, p. 143; cf. Schmidt 2002, p. 767) In this way, conflicts of interest that are harmful to the company are to be avoided or resolved in a way that is appropriate to the company, whose purpose is to be realized. (cf. Picker 2019, p. 6)

The main challenge for corporate governance is the conflict between the interests of the shareholders (principles) and the personal interests of the management (agents). (cf. von Werder 2009, p. 3) Comprehensive management power and a lack of control create the risk that the board of directors will behave opportunistically and selfishly to the expense of the company or shareholders, sometimes by collusive collaboration with the supervisory board, which is likewise organized. (cf. Martin & Zimmermann 2011, p. 81) This risk that the management, as a result of comprehensive management power and inadequate/insufficient control, pursues personal interests and interests contrary to the purpose of the company, instead of acting in a trustworthy manner in the interests of those who have entrusted him with the representation of their interests, is potentially existing in every company that is managed by an independent organ. (cf. Seibert 2011, p. 166) For it is "an unchangeable social law that in every organ of the whole which has been created through the division of labour, as soon as it has consolidated itself, a self-interest arises, an interest in itself and for itself. (cf. Michels 1957, pp. 489f.; cf. Draheim 1955, p. 81) Therefore, the principal-agent conflict is possible in every corporation that has its own organs and is in that way organisationally-legally independent from its members: in associations, trade unions (cf. Engel 2015, p. 12), and cooperatives. (cf. Grossekettler 1984, p 57. cf. Jäger 1984, p. 11; cf. Feilcke 2017, p. 23) Cooperatives also need good corporate governance (cf. Picker 2019, p. 5); which in the case of cooperatives is called "cooperative governance". They need effective governance mechanisms to prevent their management body from misusing the decision-making powers given to them, in order to pursue their own interests and interests contrary to the purpose of the cooperative. Such interests are against the interests of the other members of the cooperative and endanger the purpose of the cooperative. In the case of a cooperative, term corporate governance is to be interpreted more broadly and includes not only management in the narrow sense, but also its board and control. (cf. Picker 2019, p. 8) Corporate/cooperative governance is never a purpose itself, but always a mean to the company's purpose: it has to ensure that the respective, autonomously chosen or heteronomously specified, purpose of the association can be achieved. Therefore, governance is only "good" or "right" to the extent that it succeeds in accomplishing this. (cf. Picker 2019, p. 9)

In the case of cooperatives, the highest guiding principle for good cooperative governance is the cooperative purpose. This is unique because only cooperatives are legally mandated, to "primary serve to promote the acquisition or business of its members", according to § 1 (1) GenG. The promotion purpose is also generally regarded as the distinctive and founding feature of a cooperative, which distinguishes it from all other legal company forms. (cf. Picker 2019, p. 9; cf. Schmidt 2002, p. 1264; cf. Schulz 1984, p. 11)

As we have mentioned, cooperatives are not associations where no conflict occurs. (cf. Picker 2019, pp. 297f.) The law according to § 12 (1) GenG conceives cooperatives as a legal personality, which is established by registration in the commercial register and makes it a legal entity under private law, with all of the corresponding rights and obligations (cf. Astl & Steinböck 2014, p. 185) Due to changes in legal terms and actual framework conditions, as according to Schediwy (1992), “the amendments of 1974 and 1980 show a tendency towards alignment with AG and GesmbH as well as the requirements of business practice (e.g., enabling mergers through new formation) (p. 5), cooperatives are in particular need of cooperative governance today. (cf. Picker 2020, p. 10) Large cooperatives represent a particular challenge to cooperative governance, as the tension between the self-interest of the cooperative venture and the promotion interests of its members, which is specific to the legal form of the cooperative, emerges, leading to a principal-agent conflict specific to cooperatives. (cf. Picker 2019, pp. 297 ff.) When it comes to the cooperative, the interests of the company and the interests of the members can structurally be in conflict with each other, since the market success of the cooperative is often a necessary, but by no means a sufficient condition for the promotion success of the members. Moreover, the promotion mandate will only be achieved, if the market success of the company is transformed it the promotion success of the members. (cf. Picker 2020, p. 10) This risk that market success is no longer a mean for promotional success, but becomes a purpose of the company itself and/or serves the management's own interests contrary to the purpose of the cooperative, particularly exists in large cooperatives. That is why the principal-agent conflict, which is specific to cooperatives, is particularly evident in them. (cf. Picker 2019, pp. 297ff.) It happens that the members act passively in regard to business policy (cf. Vierheller 1983, pp. 50 f.), and do not exercise and enforce their control rights to the board of directors. (cf. Picker 2019, pp. 281ff.) Accordingly, it happens that the board of directors focuses more on the market success of the cooperative than on transforming this success into promotion success of the members. Through the expansion of non-member business, the cooperative becomes less dependent on members as customers. And through the enhanced build-up of reserves, it becomes less dependent on them as capital investors. The build-up of reserves, non-member business and company growth serve less and less to maintain or enhance the company's performance potential in the interest of the members promotion, and increasingly to serve an independent company interest and/or the board's own interests in a way that is not in the interests of the members promotion. The market success of the company is then no longer a mean to successful promotion of members, but becomes a purpose itself. The promotional business relationship between the cooperative and the members is therefore increasingly transformed into a market relationship characterized by a clash of interests. (cf. Picker 2020, p. 11) Alongside to this vertical principal-agent conflict, in large cooperatives there are typically horizontal conflicts of interest between members who pursue different and even opposing promotion interests. (cf. Picker 2019, p. 280) If the members only have different promotion interests, the purpose of promotion is not questioned. However, what is contrary to the purpose of promotion and can hardly be resolved in legal terms, is the structural conflict of interests in a cooperative between (only or primarily) members interested in promotion, on the one hand, who are not only objectively suitable for use but also have a subjective interest as users, and investing members, on the other hand, who are not customers of the cooperative but who have (only or primarily) capital appropriation interests with the cooperative (cf. Picker 2019, pp. 315ff.); which is permissible under § 5a (2) l. 1 GenG. (cf. Astl & Steinböck 2014, pp. 161 f.) This conflict of interests typically causes a distribution conflict between "using" and "capitalistic" members that is contrary to the purpose of promotion, since the cooperative can no longer use its profits exclusively to promote its members specifically and only as customers through the best possible promotion conditions. (cf. Picker 2020, p. 11f.) The funding purpose determines the objective, content and limits of the cooperative operations, and its governance. (cf. v. Cammerer 1956, p. 161; cf. Schultz 1984, p. 6) For this reason, the cooperative, as a "personalistic" corporation, must be structured in line with the promotion purpose. Its decision-making mechanisms and the responsibilities of its bodies must be designed efficiently in the same terms. In addition, cooperatives must have ways and means of disciplining their bodies on the one hand through control, sanctions and other protective mechanisms and on the other hand motivate them through incentives in a promotional manner, in order to resolve the cooperative-specific tensions between entrepreneurial market success and members promotion success in a way that is appropriate for the purpose of the cooperative. (cf. Picker 2020, p. 13)

3.2. The Framework of Cooperative Governance

From the Austrian perspective, a cooperative is a personalistic corporation, a hybrid form of a capital company and a partnership. A cooperative group and a cooperative enterprise are connected by the statuary purpose of member-promotion. As self-help organisations, cooperatives are characterized by the identity of owners and users.

Self-administration is one of the guiding principles of cooperative organisation and another principle being open membership means, that an organisation with such principles that pursues long-term objectives need a stable corporate structure with governing bodies. (cf. Münkner 2017, p. 281 f.)

The Austrian Code of Corporate Governance for commodity and service cooperatives based on the Schulze-Delitzsch system was adopted at the "Ware" Group Day in 2004 and adapted in 2010. It follows the Austrian Cooperative Act in pursuing the goal of responsible management and supervision of cooperatives and their associated companies. It is directed to sustainable and long-term value creation - based on the principle of the development mission. The aim is to achieve a high degree of transparency for the cooperative members themselves, but also for all business partners, employees and the general public, in order to promote their trust in the management and supervision of cooperatives. ("Österreichischer Genossenschafts-verband", n.d.)

When it comes to the organisational form of companies, a distinction is made between self-organised and third or external organised companies. (cf. Hausmaniger & Taufer 2016, Rz 90)

As the self-organisation is typical for partnerships, the partners themselves represent the company. The representation authority belongs to them based of their position as partners and a formal act of appointment is not required. The third party or external organ being typical for corporations, the company establishment is not a requirement for the representation of the

company. A (formal) legal act is required for the appointment of the organs. (Rieder & Huemer 2017, p. 41)
In the case of cooperatives, the principle of limited third-party organs applies. It corresponds to their nature, as for cooperatives not only the general assembly consists of the members, but also their organs are formed from among them (board of directors § 15 (1) GenG and supervisory board § 24 (1) GenG). This personalistic form of self-administration is an expression of the cooperative as a self-help organisation. The organs of the cooperative are to be occupied by the members themselves. However, there are exceptions in specific cases. (cf. Nowotny 2017, Rz 5/27.)
The organisational structure is simple. The cooperative has two mandatory organs: the general assembly and the board of directors. The general assembly is the highest decision-making body and can intervene in the management. The board of directors is responsible for management and representation. (cf. Rieder & Huemer 2017, p. 447) In case of credit cooperatives, managing directors are entitled to manage the credit cooperative and to represent it externally according to § 2 l. 1 (b) BWG.
If the cooperative is to have a supervisory board regardless of the number of employees, a provision is required in the articles of cooperative, since the supervisory board is not a generally obligatory body (§ 24 (3) GenG). If the cooperative permanently employs more than forty employees, a supervisory board is mandatory (§ 24 (1) GenG). (cf. Nowotny 2017, Rz 5/57.) The articles of cooperative may also provide for the establishment of other (optional) bodies (§ 19 GenG), such as the establishment of an advisory board. (cf. Nowotny, Rz 5/58.)

3.3. Membership

The foundation of the relationship between the cooperative and its members is the statute, which is in principle mandatory for every member. Otherwise, the GenG is decisive. (cf. Keinert 1988, Rz 522.)
According to Kastner (1986), the share in the cooperative is an expression of ‘’the compulsory membership relationships’’. (p. 196) Its transfer is done according to jurisdiction in accordance with the principles governing the cession of claim (and not under property law right regulations). (cf. OGH 7.9.1971, 4 Ob 588/71, Kastner 1986, p. 197) A bona fide purchaser according to § 367 ABGB is excluded. (cf. Pomper 2022, p. 107) As with the other companies, natural and legal persons can be members of a cooperative. A partnership under the Civil Code (GesbR) and silent partnership (StG) are generally excluded due to their lack

of legal capacity. (cf. Ratka, 2020, p. 474) Furthermore, legal persons under public law, especially authorities, can also become cooperative members. (cf. Keinert 1988, Rz 627) In the cooperative contract there are often restrictions on membership to a certain group of persons (the entry conditions are a mandatory part of the cooperative contract according to § 5 (4) GenG). However, cooperative contracts sometimes allow the admission of “investing” (non-using) members, who are not eligible for the use or production of the goods and the use of provision of the services of the cooperative (§ 5a (2) Z 1 GenG). The number of members is in general not closed. However, a certain maximum or minimum number can be set in the cooperative contract. (cf. Ratka, 2020, p. 475)

The legal position of the cooperative member, that is the membership, includes on the one hand the acquisition and termination of this membership, and on the other hand the rights and obligations resulting from it. (cf. Keinert 1988, Rz 624) The legal position of the cooperative member is regulated differently within the Cooperative Act depending on the type of liability. (cf. Pomper 2022, p. 107)

In § 2 GenG, the GenG distinguishes between three types according to the liability of the cooperative members for the cooperative's obligations:

- Cooperatives with unlimited liability
- Cooperatives with limited liability
- Cooperatives with share liability (§ 2 (3) GenG and § 27 BWG) (cf. Pomper 2022, p. 12)

Cooperatives with share liability did not really exist in practice until the amendment of the Banking Act (BWG) by BGBI I 2012/20. The reason for that was the fact that liability limited to the business share was only permissible for consumer cooperatives under the premise that a business share nominal value of at least one euro and the restriction of the sale of goods to members was provided for, and the cooperatives did not want to limit activities to their members. The amendment to the BWG added a new paragraph 10a to the former § 23 BWG (now § 27 BWG as amended by BGBI I 2013/184). In accordance with this provision, credit cooperatives can determine in the cooperative contract that the liability of their members is limited to the business share. § 27 BWG explicitly refers to § 86a GenG, which clarifies that this regulation in the cooperative contract forms a cooperative with share liability. (cf. Dellinger 2014, p. 103; cf. Binder & Lengauer 2014, p. 531)

3.3.1. Acquisition of Membership

Joining the cooperative requires a written declaration (§ 3 (2) GenG). The statement becomes legally effective upon acceptance by the board of directors, or another responsible body stated in the cooperative contract. Members of the cooperative must be entered in a register to be kept by the cooperative with certain information (§ 14 (1) GenG). There is no entry in the commercial register (like with partners of partnerships or limited liability companies), but a certain degree of publicity is ensured by the fact that the inspection of the register is to be allowed to anyone by the cooperative (§ 14 (2) GenG). (cf. Ratka 2020, p. 475.) The requirements for the admission of members are to be set in the statutes of the cooperative. This requires regulations on the admission procedure. However, the cooperative is given the right to formulate other conditions for joining the cooperative. Conditions for admission must be included in the articles of the cooperative. (cf. Astl & Steinböck 2014, p. 128)

However, the conditions must not be formulated in the sense to undermine the non-closed membership requirement in § 1 GenG. (Keinert 1988, Rz 625)

The acquisition of membership can be related to specific personal and objective conditions through correspondent bylaws. For example, the acquisition of membership can be restricted to a certain group of persons (residence in a certain geographical area, same profession in a certain region, etc.). This ensures that persons with the same economic interests are members of the cooperative, which enables the cooperative to fulfil its promotion mandate. (cf. Kastner 1986, p. 122 f.)

The acquisition of membership is a two-sided legal act. (cf. Kastner 1986, p. 139) In addition to the written declaration of accession by the applicant, an expression of the cooperative's will is also required. Membership comes into existence with the approval of the cooperative. (cf. Astl & Steinböck 2014, p. 130) In the articles it must be clear which body decides on the admission of a member. (cf. Kastner 1986, p. 139) The decision-making authority can be assigned to any organ, also to an optional body, e.g. an advisory board. (cf. Kastner 1986, p. 139) An act in combination of several organs is also imaginable. (cf. Keinert 1988, Zf 648) In the lack of regulations, the decision-making authority belongs to the board of directors. (cf. Kastner 1986, p. 195) All this does not rule out the general assembly from giving instructions or making the decision itself (residual competence). Admission by an unqualified organ is invalid. (cf. Astl & Steinböck 2014, p. 130) The will expression of the cooperative requires reception and is not bound to any particular form. (cf. Keinert 1988, Rz 643) The member may exercise his or her membership rights only after the approval of the body or after the expiration of the set deadline. The acceptance deadline according to § 862 ABGB is to be noted, considering the individual situation of the cooperative. For the acquisition of further shares, the execution on the acceptance of membership shall apply correspondingly. (cf. Astl & Steinböck, 2014, p. 131) The reason for refusal of admission is often exempted from the articles. (cf. Kastner 1986, p. 139) Even without such exemption, a decision about rejection does not need to be justified. (cf. Keinert 1988, Rz 651) It would be different if an obligation to give reasons is anchored in the statutes. In general, there is no compulsory admission. Such an obligation can be specified in the articles of cooperative. For auditing associations, a provision in the articles of cooperative specifying an obligation to accept members is given according to § 19 (2) l. 2 GenRevG. (cf. Keinert 1988, Rz 112) In principle, an applicant for membership who fulfils all legal and statutory requirements can also be rejected. Nevertheless, a cooperative internal review (a type of “legal means”) against rejection is possible, so that a second body (e.g. the general assembly) reviews the decision of the body primarily responsible (usually the board of directors). (cf. Keinert 1988, Rz 648)

Also when it comes to acquisition of membership by inheritance, a separate admission by the cooperative is required. (cf. Kastner 1986, p. 197) Similar applies to the transfer among living, for which the approval of the board of directors is mandatory.

The approval of the declaration of accession by the cooperative covers the non-existence of requirements in the cooperative agreement. (cf. Astl & Steinböck, 2014, p. 131)

3.3.2. Termination of Membership

The membership of the cooperative member is terminated by his or her "withdrawal" from the cooperative. The Cooperative Act names three possibilities for withdrawal: (voluntary) "resignation", "death", or "exclusion" (§ 5 l. 4 GenG). (cf. Pomper 2022, p. 111) Special regulations on withdrawal can be included in the articles of cooperative. (cf. Keinert 1988, Rz 182)

3.3.2.1. Resignation by the Member

Resignation by the member is the most significant termination reason in practice. This essential right cannot be omitted or limited by the articles of association. (OGH 5.6.1975, 7 Ob 105/75) This is an expression of the principle of non-closed membership. It is a unilateral declaration of intent which has to be received, no justification is required. (cf. Kastner 1986,

p. 197 f.) Resignation requires the (ordinary) termination of all shares by the member (for details on termination see §§ 54 and 77 GenG). (cf. Astl & Steinböck, p. 132) In accordance with § 5 l. 4 GenG, special provisions on withdrawal, i.e., also on termination, may be included in the cooperative articles. Provisions that would make it possible for the cooperative to terminate the membership of members are not permitted.

Since the Cooperative Act does not contain any provisions on the form of termination, a written form is suggested in order to have evidence, (cf. Zahn 1963, p. 25); which is also common in practice. (cf. Astl & Steinböck, p. 132) In the absence of a corresponding provision in the cooperative articles, an informal notice of termination (given orally to a member of the board of directors - cf. § 17 (2) last sentence) would also be effective (even then, however, it is advisable to put it in writing). In addition, provisions on the period of notice and the date of termination may be included (cf. §§ 54 (2) and 77 (1) - the cooperative member leaves at the end of the financial year, after prior notice of at least four weeks). (cf. Astl & Steinböck, p. 132) Other conditions or requirements for the validity of a termination are generally not allowed according to the prevailing opinion. (cf. Kastner 1986, p. 197) According to § 79 (1) GenG, the share, including any other balances due to the cooperative relationship, may not be paid out until one year after the end of the financial year (lockup period/year) in which the cooperative member left and it also applies to the termination of individual shares (§ 80 GenG). (cf. Keinert 1988, Rz 736) Besides the ordinary termination, termination for an important reason (extraordinary termination) can be considered. § 33 (4) GenG provides for an extraordinary right of termination in the case of an increase in the business shares and an increase in liability (by increasing the liability amount or by converting the type of liability into a cooperative with unlimited liability) for the members who are outvoted or not present or represented at the general meeting. (cf. Pomper 2022, p. 113) Here the notice period is different, they have to terminate their membership no later than the fourteenth day after the entry of the resolution in the minute book and resign in accordance with such termination. (cf. § 33 (4) GenG) Another case of the extraordinary termination right is found in the case of merger §§ 9 f GenVG, whereby consequences are regulated precisely (in contrast to § 33 (4) GenG). (cf. Dellinger 2014, p. 485)

3.3.2.2. Death of the Member

The membership of the cooperative member ends (regardless of heredity) upon death (§ 54 GenG). In the case of legal entities, it is questionable whether their dissolution or only their full termination leads to the termination of membership if this is not further regulated in the cooperative articles. (cf. Dellinger 2014, p. 487) The official dissolution or its annulment regularly terminates the membership of cooperative members subject to registration. (cf. Kastner 1986, p. 197) According to Pomper (2022), "it is left to the articles of cooperative to provide for the termination of membership of a legal entity or a legal partnership upon its dissolution." (p. 114) The question of the hereditability of membership is subject to the disposition according to the cooperative articles. Here it should be distinguished between cooperatives with unlimited liability and cooperatives with limited liability. The articles of a cooperative with unlimited liability may provide for the hereditability of membership (see § 54 (2) last sentence: "Furthermore, membership shall cease upon death, unless the cooperative contract contains any contrary provisions"). (cf. Astl & Steinböck 2014, p. 133) In the case of a cooperative with limited liability, membership is assumed to be inheritable in principle, but this can be excluded or limited by the statutes. (cf. Kastner 1986, p. 197)

3.3.2.3. Exclusion

The exclusion of cooperative members is not regulated in detail in the cooperative law. It is therefore generally considered possible only if the cooperative articles allow it. (cf. Kastner 1986, p. 199) Exclusion is only possible if there is an important reason for it, which makes the continuation of membership unreasonable for the cooperative. (cf. Astl & Steinböck 2014, p. 134) The important reason must be in the person of the cooperative member. (cf. Kastner 1986, p. 199)

In practice, the following reasons for exclusion are usually listed in the articles:

- serious violation of a provision of the articles;
- omission of a requirement for membership;
- engaging in acts likely to damage the interests or reputation of the cooperative; and
- insolvency or the opening of insolvency proceedings against the assets of a member. (cf. Astl & Steinböck 2014, p. 134)

In addition to reasons for exclusion, there are also regular rules on the exclusion procedure (competent body, decision-making requirements, formal requirements, court proceedings). (cf. Pomper 2022, p. 115)

The exclusion of members of a governing body is the responsibility of the body that also has to decide on possible dismissal, since the loss of membership also means the loss of the position as a member of the governing body. An internal cooperative review of another organ (supervisory board, advisory board or the general assembly) can be provided within the framework of the articles of cooperative. If such is set up, it is to be used before recourse to the court. (cf. Kastner 1986, p. 199)

An automatic exclusion, which results in the exclusion without further proceeding on the of the cooperative when certain facts occur, is not possible and cannot be provided for in the articles. The exclusion must not be justified to the member, but the reasons must be clear. If they were not known to the excluded member, they can be raised in the second internal instance of the cooperative or in the next court proceedings. (cf. Pomper 2022, p. 116) The GenG itself does not standardize any special form requirements about the way of informing a member about exclusion. Both verbal and written notifications can be considered. The exclusion is a unilateral declaration of intent that must be received. To be effective, it must therefore be received by the member that is to be excluded. (cf. Astl & Steinböck 2014, p. 136)

3.3.3. Transfer of Membership

Shares in a cooperative with unlimited liability can only be transferred if the cooperative contract provides for this (derivable from § 54 (2) GenG). In cooperatives with limited liability, membership is transferable (or inheritable) with the agreement of the board of directors, unless the cooperative contract regulates otherwise (§ 83 (1) GenG). (cf. Ratka 2020, p. 475) In addition to the transfer of all shares, the transfer of individual shares is also possible, unless the articles of a cooperative regulate it differently. In the case of only a partial transfer of shares, where at least one share remains with the transferor (partial transfer), the transferor shall remain a member of the cooperative, whereas the acquirer shall only become a member if he or she did not previously hold a share in the cooperative. The transfer of all shares leads to the exit from the cooperative and the acquirer receives the legal status of the transferer. (cf. Keinert 1988, Rz 736)

3.4. Members' Rights and Obligations

3.4.1. Members' Rights

The rights of membership result from the promotion mandate or from the provisions of the cooperative agreement. (cf. Ratka 2020, p. 475)

A distinction is made between:

- Proprietary rights (e.g., entitlement to promotion, compensation upon leaving the cooperative);
- Individual rights (e.g., right to attend and vote at the general assembly); and
- Minority rights (the right to request the convocation of a general assembly). (cf. Dellinger & Schellner 2022, p. 11)

The proprietary rights of the cooperative can be divided into a primary entitlement to promotion and secondary property rights, i.e. those that are not related to the purpose of promotion and in which adjustments through the cooperative articles are also possible (while restrictions of the cooperative articles with regard to the promotion mandate are not allowed). (cf. Keinert 1988, Rz 727) These are pointed to a share in the profits, payment of the existing balances on the date of departure from the cooperative and the liquidation share. (cf. Kastner 1986, p. 201)

The most important right of the cooperative member is his right to promotion. This complies with use of the cooperative facilities (participation right) and to make use of the services of its business operations (e.g., acquisition of resources at a reduced price, provision of members with housing, fulfilment of purchase or delivery obligations). (cf. Keinert 1988, Rz 727)

The cooperative agreement (§ 5 l. 6 GenG) as well as the resolution on the appropriation of earnings (§ 27 a GenG) (cf. Zehetner 2014, p. 355) can regulate how to deal with the profit, which share is to be allocated to a reserve fund and which way the profit is to be divided among the members. (cf. Kastner 1986, p. 201)

The entitlement to profit distribution only occurs with the statutory profit distribution resolution of the general assembly (§ 5 l. 6 in conjunction with § 27a GenG) (cf. Keinert 1988, Rz 421; cf. Zehetner 2014, p 358).

According to Pomper (2022), “in the case of housing cooperatives, the statutory restriction on distributions in § 10 (1) WGG must be observed, and special provisions also exist for credit cooperatives” (see § 24 BWG). (p. 120)

A profit independent interest on shares can be provided for in the cooperative articles with limited and unlimited liability cooperatives only to the extent that they take into account creditor protection aspects (§ 56 GenG) (cf. Kastner 1986, p. 201) According to Keinert (1988), “a statutory provision that provides for a fixed, profit-independent interest on the business share would, in the absence of sufficient profits, lead to an impairment of the creditors' cover fund without this being countered by unlimited liability and is therefore considered prohibited.” (Rz 728 ff.)

When it comes to liquidation share, according to § 48 l. 2 & 3 GenG, “the funds available at the time of the dissolution of the cooperative and the funds received during the liquidation shall be used as follows:

- From the remaining surpluses, the amounts paid in on the shares shall be repaid to the members of the cooperative. If the stock is not sufficient to cover the entire amount, it shall be distributed in proportion to the amount of the individual credit balances, unless otherwise agreed in the cooperative contract. (l. 2)
- The surplus remaining after the debts of the cooperative and the shares of the cooperative members have been covered shall be distributed among the members of the cooperative in accordance with the provisions of the cooperative contract on the distribution of profits (§ 5 (6) GenG). (l. 3)”

Amendments to the statutes regarding the distribution of profits, losses and liquidation proceeds may only be adopted in compliance with the principle of equal treatment (Gleichbehandlungsgrundsatz). (cf. Kastner 1987, p. 201)

If a member of a cooperative withdraws, he/she has no claims to the reserve fund or any other assets of the cooperative, unless otherwise stipulated in the cooperative agreement. (§ 79 (2) GenG)

Individual rights include the right to participate in the general meeting, which is associated with the right to speak, right to petition and to receive information, the right to vote in the general meeting and the right to bring an action for annulment or to file an appeal. (cf. Pomper 2022, p. 117; cf. Kastner 1986, p. 200; cf. Nowotny 2017, Rz 5/115.) Furthermore, the right to receive a copy of the cooperative articles and a copy of the approved financial statements and balance sheets about reimbursement of costs (§ 35 GenG), as well as access to the minute book (§ 34 GenG). Additionally, as any other person, the member can require insight of the register of members (§ 14 GenG), and this right cannot be restricted by the cooperative articles. (cf. Astl & Steinböck 2014, p. 187; cf. Kastner 1987, p. 200; cf. Keinert 1988, Rz 725)

When it comes to minority rights, the GenG regulates, that one tenth of the members can demand the convocation of the general assembly (§ 29 (2) GenG).

3.4.2. Members’ Obligations

The members of the cooperative are obliged to pay their contribution to the cooperative share, which is their most significant duty. The amount is to be set in the cooperative articles (§ 5 l.

5 GenG). Apart from cooperatives with share liability, the members of the cooperative are also responsible for the cooperative's debts. This is not a direct liability, but a cover obligation due to bankruptcy (§ 3 (2) GenIG). The degree of the coverage obligation depends on how the liability of the members is set up in a cooperative. (cf. Artman & Ruffler, 2017, p. 577f.). Within the framework of the articles, in addition to the obligation to pay the contribution, the obligation to provide additional services in the form of non-monetary service, or obligations to tender, or purchase, can be enforced. (cf. Keinert 1988, Rz 789 f.) If a member of the cooperative leaves, the cooperative can demand that he/she makes outstanding contributions, if the proportion of lost shares attributable to him/her exceeds his/her share capital or his/her contributions made to the shares, he/she may be required to make contributions that have remained unpaid. (cf. Dellinger & Oberhammer 1996 p. 201) The obligation to make additional payments exists only in the case of liquidation or bankruptcy, in the other cases it is not allowed. (cf. Dellinger & Steinböck 2014, p. 452) However, this does not forbid the voluntary payment of amounts equal to the liability sum to prevent threatening insolvency proceedings - for example in the form of a lost subvention with or without a betterment agreement. Voluntary payment is particularly suitable appropriate when a cooperative is seeking to restructure. (cf. Dellinger 2014, p. 475) The "liquid” cooperative members do not have an unlimited coverage obligation in the apportionment procedure, they are only liable in accordance with the statutory or legal maximum amounts. (cf. Nowotny 2017, Rz 5/120.)

If a cooperative with limited liability goes bankrupt (as defined in § 180 IO), the probable disposal is to be determined by the liquidator (§ 2 GenIG); the contributions in arrears (cf. Nowotny 2017, Rz 5/121.), and the contributions not yet due are to be collected to cover this (§ 3 (1) GenIG). If these are not enough, the members of the cooperative are obliged to make further contributions in proportion to the amount of their shares until they are fully covered (§ 3 (2) GenIG). The additional contribution is limited by the legal or statutory limitation of liability. If the articles do not provide for other rules, the additional contribution is limited to a further amount equal to the shares of each member of the cooperative (§ 76 GenG). (cf. Nowotny 2017, Rz 5/122.)

The members of the cooperative whose liability had not expired at the time of the liquidation of the cooperative are liable to make additional contributions. Members of the cooperative who have withdrawn in whole or in part by transferring their shares are furthermore only obliged to make additional contributions to the extent that the amount of additional contributions cannot be brought in by the acquirer of the share. (§ 3 (3) GenIG). (cf. Dellinger 2014, p. 518) The liquidator shall examine whether and to what extent members of the

cooperative who are obviously fully or partly unable to pay the amounts due to them are to be considered in the calculation of contributions. (§ 4 (1) GenIG). (cf. Pomper 2022, p. 123)
According to § 53 (1) and § 76 GenG, the members of the cooperative are liable not only in the case of bankruptcy, but also in the case of liquidation. If the liquidators determine over-indebtedness, they must directly report to the general assembly (§ 49 GenG). There is also an obligation of members to register. The register of members must be kept at the registered office of the cooperative (§ 14 GenG). (cf. Pomper 2022, p. 124)

3.5. The Division of Powers Among the Cooperatives' Organs

3.5.1. Board of Directors (Vorstand)

A cooperative is obliged to have a board of directors. The number of members of the board of directors is to be specified in the articles and it may consist of one or more members. It is also possible to set a minimum or maximum number of members, in addition to a specific number, which is to be regulated by the general assembly. (cf. Strommer 2014, p. 190)
The appointment of the board of directors is usually made by the general assembly. However, the cooperative agreement can also provide for appointment by the supervisory board (§ 15 (1) sentence two GenG). The appointment can be revoked at any time (§ 15 (2) GenG) without requiring an important reason. The members of the board of directors and the type of representation competence have to be entered in the company register. (§ 16 (1) GenG) (cf. Ratka 2020, p. 477).
The general assembly, as the highest body of the cooperative, is authorized to give binding instructions to the board of directors (§§ 19 and 34 GenG), which according to prevailing opinion assumes the board of directors members to be employees of the cooperative and not just persons with free service contracts. (cf. Kastner 1986, p. 150; cf. Keinert 1988, Zf 335; cf. Zahn 1963, p. 43; cf. Dellinger & Oberhammer 1996, p. 105). Although there are also opposite opinions, according to Windisch-Graetz (1993), the members of the board of directors are only free service contractors (at least in the case of credit cooperatives). (OGH 9 Ob A 117/88) (p. 52)
The responsibility of the board of directors is to manage and represent the cooperative (§ 17 GenG). All members of the board of directors have joint power to represent, unless otherwise agreed in the cooperative agreement. In most cases, two members of the board of directors or one member together with an authorized representative (Prokurist) have joint power to

represent. Passively, each board of directors member is also authorized to represent the company alone (§ 17 (2), § 21 GenG). (cf. Artman & Ruffler, 2017, p. 579).

Board of directors is also responsible for the proper accounting management. If the cooperative needs to have the supervisory board, the board of directors must set up an internal control system and there is also reporting obligation to the supervisory board (§ 22 (1) and (3) GenG). Within the first five months of a business year, the board of directors must prepare a final report (Abschlussbericht) and a management report (Lagebericht) (§ 22 (2) GenG). In the case of cooperatives subject to supervisory board supervision, there are reporting obligations to the supervisory board (§ 22 (3) GenG). (cf. Ratka 2020, p. 477 f.).

The board of directors makes decisions in meetings. (cf. Artman & Ruffler, 2017, p. 579) Membership is a pre-requirement to be able to get elected for a member of the board of directors (§ 15 (1) GenG). (cf. Strommer 2014, p. 192) However, in addition to natural persons, legal entities or partnerships with legal capacity may also be elected to the board of directors of a cooperative without these having to become members of the cooperative personally. (cf. Pomper 2022, p. 77) Appointing organ also has the power to revoke their appointment of a board of directors' member. This can be done at any time (lacking the provisions in the statues) and the important reason does not have to exist (§ 15 (2) GenG). (cf. Pomper 2022, p. 79)

In the context of leaving the board, a strict separation must be made between the board of directors' function and the liability relationship with the cooperative. Leaving the board of directors affects the function but does not per se lead to the dissolution of the relationship under the law of obligations, if such a relationship exists. (cf. Strommer 2014, p. 194) With regard to the revocation of the appointment, the GenG therefore clarifies that the relationship under the law of obligations (compensation claim) is not affected by the revocation of the appointment alone (§ 15 (2) GenG). (cf. Pomper 2022, p. 79) The function regularly ends with the expiration of the agreed period (usually the election period), for which it was taken (cf. Strommer 2014, p. 196). Re-election is allowed unless the cooperative articles contain restrictions in this respect (e.g., age limits). (cf. Strommer 2014, p. 193). Since only cooperative members can be members of the board of directors, the function also ends with loss of membership. (cf. Strommer 2014, p. 196). In accordance with § 23 GenG, members of the board of directors are personally and jointly liable towards the cooperative for violations of the law, the cooperative agreement, but also for violations of due diligence (§ 1299 ABGB), and for any damage caused to the cooperative. (cf. Strommer 2014, p. 251 f.). As in the case of the law of companies with the limited liability, in the absence of a corresponding provision of a discharge, the effect of a waiver to recognisable claims for damages is also granted. (cf. Zehetner 2014, p. 361 f.)

3.5.2. Managing Director of Credit Cooperatives

The 1979 Banking Act (KWG) shifted the management and representation of a credit cooperative for particular areas from the board of directors to so-called managing directors. (cf. Kastner 1986, p. 162; cf. Windisch-Graetz, ZAS 1993, 52; cf. Dellinger & Oberhammer, p. 128) The regulations on the managing directors of credit cooperatives are covered in BWG. Managing directors are entitled to manage the credit cooperative and to represent it externally according to § 2 l. 1 (b) BWG. They are the legal representatives of the credit cooperatives as defined by the BWG. This competence includes all transactions usually connected with banking business and banking operations. (cf. Frotz 1985, pp. 30 ff.) Managing directors are nominated by the board of directors, the supervisory board or the general meeting. (cf. Nowotny 2017, Rz 5/78) Only persons whose main occupation is within the credit system or within insurance companies or pension funds may be considered as managing directors (§§ 2 l. 1 (b) BWG and 5 (1) l. 13 BWG). (cf. Frotz 1985, p. 5) When appointing a managing director, their professional and personal skills must be taken into account (cf. § 5 (1) l: 6 ff. BWG). The professional qualification requires that the managing director has sufficient theoretical and practical knowledge of the business according to § 1 (1) BWG, as well as management experience. The articles of association or bylaws often provide for an obligation to consult the competent auditing association when appointing a managing director. The dismissal of a managing director is, according to the articles of association, carried out by the body of the cooperative that appointed him or her. (cf. Frotz 1985, pp. 24 f.) Credit institutions, and therefore also credit cooperatives, can only be granted a licence in accordance with § 5 (1) l. 12 BWG if they have at least two managing directors and the articles of the cooperative exclude individual power of representation, individual procuration or individual power of attorney and the management of the (banking) business is restricted to the managing directors. There are various possibilities regarding the relationship of the managing directors to the board of directors and the composition of the board of directors. There can be a honorary board, which appoints the managing directors, who are not themselves members of the board. A so-called mixed board consists of members elected by the general meeting and the full-time managing directors in a board function. If managing directors are part of the board, they are always employed on a full-time and salaried basis. (cf.

Windisch-Graetz, ZAS 1993, 52; cf. Kastner 1986, pp. 164 f.) All members of the board of directors can be appointed as managing directors within the context of the BWG (so-called full-time board of directors). The managing directors of a credit cooperative do not necessarily have to be members of the board of directors, they do not even have to be members of the cooperative. (cf. Windisch-Graetz, ZAS 1993, 52; cf. Keinert 1988, Rz 372) The regulations of §§ 16 - 23 GenG regarding the board of directors are also to be applied accordingly to the managing directors. (cf. Frotz 1985, p. 7) With managing directors, a distinction must be made between the organ position as managing director on the one hand and the relationship under the law of obligations on the other. (cf. OGH 29.10.2009, 9 Oba 100/08h = ARD 6030/6/2010.) Whether managing directors of credit cooperatives are also employees of the cooperative depends on whether the general assembly has a right of instruction towards them. Although the issuing of such instructions by the general meeting is unusual in practice, because the general meeting will hardly be in a position to issue meaningful instructions to the managing directors, the prevailing doctrine assumes that the general meeting has such a power to issue instructions. (cf. Frotz 1985, p. 9; cf. Windisch-Graetz, ZAS 1993, 52; cf. Kastner 1986, p. 166; cf. Duursma 2007, Rz 1765; cf. Keinert 1998, Rz 276) Apart from the fact that the management of the business and the representation of the credit cooperative in the banking sector has been shifted from the board of directors to the managing directors, the cooperative law remains unaffected and thus also the authority of the general assembly to issue instructions in all matters of the cooperative. (cf. Windisch-Graetz, ZAS 1993, 52)

3.5.3. Supervisory Board

A supervisory board must be appointed by the general assembly if the cooperative has at least 40 permanent employees (§ 24 (1) GenG). The appointment can be revoked by the general assembly at any time (§ 24 (1) last sentence GenG). An optional supervisory board can be provided for in the cooperative agreement (§ 24 (3) GenG). (cf. Ratka 2020, p. 478)
The supervisory board must consist of three members, unless the cooperative contract sets a higher number (in case of facultative supervisory board it can also have less than three members) (§ 24 (1) sentence two; § 24 (3) last sentence GenG). § 24 GenG only refers to the supervisory board members elected by the general assembly. Supervisory board members appointed by the workers' council are added to these. (cf. Zehetner 2014, p. 266 f.) Only members and members of organs can become members of the supervisory board. Members of

the board of directors and workers cannot become members of the supervisory board. Only cooperative members and members of cooperative organs being able to become members of the supervisory board is an expression of personalistic self-government and shows the essence of the cooperative as a self-help organisation. (cf. Kastner 1986, p. 170) §24c (6) l. 1 GenG provides an exception for financial experts (who must be a member of the audit committee), since in some cooperatives it would be impossible to fill this position with a member (cf. ErläutRV 467 BlgNR 23. GP 42; cf. Pomper 2022, p. 84)

The duration of the function is not limited in the GenG. If there is no regulation in the cooperative articles and if it is not determined during the appointment, the function is for an indefinite period. (cf. Zehetner 2014, p. 269 f.) Membership of the cooperative does not have to prior to election as a member of the supervisory board, to join during the election is sufficient. (cf. Zehetner 2014, p. 268) Membership must exist during the function period, and it ends with the termination of membership. (cf. Keinert 1988, Rz 382; cf. Zehetner 2014, p. 270; cf. Nowotny 2017, Rz 5/86.) The appointment of a supervisory board member can be revoked at any time (without giving reasons) (§ 24 (1) GenG). Resolutions are passed by simple majority. Qualified majorities may be defined within the framework of the cooperative articles. (cf. Kastner 1986, p. 170 f.) The function also ends when the supervisory board member resigns from the function. A resignation is possible at any time without giving reasons. However, a resignation at an improper time can result in claims for compensation s by the cooperative. (cf. Zehetner 2014, p. 270)

The supervisory board has to elect a chairman and a deputy chairman from among its members, unless the cooperative agreement provides this competence to the general assembly (§ 24c (1) GenG). (cf. Dellinger & Steinböck 2014, p. 276)

If the chairman (and deputy chairman) is elected by the supervisory board (§ 24c (1) GenG), in addition to the majority of the elected supervisory board members, also the majority of the entire supervisory board is required ("double majority", § 110 (3) in comparison with (5) l. 4 ArbVG). This does not apply if election by the general assembly is provided for in the cooperative agreement § 24c (1) GenG, which is usual in practice (cf. Zehetner 2014, p. 267)

The internal regulation of the supervisory board can be regulated in more detail in rules of procedure (or in the cooperative articles) in compliance with the (mandatory) provisions of the GenG. Usually, statutes even contain the obligation to issue rules of procedure without specifying their (minimum) content in more detail. (cf. Dellinger & Steinböck 2014, p. 278)

The supervisory board has to meet at least four times a year (quarterly). The board of directors or a member of the supervisory board can request the meeting. The meeting must take place within two weeks after the request for convocation. The chairman of the supervisory board is responsible for the convocation of the meeting (§ 24d GenG). (cf. Pomper 2022, p. 87) All members of the supervisory board have to attend the meeting and they have the right to comment on all items on the agenda. The chairman of the supervisory board has to lead the meeting (or his deputy if he is unable to do so) In general, resolutions are passed with a simple majority. In order to have a quorum, at least half of the members must be present. (cf. Dellinger & Steinböck 2014, pp. 282 ff.)

The main task of the supervisory board to monitor the board of directors for its legality, expediency and economic efficiency (see § 24e (1) GenG). (cf. OGH 31.5.1977, 5 Ob 306/76.; cf. Pomper 2022, p. 88) The supervisory board has to examine the annual financial statement and the proposals for the distribution of profits for their plausibility and to report to the general assembly (§ 24e (4) GenG). For this purpose, the members of the supervisory board have access to the cooperative books. They can also demand a report from the board of directors on the cooperative matters (§ 24e (1) GenG). The annual financial statements are approved by the general assembly. (cf. Zehetner 2014, p. 317; cf. Artman & Ruffler 2017, p. 580) The supervisory board has to convene the general assembly if this is necessary on behalf of the cooperative (§24e (5) GenG). (cf. Zehetner 2014, p. 325; cf. Artman & Ruffler 2017, p. 580) The supervisory board can suspend the board of directors members until the next general assembly (right of suspension), when it seems necessary (§24e (2) GenG). (cf. Zehetner 2014, p. 323; cf. Artman & Ruffler 2017, p. 580)

The members of the supervisory board are liable for the damage they cause to the cooperative through non-fulfillment of their obligations (§24e (6) GenG). An objective standard of care applies. The provisions for stock companies and judicature apply analogously. The members of the supervisory board are jointly liable and regardless of the degree of fault. (cf. Zehetner 2014, p. 326) However, different degrees of fault have significance for subsequent (reciprocal) recourse claims. (cf. Kastner 1986, p. 176) If there is no personal fault, there is no liability, so if a member of the supervisory board is not culpable, he or she is not liable. (cf. Zehetner 2014, p. 326)

3.5.4. General Assembly

The general assembly is the highest body of the cooperative. In the general assembly members exercise their rights (§ 27 (1) GenG). It can directly influence the management of the cooperative by giving instructions to the board of directors (§ 34 (1) GenG). In the cooperative agreement, certain matters can be reserved for the approval of the general assembly (§ 19 GenG). In the first eight months of each business year the general assembly has to decide on the financial statements and the report of the board of directors (§ 22 (2) GenG), on the appropriation of earnings and on the discharge of the board of directors and the supervisory board (§ 27a GenG). Therefore, the general assembly has to meet at least once a year (cf. Ratka 2020, page 479 f.).

As long as a cooperative has at least 500 members (§ 27 (3) GenG), the cooperative articles can specify that the general assembly consists of delegates. The delegates are elected for a maximum of five years from among the members members of groups provided for in the statutes, which can be formed, for example, according to professions or local areas. (cf. Kastner 1986, p. 185; cf. Nowotny 2017, Rz 5/93.)

The general assembly is convened by the board of directors, unless other persons are authorised to do so according to the cooperative agreement or the law (§ 28 GenG). As we have already mentioned, the supervisory board can also convene the general assembly if this is necessary on behalf of the cooperative (§24e (5) GenG). A general assembly has to be convened if the welfare of the cooperative requires it (§ 29 (1) GenG). A minority of 10% of the members can demand the convocation the general assembly (in the written form and by stating a reason) (§ 29 (2) GenG). In case the members who were obliged to convoke the general assembly, do not do so, they might be ordered by the court to pay fines (§ 29 (3) GenG) (cf. Ratka 2020, page 480).

The powers the general assembly members are entitled to exercise under the GenG and the articles of association are:

- Election and dismissal of members of the board of directors (unless the statutes assign this to another body),
- Election and dismissal of supervisory board member,
- Election and dismissal of members of other organs (§ 19 GenG), if not assigned to the board of directors or the supervisory board,
- Election and dismissal of liquidators (§ 41 GenG),
- Resolutions on the financial statements (annual financial statements or other financial statements) prepared by the board of directors and checked by the supervisory board,
- Resolutions on the use of the net profit and handling of a balance sheet loss,
- Adjustment of the cooperative agreement (§ 9, § 33 GenG),
- Resolution on the audit report (§ 6 GenRevG),
- Resolution on the merger of the cooperative (§ 2 GenVG),

- Resolution on the conduct of the legal process against members of the board of directors and supervisory board in cooperative matters (§ 25 GenG).

In the general assembly, the members of the cooperative can also express their opinion on the implementation of the promotion mandate. (cf. Kastner 1986, p. 176) In principle, the general assembly has a quorum if at least 10% of the members are present or represented (§ 31 GenG). However, after waiting half an hour, the meeting is quorate in any case if this was pointed out in the invitation (§ 32 GenG). The resolutions are generally passed with a simple (absolute) majority. In the case of a tie, the chairman hast the casting vote, if the GenG does not provide for special decision requirements. (cf. Kastner 1986, p. 183)

If different majorities are to be set for (individual) resolutions, these must be clearly and explicitly stated in the cooperative articles. Besides qualified majorities (e.g., 2/3 majority), unanimity is also possible. Furthermore, relative majorities are also possible (e.g., majority of the votes, even if this is less than half of all votes. Furthermore, a majority of the votes cast is required). (cf. Keinert 1988, Rz 301.; cf. Astl & Steinböck 2014, p. 152) In the case of particularly important resolution matters, the law provides for qualified majority requirements. This applies to adjustments in the articles and the dissolution of the cooperative (§ 33 (2) GenG), but regulations deviating from the requirements including the standardization of simple majorities are permissible. (cf. Keinert 1988, Rz 302.; cf. Astl & Steinböck 2014, p. 153)

According to the prevailing doctrine, the provisions of the AktG on contestability and nullity of general assembly resolutions (see §§ 197 ff. AktG) are to be applied analogously to cooperative general assembly resolutions. (cf. OGH 29.6.1989, 6 Ob 605/89; cf. Nowotny 2017, Rz 5/76a; cf, Strommer 2014, p. 207)

Violations of the promotion mandate are void as they are not compatible with the nature of the cooperative according to § 1 (1) GenG. (cf. Nowotny 2017, Rz 5/76a)

If a reason for nullity exists, the member can proceed with an action for nullity analogous to § 201 (1) AktG. (cf. Siebenbäck 2014, p. 327) The nullity is determined by a court decision, in any legal proceedings it can be invoked by an objection. (cf. Nowotny 2017, Rz 5/106) Analogously null and void resolutions can be reversed if the resolution was entered in the company register and three years have passed since then. If the resolution is not void, but violates the law or the cooperative articles, a member or members of the bodies can legally challenge the resolution (§§ 195 AktG ff.). (cf. Nowotny 2017, Rz 5/106)

3.5.5. Optional Organs

In comparison to AG and GmbH, GenG leaves more more for optional bodies, often called the advisory board (Beirat). According to § 19 GenG, the approval of specific and individual types of businesses can also be transferred to "organs" other than the supervisory board and the general assembly. (cf. Nowotny 2017, Rz 5/106)

As an organ of the cooperative, the advisory board is to be included in the cooperative articles if responsibilities are to be given with binding effect. On the other hand, if the advisory board only has to give advice if this is requested by a cooperative body, it is not to be considered as a body. (cf. Keinert 1988, Rz 391 ff.) Mandatory statutory tasks of the general assembly or the (obligatory) supervisory board cannot regularly be transferred to an advisory board. However, in addition to the (obligatory) supervisory board, an advisory board with additional advisory tasks can be regulated in the statute. If a supervisory board has to be set up according to § 24 GenG, the tasks legally assigned to the supervisory board cannot be assigned to an (additional) optional advisory board, as this would hinder the participation rights of the employee representatives. (cf. Kastner 1986, p. 187)

4. Cooperative Financial Structure

4.1. Cooperative Financial Structure and Cooperative Identity

As we have already mentioned, according to § 1 (1) GenG, the cooperative must primary serve to “the acquisition or business of its members”. Therefore, the financial structure is based on the logic that is derived from cooperative identity, the requirement to comply with cooperative principles. (cf. Meira 2017, p. 451) A member joining the cooperative has only to pay the nominal amount of the shares contributed by him and no additional share premium, unless otherwise required in the cooperative agreement. The same applies to members leaving the cooperative. They shall only receive back the nominal amount of the shares. (cf. Dellinger & Schellner 2019, p. 107) While stock companies try to maximize their profits, cooperatives focus to promote and provide benefit to their members. Nonetheless, cooperatives also have to generate sustainable profits and surpluses in order to be able to fulfil their promotional mandate in the best possible way. (cf. Pomper 2022, p. 2) In contrast to stock companies, cooperatives have a special ("natural") way of promoting members, no fixed nominal capital (but a movable total nominal amount of shares) and a stronger personalistic structure. (cf.

Dellinger 2014, p. 20) Usually, part of the surplus is allocated to a reserve fund of the cooperative. This creates new opportunities for cooperative development and strengthens resilience in times of crisis. With a reserve fund cooperative is less likely to become insolvent. It is also possible to allocate a percentage of the surplus to an education fund for members. It is also not excluded that dividends are paid out on the contributed shares of the members, provided that there are also distributable surpluses. In addition, cooperatives also offer the possibility of reimbursement. Cooperative members receive proportional reimbursement from the surplus on the basis of the support services provided for the cooperative. The more the member provides in service, the higher the reimbursement. (cf. Pomper p. 2 f.) According to § 3 (2) GenIG, as mentioned in the last chapter, "the members of the cooperative are required to make additional contributions, if necessary up to the full amount of their liability (§§ 2, 53 and 79 GenG), in proportion to their shares, if the statutes do not provide for a different distribution of the loss." Also, cooperative agreement sometimes allows "investing" members. (§ 5a (2) l. 1 GenG). The business with non-members is also allowed, but limited in terms of purpose transactions of the cooperative. In count, auxiliary or ancillary transactions they are not limited. (cf. Keinert 1998, Rz 137)

4.2. The Legal Context of the Financial Structure of Cooperatives

From the Austrian perspective, cooperatives are special legal type based on the Cooperative Acts from 1873 up to 2008, as we have described in the work before. (see chapter 2.1.)
The cooperatives are legal business types with the objective to promote their members, where (in ideal case) owners and users are the same people (identity principle), which is the main characteristic that sets cooperatives from the other legal business forms (cf. Dellinger 2014, pp. 22 f.) The changes brought through amendments from 1974 onwards, brought changes to financial structure of cooperatives, showing the tendencies towards alignment with AG and GmbH (cf. Schediwy 1992, p. 5) The relations between cooperatives and their members are set by the cooperative acts, the by-laws, and general meetings. (cf. Münker 2017, p. 300) Next to GenG, important cooperative laws are GenRevG, GenRevRÄG, GenVerschmG, GenIG, GenSpaltG, as well as the auxiliary laws for each specific branch of cooperatives (WGG, BWG etc.)

4.3. Cooperative Share Capital

The nominal amount of the shares has to be numerically set in the cooperative's articles.
The shares according to § 5 l. 5 GenG represent the member's obligation to contribute, with which the right to vote, right to profits and the liability are connected. (cf. Kastner 1986, p. 141) There is in principle no minimum amount for cooperative shares, if there are no legal provisions, apart from housing cooperatives (minimum share € 218 according to § 6 (1) WGG) and in case of consumer associations, liability may be limited to the cooperative share if this is at least one euro (§ 2 (3) GenG). Each member has to subscribe and pay for least one share, i.e., undertake the commitment to pay in. The cooperative articles can require that a member has to acquire several shares (in addition see also § 7 (2) sentence two GenVG). (cf. Astl & Steinböck 2014, p. 141) The member has to be fully able to see the amount of his or her contribution obligation when joining the cooperative. (cf. Zahn 1963, p 28; cf. Keinert 1998, Rz 192) The acquisition of a minimum number of shares can also be required, where any acquisition of shares beyond that is at the member's discretion. (cf. Kastner 1986, p. 140)
The prevailing opinion has so far supposed that the nominal value of a share must be the same for all members. (cf. Zahn 1963, p. 27; cf. Kastner 1986, p. 140; cf. Keinert 1998, Rz 186) Due to the legal possibilities of investing members (§ 5a (2) l. 1 GenG) and the fact that the GenG does not provide for explicit regulations on the amount of cooperatives shares, the opinion today is increasingly accepted that if there is an objectively justified reason, a differentiation is allowed within the context of the (relative) equal treatment.
The issues of shares at a higher price than the nominal is allowed (extra charge, share premium). The cooperative articles have to specify how the premium is to be set and which authority can determine the premium (usually the board of directors). The share premium is not added to a cooperative share balance, but to the open capital reserves.
If the cooperative is dissolved, the member is entitled to pro rata distribution of the liquidation proceeds, unless the cooperative articles provide otherwise. In case of termination of shares, the member only has a claim to the nominal value. If, however, the net asset value is lower than the nominal value, then the member only has a claim on that value. In case of a corresponding provision in the cooperative articles, the cooperative can set off the due claims, that are entitled to the cooperative against a member who left, against the share credit balance (dispute balance) For cooperatives with limited (§ 79 (2) GenG) as well as with unlimited (§ 55 (3) GenG) liability, the GenG states that the members who have left the cooperative have no claim on the reserve fund and the other available assets of the cooperative, unless the

statutes provide differently. The nominal value principle is derived from these standards. In case of doubt, the cooperative member has no share in the intrinsic value of the cooperative. In deviation from this, the articles of association can provide for substance participation, but this has hardly ever been the case in practice. (cf. Astl & Steinböck 2014, p. 142)
The formation of shares by contribution in kind is allowed according to prevailing doctrine. According to the previous doctrine (cf. Hämmerle & Wünsch 1978, p. 478; cf. Zahn 1963, p. 27), there was a monetary payment for shares exclusively. § 12 (3) UmgrStG also provides for the contribution of companies and businesses to cooperatives. This is indeed a provision under tax law. (cf. Kastner 1986, p. 141) The possibility of making contributions in kind should, if necessary, be regulated in the cooperative articles as a way of forming the shares. (cf. Kastner 1986, p. 141; cf. Dellinger & Oberhammer 1996, pp. 190 ff.) The admission of contributions in kind can also be made indirectly, e.g., through the regulation of a general assembly authority to decide on contributions to the cooperative. If the value of a contribution in kind does not reach the amount of the shares taken over for it, the member has to make a monetary contribution for the difference sum (in analogy to § 10a (1) GmbHG and according to general warranty law). As a rule, contributions in kind in the founding stage will be assessed by the auditing association according to § 25 GenRevG as part of the review of the application for admission. (cf. for Germany § 11a (2) dGenG, according to which the court has to reject the registration of a cooperative if the auditing association declares that contributions in kind have been overvalued.) If the valuation of contributions in kind is incorrect, the board of directors is liable towards the cooperative in case of fault for the damage incurred according to general principles. Contributions in kind can be both movable and immovable property, receivables, intangible assets (e.g., patent rights), companies, shares in companies, etc. (cf. Astl & Steinböck 2014, p. 142; cf. Ettel 2012, § 20 Rz 12 ff.)
The cooperative articles can provide, that against a decided increase in the share capital, several previously subscribed shares can be offset. An increase of the nominal value of the share is possible by a simple article amendment. As far as the financing is not done by members contributions, but from existing funds of the cooperative, this is only possible from the taxed profit. However, such a transaction is subject to withholding tax because the exemption provision under § 3 (1) l. 29 EStG does not apply to the acquisition of share rights based on a capital increase from company funds due to the lack of applicability of the capital adjustment act. (cf. Astl & Steinböck 2014, p. 144; cf. EStR 2000 Rz 313) The reduction of the nominal amount of the share requires not only an amendment of the cooperative articles

but also a public notice procedure according to § 33a GenG. (cf. Astl & Steinböck 2014, p. 145)

4.4. Taxation of Cooperatives

4.4.1. Introduction to the Taxation of Cooperatives

As we have already mentioned, the cooperative is a legal entity under private law. (see chapter 3.1, p. 25) That means, that the cooperative can conclude contracts and enter into economic business transactions as contracting partner. It can therefore earn profits and manage its assets. This competence is also recognized in Income Tax Act (EStG) through the separation principle (Trennungsprinzip), which states that the cooperative's income to be considered independently from the income of the cooperative members.

The cooperative itself is subject to corporate income tax (KöST) at a tax rate of 23% (2005 - 2022: 25%; 2023: 24%). If profits, or part of profits, are distributed to the members of the cooperative, the tax treatment depends on the legal form of the members, as well as on the member's individual situation. In the case of natural persons, such income is income from capital assets. The cooperative then has to withhold a capital gains tax (KESt) of 27.5 % from the profit share to be distributed and pay it to the tax office on behalf of the cooperative member. This amounts to a combined tax liability (23% corporate income tax and 27.5% capital gain tax) of 44.175% (2024). In the case of the member being a legal entity that is also a subject to corporate income tax like the cooperative, the income from the participation is tax-free. (see further elaboration in 4.4.3.2) (cf. Pomper 2022, p. 187) Even though the cooperative is subject to the corporate income tax, this legal form differs substantially from corporate legal forms. Cooperatives do not have a fixed capital, their members can constantly change, and its primary task is not to make profits, but to promote their members. (cf. Feil, Perkounigg & Igerz 1986, p. 131) Because of these differences, the specific characteristics resulted when it comes to the taxation of the cooperative's income. However, the development of corporate tax law with regard to the taxation of cooperatives shows that these privileging regulations have been increasingly restricted over time. (cf. Maurer & Perkounigg 2000, p. 230 f.) Some special regulations for cooperatives have been weakened or completely abolished over the years, such as the treatment of cooperative reimbursements as business expenses or the exemption of cooperatives from the affiliation privilege. (cf. Stoll 1972, pp. 42 ff; cf. Newertal 2014, p. 33) The cooperative has increasingly aligned with stock companies when it comes to taxation. It is therefore doubtful whether the characteristics of the cooperative legal form are still sufficiently considered by the few remaining cooperative-specific regulations in the Corporate Tax Act. While the income of natural persons is subject to income tax (ESt), the income of legal persons is subject to a corporate income tax (KöSt). Legal entities are therefore recognized as separate tax subjects for profit taxation, in contrast to partnerships (e.g., OG, KG), which are not regarded as separate tax subjects. (cf. Maurer 2014, pp. 92 f.)

4.4.2. Personal Liability to Tax

According to § 1 (1) KStG, only corporations are subject to corporate tax. Legal persons of the private law are seen as corporations according to § 1 (2) l. 1 KStG.

The cooperative societies belong, among others, to the legal persons under private law according to the Cooperative Societies Act. (cf. Wiesner et al., 1988, § 1 n. 4)

The Corporate Tax Act differentiates between unlimited and limited tax liability.

A cooperative is subject to unlimited corporate tax if it has its registered office or its management in Austria. (§ 1 (2) first sentence KStG).

The limited tax liability has a double meaning in the case of cooperatives:

1) A cooperative that has no registered office or management in Austria is subject to limited corporate tax when it has the income as defined in § 21 (1) KStG. The tax liability then extends to all domestic income.

2) A cooperative is exempt from unlimited corporate liability under certain conditions if they fall under § 5 KStG. (cf. line 3 for credit institutions; line 9a for cooperatives whose purpose and actual business operations are limited to the joint use of agricultural and forestry facilities or business object by their members (e.g. breeding, pasture and machine cooperatives); line 9b for winegrowers' cooperatives whose actual business operations are limited to the processing or utilisation of agricultural products obtained by the members themselves, if the processing or utilisation is in the field of agriculture. The tax exemption is not lost if the cooperatives carry out auxiliary business within the scope of their business operations; and line 10 for construction associations (see line 10 for further requirements). (cf. Maurer 2014, p. 93)

4.4.3. Non-Personal Liability to Tax and Profit Determination

In the case of unlimited tax liability, the income on which corporate tax is based is that which the cooperative has received within a calendar year. (§ 7 (1) KStG). According to § 7 (2) KStG, the definition of income is based on the total amount of income from the types of income listed in § 2 (3) EStG.

Since 2007, only in the case of cooperatives with the reporting obligation, all income in terms of § 2 (3) EStG is to be attributed to income from trade or business according to § 27 Z 1 EStG. Thus, cooperatives are only considered to be corporations in terms of § 7 (3) KStG if they are obliged to prepare accounts according to § 189 UGB. (cf. Maurer 2014, pp. 94 f.) This is the case if the cooperative has the turnover limit of more than

€ 700.000 euros per business year according to § 189 (1) l. 3 UGB. The so-called buffer years of § 189 (2) UGB must be taken into account, according to which the reporting obligation comes into effect as of the second following business year if the threshold value of € 700.000 is exceeded in two consecutive business years. This does not apply again from the following business year if the turnover is no longer exceeded in two consecutive business years. Whereas the turnover already exceeds € 1.000.000 as of the following business year, the reporting obligation already exists as of the following business year. According to § 7 (3) KStG, a cooperative which has not reached the turnover limit but did reach it in the previous year is still obliged to prepare accounts upon request. The possibility to submit an application only exists for cooperatives that have already been subject to § 7 (3) KStG because they were obliged to report according to § 189 UGB. If the reporting obligation according to company law regulations did not exist in the past, they cannot submit an application and thus not voluntarily subject themselves to the determination of income according to § 7 (3) KStG. (cf. Lamprecht 2019, p. 15) Cooperatives that are not required to prepare accounts according to § 189 UGB and for which no option declaration has been submitted are not covered by § 7 (3) KStG. They can therefore also have income from different types of income. For the determination of the total income of cooperatives, the relevant regulations must also be observed (7 (2) KStG).

In addition to the question of tax liability, it is also important which method is used to determine the taxable profit. Depending on the method of profit determination used, the same share can be treated differently or lead to tax liability at different points in time. The taxable profit of a year forms the basis for the calculation of corporate income tax.

The four profit determination methods are:

1. Comparison of business assets according to § 5 EStG (Entrepreneurs who must keep accounts according to the UGB);
2. Comparison of business assets according to § 4 (1) EStG (Accounting for other entrepreneurs);
3. Full income-expenditure account according to § 4 (3) EStG;
4. Determination of profits according to average rates pursuant to § 17 EStG. (cf. Pomper 2022, p. 194 f.)

As we have mentioned, since 2007, only cooperatives subject to reporting requirements under § 189 UGB, for which all income is classified as income from trade or business under § 7 (3) first sentence KStG, have to determine their profit according to § 5 (1) EstG. For all other cooperatives, the other three methods of profit determination mentioned come into consideration.

The determination of profits according to § 5 (1) EStG differs from that according to § 4 (1) EStG essentially in the following points:

- The determination of profits according to § 5 (1) EStG also allows for the formation of business assets that not only include purely (operationally) necessary assets, but also other assets that are not absolutely necessary for service provision (gewillkürtes Betriebsvermögen), whereas the determination of profits according to § 4 (1) EstG only covers necessary business assets.
- According to § 5 (1) EStG, when valuing business assets, the valuation rules under company law must also be observed, whereas according to § 4 (1) EStG only the valuation principles under tax law must be observed.
- Taxpayers who are obliged to prepare accounts according to § 189 UGB and record-keeping farmers and foresters are allowed to have a business year that deviates from the calendar year. Otherwise, the business year is the same as the calendar year (§ 7 (5) KStG).

The corporate tax rate to be applied to the income is 23% (§ 22 (1) KStG). The regulations concerning minimum corporation tax (§ 24 (4) KStG) only apply to corporations with unlimited tax liability. Cooperatives are therefore not subject to minimum corporation tax. (cf. Doralt & Ruppe 2007, p. 74 f.; cf. Maurer 2014, p. 96)

4.4.3.1. Deposit and Payment of Shares

Deposits and withdrawals are not considered in the determination of profits. Contributions are generally understood to be the addition of assets by the shareholders, provided that this addition is only due to shareholders' position. (cf. Bertl, Deutsch-Goldoni & Hirschler 2015, p. 366) On the contrary, withdrawals are, if generally held definition of § 4 (1) EstG is used, "all non-operational disposals of values". (cf. KStR 2013 Rz 542 for withdrawals as an income appropriation; see the second last paragraph of 4.4.4.1.) In the case of a cooperative, the payment of a share corresponds to a contribution and its payment to a capital repayment. The subscription of shares, whether in the context of the formation of the cooperative or later, as well as their repayment, is a tax-neutral transaction, i.e., it does not affect the tax result of the cooperative in any way. The subscription of shares indeed increases the net operating assets in the respective profit determination period, but this increase in assets is not added to the profit due to legal regulations (§ 8 (1) KStG). The other way around, the payment of shares is also tax-neutral for the cooperative. Furthermore, income tax law provides for an option to address open profit distributions as a capital repayment from a tax point of view. (cf. Pomper 2022, p. 202 f.)

4.4.3.2. Earnings from the Participation in Companies

Since the cooperative itself is the subject of rights and obligations, it can participate in other companies. It can be a member of another cooperative, a partner in a limited liability company (GmbH) or a shareholder in a stock company (AG). In its capacity as a shareholder, it may receive a share of the distributed profits, the investment income. § 10 of the Corporation Tax Act (KStG) explicitly exempts such investment income from tax liability. However, the participation income exemption only applies to participations in corporations; other regulations apply to participations in partnerships (OG or KG).

The following income is covered by the exemption:

- Profit shares from domestic capital companies and cooperatives;
- Reimbursements from domestic cooperatives;
- Income from usufructuary rights of domestic corporations;
- profit shares from participation capital; and
- under certain conditions, income from foreign corporations.

The reason for the participation income exemption lies in the fact that participation income is distributed profit that was already subject to corporate income tax when it was generated. If these were to be treated as taxable profits for the recipient cooperative, they would be taxed again. (cf. Pomper 2022, p. 204)

4.4.4. Profits and Losses in the Cooperative

4.4.4.1. Introduction to Appropriation of Income

In income tax law, a fundamental distinction must be made between the determination of income and the use of income. For the determination of income of a corporation, the principle enshrined in § 8 (2) KStG applies that it is irrelevant in which way the income is used: the use of income has no influence on the determination of income. (cf. Maurer 2014, p. 97). In other words: deposits and withdrawals are not considered when determining income and it is equally irrelevant for the determination of income how the income is used. Especially it cannot be considered to reduce income.

Corporate tax law understands under the term "use of income" the tax-neutral distribution of income to the shareholders, as well as the use of funds for activities that do not serve to generate income. (cf. KStR 2013, Rz 537-540)

According to the classification of § 8 (2) KStG, there are the following types of income appropriation:

1. distribution:
    - open distribution;
    - hidden distribution;
2. withdrawal; and
3. use of income in other ways.

Open distributions are understood to be the distribution of the profit generated to the members on the basis of a distribution decision. The extent to which a distribution of profits appears permissible or even required in the case of a cooperative is a question of company law that arises from the purpose of the cooperative. (see § 1 GenG) Reimbursements to members are a special form of open distribution.

In the case of hidden distributions, pecuniary benefits are granted to a member or a related person, whereby the reason for this has to be the participation in the cooperative. Unlike in the case of open distributions, no distribution resolution. In the case of cooperatives, inappropriate pricing in favour of the members (active pricing policy) is a form of hidden distribution.

According to § 8 (2) KStG, the withdrawal can only be considered as an income appropriation in the case of ownerless corporations, where an open appropriation of profits is not possible. (cf. KStR 2013, Rz 542) These both characteristics do not apply to cooperatives.The use of income in a different way occurs if the cooperative makes non-deductible expenses as defined in § 12 KStG (e.g. donations). (cf. KStR 2013, Rz 540)

4.4.4.2. Appropriation of Profit

The right to propose how the profit is to be used belongs to the board of directors, but the final decision is made by the general assembly. Cooperatives with reporting obligation according to § 189 UGB, that are obliged to prepare an appendix to the annual financial statement, are obliged to formulate the proposal for the appropriation of profits in the appendix according to § 238 (1) l. 9 UGB. The term "appropriation of profits" used here is not necessarily identical with the term "appropriation of income" as defined in § 8 KStG. If, for example, the cooperative makes a donation, this is a use of income in a different way, but not a use of profit that has to be formally decided.

The profit can be used in different ways:

1) Open distributions to the members;

2) Allocation to the reserve fund as statutory reserves; and

3) In the case of reporting cooperatives, the profit can also be left (in whole or in part) as profit brought forward. Strictly speaking, this is not a form of profit appropriation, since the element of "appropriation" is missing. Rather, the current profit is carried forward to the next business year because it is not used, and thereby increasing the future net profit.

4.4.4.3. Appropriation of Loss

If losses and profits from different sources of income are to be offset in the same business year, this is referred to as loss offset. If an operating loss remains in a business year that is to be offset against a profit in the following years, this is referred to as a loss carried forward. A special feature is the loss carryforwards on investments (Wartetastenverluste) governed by § 2 (2a) EStG. These are losses on participations for which tax advantages are in the foreground. The special feature is that the losses may only be offset against profits from the same source. The loss carryforwards on investments (Wartetastenverluste) are subject to an offsetting limit of 100%. The offsetting of the loss carryforwards on investments (Wartetastenverluste) takes precedence over the offsetting of operating losses. (cf. Pomper 2022, p. 222 f.)

4.4.5. Capital Gains Tax

The capital gain tax (KESt) is a special form of collection of the income tax. The special feature is that the debtor of the capital gains withholds the tax for the recipient and pays it to the tax office. In the case of natural persons and certain corporations (that do not fall under § 7 (3) KStG, concretely these are cooperative that are not obliged to hold accounts according to § 189 UGB or § 22 GenG), the tax deduction constitutes the final effect of taxation, i.e., with the withold the tax is considered to have been paid. The legal basis for the capital gain tax deduction is governed by § 27 EStG (definition of capital gains), § 27a EStG (special tax rate) and 93-97 EStG (capital gain tax deduction and final taxation).
A cooperative can be subject to capital gains tax in two ways: either the cooperative itself receives capital gains for which capital gains tax has been withheld, or it makes distributions to its members and has to check such distributions for a possible capital gains tax deduction.

4.4.5.1. Capital Gains of the Cooperative

There are certain conditions specified in the Income Tax Act which have to be fullfilled, in order for the witholding of the capital gains tax to be allowed. The first condition is that the relevant income falls under the category of income from capital assets. This includes:
- income from the transfer of capital according to § 27 (2) and (5) EStG;
- income from realized appreciation according to § 27 (3) and (6) EStG; and
- income from derivatives according to § 27 (4) EstG (cf. Pomper 2022, p. 224).

The income must also be subject to the special tax rate of § 27a (1) EStG. In most cases, the tax rate for natural persons is 27.5%. If the recipient of the investment income is a corporation, then the capital gains tax deduction may also be 25%. According to § 93 (1a) EStG, this is an option that is at the discretion of the withholding party. Incomes such as personal loans, interest income from non-securitized receivables that are not based on a banking transaction, income as a silent partner and income from non-securitized derivatives, are not subject to the special tax rate. For these, a capital gains tax deduction is therefore not possible. The deduction of capital gains tax also requires a domestic paying or custodian office. In the case of foreign capital debtors (e.g., interest income from a foreign bank), Austrian law does not provide for the deduction of capital gains tax and it is unlikely that this would be legally enforceable.
If all requirements above are met, the exceptions listed in § 94 EstG have to be checked. The

most important exemptions for a cooperative are for participation income of 10% or more and if the cooperative has submitted a declaration of exemption.
For certain participation income, there is an exception to the capital gains tax deduction according to § 94 l. 2 EstG. However, the exception only exists if the participation rate is at least 10%, and the participation can be direct or indirect. If the participation in a foreign corporation exists in an EU member state (to be precise, it has to be a corporation, that fulfils requirements according to Council Directive 2011/96/EU L. 345/8), then an additional requirement is that the participation has existed for at least one year.
Corporations, regardless of whether they are subject to limited or unlimited tax liability, have the option of submitting a declaration of exemption to their principal bank according to § 94 l. 5 EStG, whereby no capital gains tax is deducted. (cf. Pomper 2022, p. 225)

4.4.5.2. Distributions to Members

A cooperative may distribute its profits to the members if the company law conditions are met. The distribution may be made in open or in hidden form. (see 4.4.4.)

4.4.5.2.1. Open Distribution

An open distribution is made on the basis of a profit appropriation resolution. It has to be determined whether a distribution is allowed under cooperative law and covered by the statues. Due to the legally defined purpose of cooperatives, direct profit distributions are an exception in the cooperative system. (cf. Dellinger 2014, p. 23)
An occasionally used way of making open distributions is to pay interest on members' shares. In this case, interest is paid to the members depending on the volume of shares subscribed. It can be seen as remuneration for the capital provided and can therefore be seen in the same way as dividends in a corporation. (cf. KStR 2013, Rz 1414)

4.4.5.2.2. Reimbursements

Reimbursements to the members are listed in § 8 (3) l. 2 KStG as a separate form of income appropriation. In this context, the members receive proportional remuneration for the surpluses which the cooperative has generated from the members' business on the basis of the revenues generated with the cooperative. In contrast to interest on shares, reimbursements are not dependent on the capital paid in, but are based on the turnover that the individual member has generated with the cooperative. The turnover can be in the form of purchase or sales transactions, depending on the type of cooperative. Possible forms of reimbursement are:

- Purchase price reimbursements (discounts for goods purchased by the cooperative),
- Subsequent purchase price payment (for products delivered to the cooperative), and
- Reimbursement of expenses (from the service business). Reimbursement of expenses may be granted either for services provided by the cooperative to the members or in the other direction for services provided by the members to the cooperative. In the first case, it is assumed that from the cooperative are collected too high expenses contributions, in the second case that the members' services were too little remunerated.

Whether a remuneration is a mere exchange of services or a form of distribution (in the sense of an appropriation of income) is evaluated in each individual case on the basis of an arm's length principle. If the remuneration satisfies the arm's length principle, for example if non-members also receive a corresponding discount for their services, then the transaction is recognized for tax purposes (mostly as a tax-reducing business expense). If, however, e.g. staggered discounts depending on the reference quantity are only remunerated to members at the end of the year, then income appropriation is at hand. (cf. KStR 2013, Rz 1404-1413 for the tax treatment of goods reimbursements)

4.4.5.2.3. Hidden Distribution

An active pricing policy is when the cooperative offers its members pricing that is not available to non-members. As with reimbursements, the arm's length principle is crucial for the classification as a deductible business expense or as a distribution. Unlike the remuneration, which is paid out at the end of the year, the active pricing policy has an effect during the ongoing business operations. (cf. KStR 2013, Rz 1403)

4.4.5.2.4. Consequences for the Cooperative

A distribution, either open or hidden, is an income appropriation for the cooperative according to § 8 (2) KStG. As a result, the corresponding payments or incurred expenses are not deductible as business expenses. They cannot reduce the taxable income because they are considered part of the income. (cf. Pomper 2022, p. 227 f.)

4.4.5.2.5. Tax Handling of Members

The taxation of members is based on the Income Tax Act for natural persons and on the Corporate Income Tax Act for corporations. (cf. Maurer 2014, p. 99).

If the recipients of the distributions are natural persons, capital gains tax of 27.5% must always be withheld from the distributions. Payments from cooperative shares are capital income as defined by § 27 (2) l. 1b EStG. They are subject to the special tax rate of 27.5% according to § 27a (1) l. 2 EStG. Since it is a domestic cooperative, capital gains tax has to be withheld according to § 93 (1) KESt. This applies regardless of whether the cooperative shares are held as private or business assets. With the capital gains tax deduction by the cooperative, the distributions for the member are finaltaxed. However, the member has the option of the standard taxation option according to § 27a (5) EStG.

In the case of the standard taxation option, all capital gains are subject to the regular, progressive income tax rate instead of the special tax rate of 27.5%. In that case, the capital gains are added to the remaining income. The sum of the income is finally taxed according to the general tax rate, whereby the deducted capital gains tax is credited or refunded in this case. The standard taxation option only makes sense if the member's marginal tax rate is below 27.5%. In a progressive tax system, the marginal tax rate is the individual tax rate at which an additional euro is taxed. (cf. Pomper 2022, p. 228 f.)

5. Control of Cooperatives

5.1. The Control of Cooperatives – What Should be Controlled and Why?

The objective of the cooperative is the promotion of its members. The cooperative must "primary serve to promote the acquisition or business of its members" (§ 1 (1) Geng). (see chapter 2.5). One of the essential principles of the cooperatives are also objectives such as training and education for their members so they can help their organization grow and inform general public about the nature and benefits of cooperatives. The cooperative autonomy and independence imply, that cooperatives, being self-help, autonomous organizations, are controlled by their members. (see chapter 1.1.)

In order to achieve the above-mentioned objectives, the members of the cooperative are obliged to form the board of directors, that has to manage and represent the cooperative (§ 15 and 17 GenG). Board of directors is also responsible for the proper accounting management and in case of the cooperative that requires a supervisory board, the board of directors must set up an internal control system and there is also reporting obligation to the supervisory board. (§ 22 (1) and (3) GenG).

§ 22 (1) GenG was amended by the URÄG 2008 so that the board of directors of a cooperative is no longer only responsible for keeping "books", but also for keeping an accounting system that meets the requirements of the company. Furthermore, the obligation was introduced to set up an internal control system (das interne Kontrollsystem - IKS) that has to meet the requirements of the company. However, § 22 GenG did not contain a more detailed definition of an IKS. ISA 315 defines system of internal control as “the system designed, implemented and maintained by those charged with governance, management and other personnel, to provide reasonable assurance about the achievement of an entity’s objectives with regard to reliability of financial reporting, effectiveness and efficiency of operations, and compliance with applicable laws and regulations.” (cf. ISA 315 2019, p. 9) Only cooperatives that are according to § 24 GenG required to have a supervisory board (i.e., with at least 40 employees on a permanent basis), are subject to this obligation. It appears that the legislator only wanted to introduce an IKS on those cooperatives that are also subject to the supplementary provisions for stock companies. If this is the case, it is not the supervisory board obligation that is in the main focus, but rather the fulfilment of features specific to the company's size category (medium-sized or large cooperative). According to § 24c (6) l. 4b, the (possible) audit committee must also monitor the effectiveness of the ICS, if applicable the internal audit system, and the risk management system of the cooperative. (cf. Zehetner 2014, p. 229)

The board of directors has the obligation towards the cooperative members for their actions, and therefore the board of directors must prepare a final report (Abschlussbericht) and a management report (Lagebericht), within the first five months of a business year (§ 22 (2) GenG). (see 3.2. & 3.5.1.)

A respective reporting obligation for cooperatives was also not provided for until the URÄG 2008. (cf. Zehetner 1999, p. 284) With the URÄG 2008 this difference to the law on stock companies was eliminated. Henceforth, § 22 (3) GenG obliges the board of directors of a cooperative, which is required to have a supervisory board according to § 24 GenG, to submit an annual report, quarterly reports and - in case of an important reason - special reports. The regulation corresponds to the legal situation of the stock companies.

In the first eight months of each business year the general assembly has to decide on the financial statements and the report of the board of directors (§ 22 (2) GenG), as well as on its

discharge (§ 27a GenG). Therefore, the general assembly has to meet at least once a year. (cf. 3.5.4. General Assembly). However, the board of directors is not subject of control of the annual meeting alone, as the general assembly also decides on appropriation of earnings and on the discharge of the supervisory board (§ 22 (2) GenG). (cf. Zehetner 2014, p. 230)
The Cooperative Act does not contain any regulation on the right to information before the general meeting, which is worth paying attention to. (cf. Weber 1980, p. 221) § 35 GenG states that the board of directors is obliged to provide the members of the cooperative with a copy of the approved accounts and balance sheets against reimbursement of costs, when they request it. (cf. Zehetner 1999, p. 328) Also § 27 GenG only speaks of an exercise of the rights of inspection and examination in the general meeting, but without defining these rights in more detail. The GenG does not provide for a regulation of corresponding rights within a certain period of time before the general meeting.
However, it is not just members who are interested in controlling the management of the cooperative. Like any other business, a cooperative must constantly monitor its documents and accounts in order to maintain a clear and accurate understanding of its financial position and results and to be able to make more appropriate decisions in the future. Nevertheless, accounts are not only necessary for companies, but also required by other market participants (stakeholders). Especially, because it is also very important for cooperatives to spread the cooperative spirit in their region, promote the culture, support the community development, improve quality of life and environmental protection. (cf. Fajardo 2017, pp. 589 f.)
In Austria, § 245a UGB sets out the requirements for the preparation of financial statements in accordance with European Commission Regulation (EC) No 1606/2002, including applicable accounting standards and financial reporting thresholds.
The law requires every company to keep appropriate accounting records that are adequate to:
- Present and explain the company’s transactions;
- Disclose with reasonable accuracy the company's current financial position at a particular point in time; and
- Enables directors to prepare financial statements in accordance with the law and Austrian GAAP (Generally Accepted Accounting Principles), to which the financial statement has to comply. (GSL, n. d.)
This obligation also applies to cooperatives.
When the Cooperatives Revision Law Amendment Act (GenRevRÄG) 1997 came into force, the accounting provisions for cooperatives were significantly changed. In essence, the new version of § 22 in the area of accounting put medium and large sized cooperatives on an equal

footing with limited liability company, as the special norms of AG do not apply to cooperatives. A further adaptation of the accounting provisions was introduced by the Corporate Law Amendment Act (URÄG) 2008, where the alignment with stock companies was continued. (see. chapter 2.1, p. 12 f.)
Henceforth, there are three levels of accounting requirements for cooperatives depending on their size. Small cooperatives that do not exceed the thresholds of § 189 UGB only require cooperative accounting as defined in § 22 (2). (see the beginning of the chapter) For this purpose, the preparation of a simple form of a balance sheet as well as a determination of revenues and expenditure statement is sufficient (cf. Zehetner 1999, pp. 183 and 249; cf. Keinert 1988, Rz 362); which the report described in § 22 (2) GenG is to be supplemented with. A profit and loss account is not required (at least from a company law perspective). (cf. Zehetner 1999, p. 249) In addition to the cooperative accounting obligation, cooperatives are subject to the accounting obligation of the UGB (applicability of the first section of the third book of the UGB), if the thresholds of § 189 UGB are exceeded. In addition, medium-sized and large cooperatives have to comply with the additional accounting provisions for stock companies (second section of the third book of the UGB) (§ 22 (4) GenG). In addition, the provisions of the fourth section of the third book of the UGB (in particular on company law annual audits, disclosure and publication) are applicable to them (§ 22 (6) GenG). For housing cooperatives, § 23 WGG, for credit cooperatives § 43 ff BWG must be observed. (cf. Astl & Steinböck 2014, pp. 145 f.)
However, control mechanisms are not limited to providing members with an explanation of management and accounting results, as this information must be verified by independent experts (audits) and made known to members and other stakeholders. (cf. Fajardo 2017, p. 590)

5.2. External Controls on Registration of the Incorporation of a Cooperative – Controls of Legality

In Austria, the development of cooperatives did not take place so quickly or with the full intensity, as the cooperatives in Austria were formed without strong authorities, such as Friedrich Wilhelm Raiffeisen or Hermann Schulze-Delitzsch in Germany, who could have given them a unified character. They were arranged only for local needs and could not trigger a larger movement of unification under the given conditions. (cf. Brazda 1990, p. 105)
When it comes to audit, the 1873 GenG still did not know for the compulsory cooperative

membership in auditing associations. § 1 Auditing Act of 1903 states (only) that "cooperatives are obliged to have their institutions and their management in all branches of administration audited at least every second year by an expert auditor who does not belong to the cooperative or the association". The Cooperative Law Amendments of 1934 and 1936 gradually introduced the obligation for every cooperative to belong to an auditing association. (cf. Tomanek 2014, p. 6)

Therefore, when setting up a cooperative, next to the under § 3 (1) GenG necessary requirements for the establishment, § 24 GenRevG states that a cooperative may only be registered in the commercial register if the recognized, locally and technically competent auditing association, has guaranteed the acceptance of the cooperative to be established (unless the cooperative is exempt from the obligation to join the auditing association according to § 26 GenRevG) (cf. Astl & Steinböck 2014, p. 110)

5.3. The Need of Internal and External Control

Cooperative auditing is seen - from both historical and legal aspects - as an advisory and support activity whose most essential goal is the protection of members. However, this internal association control should not be limited to business conduct and economic interests, but in addition should apply a qualitative criterion, namely the degree of approval of the members for the purposes pursued and the consensus on cooperative principles as a standard for the audit.

In fact, however, cooperatives in the western industrial countries have showed a tendency towards "economisation", i.e. in the course of their establishment, functions have been spun off to joint business operations, the number of members has increased, management elites have been formed and they have been transformed into modern enterprises which, in order to be competitive, are oriented towards purely economic efficiency criteria. Since at the same time the members also accept the dominant acquisition attitude of their social environment, there has been a "dilution" of direct participation, which makes the criterion of "consensus of the members" seem not very realistic. (cf. Brazda 1986, p. 18)

While Raiffeisen was from the beginning a supporter of compulsory auditing due to his educational interest (according to Raiffeisen, by improving the material situation of the rural population, the possibility should be created to realise spiritual and moral advancement), he encountered Schulze-Delitzsch and his fear of a threatening supervision of the cooperative by the state in the introduction of compulsory auditing within the framework of the Auditing Act.

Schulze-Delitzsch saw in a compulsory audit the chance to be able to realise the idea of self-help even for the individual cooperatives in their own association and thereby strengthen the liberal cooperative (organisation) law. (cf. Brazda 1986, p. 19)

Originally, the compulsory audit for cooperatives was justified on the basis that the cooperative members were not sufficiently qualified as members of the board of directors and the supervisory board. (cf. Beuthien, Hüsken & Aschermann 1989, p. 150) It was intended to protect the inexperienced cooperatives, who still managed and controlled their small cooperatives themselves in the 19th century, from the financial risks associated with the management of an independent business by means of an external compulsory audit. (cf. Bundesjustizministerium 1965, p. 9; cf. Beuthien 1990, p. 48; cf. Boettcher 1969, p. 233) With the structural inferiority and business inexperience of the cooperatives, the cooperative-specific compulsory audit can no longer be justified in a paternalistic way. (cf. Lehmann & Sieker 2015, p. 3) On the one hand, modern cooperatives - unlike the small cooperatives of the 19th century, which were characterised by pauperism (poverty) - are no longer composed of economically "weak" members, but of heterogeneous occupational groups and all social classes. (cf. Laurinkari 1990, p 1; cf. Picker 2019, p. 457)

When it comes to the control of the funding mandate fulfillment (since § 1 GenRevG also states that cooperatives also need to be checked in particular that the funding mandate has been fulfilled), we can say, that in the 19th century, the small cooperatives did not need any external control of the funding purpose. Although their members were inexperienced in business management and had to be advised and supported by an external auditor, the fact that they dominated and controlled the management of their cooperative themselves at least ensured that this was oriented towards their user-related promotion. (cf. Picker 2019, p. 458)

In modern large cooperatives, the need for control is opposite. As a rule, these have a professional management and are therefore no longer dependent on a business "support audit", but rather on an effective funding purpose control by the auditing association. (cf. Boettcher 1969, p 233; cf. Neumann 1975, p. 32) The "participation democracy" most often does not function in these cooperatives, as the board of directors de facto dominates the management to a large extent in legal terms and, due to the passivity of the cooperative members in terms of business policy. However, since it can happen that the management tends to pursue their own interests that are contrary to the funding purpose, large cooperatives need a particularly effective "funding purpose control democracy" to compensate for the lack of member rule in business policy.

However, the supervisory board often fails to fulfil its central control task because its

members are often not in a position to sufficiently control the corporate policy of the professional management. (cf. BVerfG vom 19.1.2011 – 1 BvR 1759/91) The auditing association must therefore compensate for the self-organised control deficit of the cooperative supervisory board with its special entrepreneurial expertise and its cooperative-specific experience. (cf. Picker 2019, p. 458)
Schulze-Delittzsch thought that "the task of the auditing association is not to replace the effectiveness of the supervisory board, rather it should counteract wrong directions and neglect of duty", when he spoke out about the double control of the management in the cooperative society by the external auditing association and the supervisory board. (cf. Thorwart 1909, p. 439)
Therefore, in modern large cooperatives, the auditing association functions as an indispensable countervailing power to the often (over-)powerful board of directors and therefore as a central governance mechanism to avoid or resolve the principal-agent conflict specific to cooperatives. In this respect, the cooperative compulsory audit still paternalistically serves the protection of members, but functionally differently than in small cooperatives of the 19th century. If at that time the external auditor had to protect the cooperative members from their own inexperience as autonomous managers, today the auditing association has to protect them from an overly arrogant (external) management that one-sidedly pursues the company's interests at the cost of the promotional interests of the members. (cf. Picker 2019, p. 459 f.)

5.4. Audits of Cooperatives

5.4.1. Audits

According to § 1. (1) GenRevG, “Cooperatives shall be audited by an independent and autonomous auditor with regard to legality, compliance and expediency of their facilities, accounting and management, particularly with regard to the fulfilment of the promotion purpose and to the economic efficiency, as well as to expediency, status and progress of their asset, financial and profit position at least every second business year. Cooperative exceeding at least two criteria as provided in § 221 (1) UGB and cooperatives having to set up a supervisory board according to § 24 GenG (RGBl. No. 70/1873), are to be audited every business year.” (cf. Unofficial Translation of the Austrian Co-operative Societies’s Revision Act)

The auditor must subject the entire activities of a cooperative to both formal and substantive cooperative annual financial statement and management audits (Gebarungsprüfung). Formal examinations focus on the external compliance of the financial statements, including their numerical accuracy, while substantive (material) examinations focus on the accuracy of the content and the economic justification of the financial statement items as the subject of the audit. (cf. Marten, Quick & Ruhnke 2003, p. 241) The audit therefore covers the entire cooperative including its participations (Beteiligungen) (§ 1 (2) GenRevG). No area may be excluded from auditing by resolutions of cooperative bodies or any other person responsible for the cooperative. (cf. Perkounigg & Kessler 2014, p. 559)

Management audit can be defined as follows:

A management audit (Gebarungsprüfung) is an audit carried out in the interest of the owner, which generally goes beyond the audit of the financial statements and provides a statement on the economic efficiency, expediency and legality of the corporate activities, especially of the management, as well as on the fulfilment of the funding mandate. A component of the management audit is also the identification of weaknesses and opportunities for improvement. This is intended to contribute to the sustainable positive development of the company audited. (cf. Leitner 2019, p. 22.) With regard to the sustainable development of the cooperative in the sense of the funding mandate, the management audit is not only carried out with the focus on the past, but also takes into account future perspectives as far as possible, to the extent that can be derived at the given point in time after careful assessment. (cf. Pomper 2022, p. 174)

Audit subjects are the management, the facilities, the accounting, as well as the asset, financial and profit position. The objectives and criteria to be audited are fulfilment of the funding mandate, economic efficiency, legality, compliance, expediency, status and progress. (cf. Pomper 2022, p. 177; cf. Unofficial Translation of the Austrian Co-operative Societies's Revision Act)

The mandate to promote as an essential principle of the cooperative also plays an important role in the audit. Compliance with this principle as well as economic efficiency are essential audit criteria of a cooperative audit.

It is not only those means that best achieve the desired goal (fulfilment of the funding mandate) that are required, but also those that are most cost-effective (economic efficiency), which represents a double optimization. (cf. Fischer 1997, p. 410 f.)

By legality is meant that compliance with the cooperative contract is also to be examined. Accordingly, this criterion should show that the applicable legal and statutory regulations are complied with. (Pomper 2022, p. 178)

The criterion of compliance is of particular importance in this context of accounting, in particular with regard to the principles of proper accounting (cf. Loitlsberger 1996, p. 24 ff; cf. Blaich, Egger, Weilinger 1995, p. 51 ff; cf. Nowotny 2000, § 195 Rz 6 ff, cf. Rohatschek & Leitner-Hanetseder 2016, § 195 Rz 2 ff; cf. Petutschnig 2016; § 190 Rz 11), although the criterion also applies to the management and the facilities. In principle, the accounting must be such that it can provide an expert third party with an overview of the business transactions and the situation of the enterprise within a reasonable period of time. (§ 190 (1) UGB) In addition, entries into books and other required records must be carried out in a complete, correct, timely and orderly manner and its immutability has to be ensured. (§ 190 (2) and (4) UGB)

For expediency, the auditor assesses the extent to which management has met the goal or purpose. (cf. Pomper 2022, p. 178)

When it comes to auditing subjects, management is to be understood as the responsible action for the securing and continuation of the enterprise, which means that it includes all measures of an organisational, commercial and personnel-related nature that are necessary for the carrying out of the activity. (cf. Koppensteiner & Rüffler 2007, § 21 Rz 3) Accounting reflects all operational processes. It has the following functions: complete documentation of changes in the value of assets and capital, determination of success, basis for special accounts for the control and disposition function and information function for the benefit of all those interested in the company. (cf. Torggler 2012, Vor § 189 Rz 33) From the perspective of the assessment of the company as a whole, the term "facilities" includes everything that is not already covered by management and accounting. This term is therefore not only to be seen in spatial terms, but also includes the organisation of the enterprise.

As we have already mentioned in chapter 5.1, The ICS is designed to monitor and control the effectiveness and economic efficiency of the business activities, the reliability of financial reporting and compliance with the legal requirements relevant to the company, so that the achievement of the company's goal is not negatively affected by the occurrence of business risks.

Therefore, the ICS is to be assigned to all three areas: The management is responsible for the appropriate implementation of the ICS both in the area of accounting and facilities. This also corresponds to § 22 (1) GenG, which requires that the board of directors introduces an accounting system that meets the requirements of the company and that cooperatives obligated to have a supervisory board have an adequate ICS. (cf. Perkounigg & Kessler 2014, p 560)

The asset, financial and profit position (cf. Wagenhofer & Groß 2016, § 222 Rz 43 ff; cf. Rohatschek & Leitner-Hanetseder 2016, § 195 Rz 17 ff.) are to be examined with regard to their expediency, status and progress, because they are not verifiable in terms of legality and compliance. The audit of the asset, financial and profit position is in line with § 222 (2) UGB, which provides that the objective of the preparation of the annual financial statements is to give a true and fair view of the asset, financial and profit position. (cf. Pomper 2022, p. 180 f)
With the application of the statutory accounting regulations (legality) and the principles of proper accounting (compliance), the requirement of conveying as accurate as possible picture of asset, financial and profit position, is supposed to regularly be satisfied. (cf. Nowotny 2000, § 222 Rz 28)
The audit of the accounts of cooperatives therefore includes the audit of the legality and compliance of the accounting as well as the audit of the status and progress of the asset, financial and profit situation of the cooperative. The type and scope of the audit procedures depend on the size of the cooperative and the type of financial statement according to § 22 (2) GenG and are at the discretion of the auditor.
In principle, this audit includes in particular the assessment of whether:
- the annual financial statement (consolidated financial statement) or other financial statement complies with the legal and statutory provisions;
- an annex (group annex) complies with the provisions of the company law;
- a management report (group management report) is in accordance with the submitted annual financial statements;
- the annual report fully and properly explains the annual financial statements or other financial statement;
- the annual financial statements (consolidated financial statements) give a true and fair view of the assets, financial and profit position of the cooperative, or that the status and progress of the assets, financial and profit position are properly reflected in the other financial statements (if the other financial statement is presented as a surplus statement, the status and development of the assets and financial position are part of the management audit);
- the valuation principles, including the regulations on valuations, have been observed in accordance with the law; and
- the activities of the management have been reflected in the accounting system.
In the case of cooperatives subject to auditing according to § 22 (6) GenG (the paragraph states that the provisions of the UGB, concerning auditing, among other things, must be applied to cooperatives that exceed at least two of the characteristics specified in § 221 (1)

UGB), it should be noted that, as a result of the reference regulations to the UGB, the provisions on auditing (§ 268 ff UGB) and thus also on giving an auditor's opinion (Bestätigungsvermerk) (§ 274 UGB) must be applied. (cf. Perkouigg & Kessler 2014, p. 561) As soon as the cooperative exceeds the size categories as a medium-sized company according to § 221 (2) UGB, it is also subject to the obligation to audit the financial statements according to § 268 ff UGB. Therefore, the auditor also becomes the annual financial statement auditor. (§ 22 (6) GenG) In this case, the audit procedures concerning the audit of the annual financial statements are congruent with the audit procedures according to the UGB. The management audit (Gebarungsprüfung) of cooperatives includes all audit procedures that are not already part of the audit of the financial statements of cooperatives. Unlike the audit according to §§ 269 ff UGB, this audit primarily serves to assess the compliance of the entire activity of the cooperative with its purposes and goals and therefore represents a more extensive audit. (cf. Perkouigg & Kessler 2014, p. 562) For this reason it can be defined as a complete examination of the cooperative, which serves to assess whether the management of the cooperative is properly carried out with regard to the realisation of the goals of the cooperative business activity. (cf. Steckel, Perkounigg & Wurzer 2010, p. 21 ff.)

In this context, compliance with the provisions of the cooperative agreement, cooperative law regulations and the regulations in other laws in both formal and substantial terms is also included in the scope of the audit, insofar as these have not already been covered by the audit of the annual financial statements. This includes, for example, the audit of whether decisions in the organs of the cooperative have been made properly, rules of procedure have been complied with or necessary entries have been made in the commercial register, as well as compliance with the formal requirements of the BWG in the case of credit cooperatives.

In 2012, the Union of Austrian Auditing Associations (Die Vereinigung der Österreichischen Revisionsverbände - VÖR) and following it, the cooperative associations, developed a management audit guideline in which the principles and contents of the audit are specified in more detail and in which also the form of reporting is proposed. A particularly important part of the management audit of cooperatives is the fulfilment of the funding mandate, whereby the legislator emphasises the importance of this essential feature of cooperatives. Equally important is the explicit mention of economic efficiency, which expresses a clear commitment to the management audit as an important part of the cooperative audit. (cf. Perkouigg & Kessler 2014, p. 562)

With regard to the period to be audited by the cooperative audit, it should be noted that the GenRevG 1997 provides for periodic mandatory audits, whereby the GenRevRÄG followed the development of accounting regulations insofar as it now corresponds to the audit obligations of the UGB (§§ 268 ff). This means that cooperatives that exceed at least two of the criteria in § 221 (1) UGB (the current limits are: 5 million euros balance sheet total; 10 million euros revenue; and an annual average of 50 employees), and are of a size equivalent to a medium-sized corporation, are subject to an annual audit obligation. However, it must be taken into account that the audit obligation under cooperative law goes beyond the provisions of company law, since not only an annual audit of the annual financial statements is required, but also a more extensive annual audit in the sense of the GenRevG 1997. Otherwise, the GenRevG 1997 provides for a two-year audit cycle. Due to the formulation as a minimum regulation, it can be assumed that an annual audit can also be carried out voluntarily. (cf. Perkouigg & Kessler 2014, p. 563) Special audits can be carried out at any time and therefore also during the year due to the limited scope of the audit. Such special audits can be demanded from the responsible audit association by the board of directors, supervisory board and general assembly (in the case of credit cooperatives also by the managing directors of credit cooperatives as defined in § 2 l. 1 lit b BWG), depending on the content and the issues involved, with the corresponding majority decisions (OGH 31.12002, 6 Ob 313/01z GesRz 2002, 92, does not recognise minority rights in this respect). Special audits are to be distinguished from regular audits and generally only concern segments of business activity or management (cf. Dellinger & Steinböck 2016, § 63a Rz 20 ff.). Due to these restrictions, it must be clear from the audit assignment issued what exactly is to be the subject of the special audit. (cf. Dellinger & Steinböck 2016, § 63a Rz 25) When issuing special audit assignments, an overlap between bank audit and special audit should be avoided as far as possible. (cf. Dellinger & Steinböck 2016, § 63a Rz 24)

In § 1 (2) GenRevG, due to the special importance of the audit of participations (Beteiligungsprüfung), those cases are mentioned separately in which there are corporate interrelationships or dominant influences. In these cases of participations, the legislator expressly points out that the audit must also extend to these companies. From this regulation, however, no double audit results. Rather, it is ensured, taking into account an economic audit responsibility, that even in the case of partial or complete transfer of business operations to other companies, regardless of their formal audit obligations according to other legal provisions, the management of this company cannot be excluded from the cooperative audit. In practice, this means that a cooperative, in the context of the audit carried out on it, must provide the auditor with all the documents in connection with corporate participations that the auditor requires in order to examine not only the intrinsic value but also the expediency and economic efficiency of the participation. (cf. Perkouigg & Kessler 2014, p. 566)

5.4.2. Auditor

The audit is carried out by an independent and autonomous auditor. (§ 1 (1) GenRevG) The auditor carries the audit, i.e., the auditing responsibility and the requirement to conduct the audit properly is the responsibility of the auditor, also when the auditor is in an employment relation with an auditing association. (cf. Perkouigg & Kessler 2014, p. 565 f.) This means that the appointment by the auditing association does not change the carrier of the responsibility for the audit, which clearly belongs to the auditor. Also, the auditing responsibility is not transferred to the auditing association through the appointment, but remains with the auditor. (Perkounigg & Kessler 2014, p. 571).

In general, an auditor is in an employment relationship with an auditing association of which the cooperative to be audited is a member. (cf. Pomper 2022, p. 185)

The appointment of an auditor is usually made by a recognised auditing association of which the cooperative is a member. In the case of cooperatives not belonging to an association, an auditor is to be appointed by the court ex officio (§ 2 (1) and (2) GenRevG)

As auditor may be appointed:

- a registered auditor;
- a sworn accountant and tax consultant / an auditing and tax consulting firm; or
- a sworn bookkeeper and tax consultant / a bookkeeping and tax consulting firm. (§ 3 (1) GenRevG)

According to § 4 (1) GenRevG, “The auditor is entitled to examine the books and records of the cooperative as well as the assets and debts; to this end all information and evidences necessary for a thorough audit shall be given to him. He is in particular allowed to enter all commercial and industrial premises of the cooperative and examine all stocks, view all documents including data carriers and make copies, obtain information orally or in writing from members of the board of directors and supervisory board, employees as well as any other representative of the cooperative, in individual cases also from members, creditors or debtors and create minutes in order to ascertain important factors anytime.” (cf. Ratka 2020, p. 481)

The auditor has to report the results of the audit in writing to the board of directors, the supervisory board and, if necessary, to the auditing association. The auditor has to provide an

abstract of the audit report for the general meeting which is adequate to inform the members. (§ 5 (2) GenRevG) The cooperative has to submit the conduction of the audit and the time spent for registration to the commercial register. (§ 5 (5) GenRevG). “In case a supervisory board exists, the board of directors of the cooperative shall, after receipt of the audit report, discuss in a joint meeting the report, make the necessary decisions and when convening the next general meeting, declare the audit report to subject matter on which a decision is to be taken.” (§ 6 (1) GenRevG). Under certain circumstances, the auditor himself may convene an extraordinary general meeting (§ 7 GenRevG) If the audit report shows defects, the cooperative has to initiate appropriate measures to eliminate them and report on them to the auditor. If the deficiencies are not eliminated, a report on the defects is to be submitted to the commercial register. (§ 8 (1) and (2) GenRevG) (cf. Ratka 2020, p. 481)
According to § 10 (1) GenRevG, “The auditor, the auditing association and their assistants as well as the legal representatives of the auditing association or audit company involved in the auditing are obliged to secrecy. They shall not without authorization use company- or business secrets learned in the course of, their activities. If an auditing company is auditor, obligation to secrecy also applies with respect to the supervisory board of the auditing company and its members. Who intentionally or negligently fails to comply with his obligations, shall be obliged to compensate the cooperative and, if a company according to § 1 (2) has been damaged, also this company for the damage incurred. Several persons are liable as joint and several debtors.” Also, according to § 10 (2) GenRevG, “The auditor shall be obliged to audit carefully and impartially. If he intentionally or negligently fails to comply with this obligation, he is obliged to compensate the cooperative and, if a company according to § 1 (2) has been damaged, also this company for the damage incurred.” (cf. Unofficial Translation of the Austrian Co-operative Societies’s Revision Act)
The auditor is also characterised by comprehensive professional qualifications. Normally, this is achieved by passing a professional examination to become an auditor and by ongoing professional training activities. (§ 13 ff. GenRevG in conjunction with GenRevPV 2008)
According to § 61 BWG, in the case of credit cooperatives, the auditors of the auditing associations, i.e., the legally competent auditing institutions, are also to be appointed as bank auditors. (cf. Perkouigg & Kessler 2014, p. 580)

5.4.3. Auditing Association

As we already mentioned in 5.2, in the case of the legal form of a cooperative, the acceptance assurance from a recognized, locally and technically competent auditing association is a prerequisite for registration in the commercial register. Therefore, we speak of compulsory association membership - association obligation. (cf. Dellinger & Steinböck 2019, p. 459; cf. Schenider 2022, p. 22)

Besides the audit, the Auditing Association may aim at severing the interests of its members as well as their consulting and support (§ 19 (3) GenG) Although the focus is on auditing, auditing associations can offer comprehensive incorporation services and other advisory services in the areas of law, accounting and taxation. (cf. Pomper 2022, p. 186; cf. Unofficial Translation of the Austrian Co-operative Societies's Revision Act)

All recognised audit associations in Austria are members of the Union of Austrian Auditing Associations (Die Vereinigung der Österreichischen Revisionsverbände - VÖR) and to be entered as "audit firms" as defined under § 2 l. 3 Auditor Supervision Act (Abschlussprüfer-Aufsichtsgesetz - APAG) (cf. BGBl I 83/2016) in the public register maintained by the Auditor Supervision Authority (Abschlussprüferaufsichtsbehörde - APAB) (§ 52 APAG). The VÖR is also responsible for the representation of the interests of the auditors, among other things, for maintaining the list of approved auditors according to § 17a (2) GenRevG. (cf. Dellinger & Steinböck 2019, pp. 476; 481; cf. Schneider 2022, p. 22)

Accordingly, a distinction is made between Raiffeisen cooperatives with the Austrian Raiffeisen Association, with eight affiliated auditing associations (Österreichischer Raiffeisensverband), consumer cooperatives with the CoopVerband - Auditing Association of Austrian Cooperatives (CoopVerband - Revisionsverband österreichischer Genossenschaften), commercial cooperatives with the Austrian Cooperative Association (Schulze-Delitzsch) (Österreichischer Genossenschaftsverband), and building cooperatives with the the Austrian Federation of Limited-Profit Housing Associations - Auditing Association (Österreichischer Verband gemeinnütziger Bauvereinigungen - Revisionsverband). Since the last auditing association was founded in the early days of the Second Republic in 1946 (Austrian Federation of Limited-Profit Housing Associations), there had been three new recognitions in the period from 2016 to 2023. A fifth auditing association was recognised in Austria for the first time after 70 years in December 2016 under the name Rückenwind - Förderungs- und Revisionsverband gemeinwohlorientierter Genossenschaften. The association sees itself as a representative for public welfare-oriented and independent cooperatives that have a regional focus of activity. (cf. Brazda 2020, p. 2) The sixth recognition of an auditing association took place in 2021, namley with Cooperative Audit Association renew - Cooperative Audit Association for regional energy, sustainability, commercial and economic cooperatives

(Genossenschaftsrevisionsverband renew - Genossenschaftsrevisionsverband für Regionale Energie-, Nachhaltigkeits-, Erwerbs- und Wirtschaftsgenossenschaften). The last recognition of an auditing association took place in April 2023 under the name Federal Auditing Association for Limited-Profit Housing Associations (Bundesrevisionsverband für gemeinnützige Bauvereinigungen).

The proof of assurance of acceptance to the auditing association shall be provided by written declaration of the auditing association. (§ 24 (2) GenRevG). When it comes to the application for admission to the Cooperative Audit Association, according to § 25 (1) GenRevG, "the cooperative to be founded shall enclose to the application for acceptance to the auditing association the cooperatives agreement and prove, that after a sound economy forecast as well as due to the personal circumstances of the members of the first board of directors or, in case such board has not yet been elected, of the founders, it is to be expected that the cooperative fulfils its planned promotion purpose permanently"; and "the auditing association shall decide upon the application for acceptance within eight weeks in writing" (§ 25 (2) GenRevG) (cf. Unofficial Translation of the Austrian Co-operative Societies's Revision Act)

Exceptionally, instead of the assurance by an auditing association, a judicial exemption from the obligatory association membership may be obtained. (§ 26 GenRevG). (cf. Astl & Steinböck 2014, p. 110) In these cases, the commercial register or (still occasionally) the respective provincial government takes on the role of the auditing association. (cf. Pomper 2022, p. 186)

The auditing association only has technical and organisational tasks in the course of the audit. In particular, the auditing association has to create all the conditions that guarantee the proper fulfilment of the tasks assigned to the auditor. By creating the necessary organisational conditions, the association has to ensure that the audit is carried out efficiently. Under this aspect, an auditor who is in an employment relationship with an auditing association is subordinate to the association only from a labour law and disciplinary perspective. (cf. Perkounigg & Kessler 2014, p. 566)

6. Cooperation Among Cooperatives

6.1. Anti-trust Law and Cooperatives

Almost any form of corporate cooperation can come under the attention of the antitrust authorities, as all companies that act as suppliers or demanders on the market are addressees of antitrust law. This means that they must comply with the applicable antitrust and abuse prohibitions of European and Austrian antitrust law. The prohibitions on cartels prohibit anti-competitive cooperation between companies, while the prohibitions on abuse prohibit the use of market power to the disadvantage of market partners and competition. However, the prohibitions of abuse assume a certain market strength, which cooperatives as small and medium-sized companies usually do not have. The antitrust prohibitions cover agreements and coordinated practices between companies. This concerns actual or potentially restrictive cooperation between competitors. In addition, anticompetitive decisions by associations of undertakings (e.g., statutory decisions) are covered by the antitrust prohibitions. (cf. Kling 2021, p. 287)

The cooperative legal form is often chosen as an institutional framework for cooperation, when from more companies, which want to stay independent, certain tasks in cooperative collaboration are carried out. In certain situations, this can restrict the competition, although the question arises where the limits of the cooperative interaction under antitrust law are. The cooperative is in a tense relationship with anti-trust law, although the cooperative as such, even if it has dominant position in the market, does not constitute anti-competitive behavior. (cf. EuG 2.7.1992 T-61/89, Rz 51)

The restriction of competition consists in restricting or abandoning the freedom of competitive behavior through the coordination of competing companies, artificially changing the reaction of competitors by means of an agreement and thus making it predictable, which has the effect of distorting the selection process of competition and therefore also contradicts the protected subject matter of the antitrust ban. (cf. Beuthien et al. 2011, § 1 Rz 155)

With the implementation of the cooperative's promotional mandate, which is the primary objective of this legal form, the scope of action of its business partners is often reduced and competition is therefore restricted. On the other hand, however, cooperative cooperation also provides considerable incentive for stimulating competition. It is only through the cooperation based on the idea of self-help for the purpose of mutual promotion of acquisition and their economy that economically weak companies are able to achieve competitiveness. (cf. Krejci 1986, p. 3; cf. Mösenbacher 2014, p. 59)

Austrian antitrust law provides a normative regulation for the restrictions of competition realized within the framework of cooperative cooperation. Community law does not have a separate regulation that takes into account the cooperative legal form. At Community level, the Commission, the General Court and the European Court of Justice are always neutral with regard to the restrictions of competition associated with economic cooperation. As a result,

however, the assessment of the European authorities with regard to the impairments of competition associated with cooperative cooperation largely harmonizes with the Austrian law, even without statutory regulation.
The majority of impairments to competition within a cooperative framework will be horizontal restrictions on competition, i.e. restrictions on competition between companies that are actual or potential competitors on one and the same market. The limit of the admissibility of such restrictions of competition within the scope of application of Community law is to be determined in accordance with the guidelines published by the Commission on the applicability of Article 101 of the Treaty on the Functioning of the European Union on horizontal cooperation agreements. (cf. Bekanntmachung der Komission Leitlinien zur Anwendbarkeit von Artikel 81 EG-Vertrag auf Vereinbarungen über horizontale Zusammenarbeit ABI 2001 Nr C 3 S 2)
On the other hand, vertical competition, i.e., competition between companies operating at different economic levels, is in comparison rarely affected in the cooperative framework. Where Community law applies, vertical restrictions of competition are to be judged based on the Block Exemption Regulation (Verordnung (EG) Nr. 2790/1999 der Komission vom 22. Dezember 1999 über die Anwendung von Artikel 81 Absatz 3 des Vertrages auf Gruppen von vertikalen Vereinbarungen und aufeinander abgestimmten Verhaltensweisen, ABI 1999 Nr L 336 S 21), together with the guidelines issued by the Commission (cf. Mitteilung der Kommission Leitlinien für vertikale Beschränkungen, ABI 2010 Nr C 130 S 1). In this respect, there has been complete accordance with Community law ever since the Block Exemption Regulation was adopted into Austrian law based on § 30e KartG 1988 by ordinance of the Federal Minister of Justice (cf. Verordnung des Bundesministers für Justiz über die Freistellung von vertikalen Verbindungen, BGBI II 2002/486). This compliance remains fully intact even after the entry into force of the KartG 2005. The individual cartel types and regulation based on this prohibiting its implementation were replaced by the KartG 2005 by a general prohibition of restrictions of competition based on the model of Art 81 EC Treaty (now Article 101). This also removed the special treatment for vertical restrictions of competition, which were regulated in the KartG 1998 as vertical distribution restraints. (cf. ErläutRV 926 BlgNR 22. GP 3 zum KartG 2005)
Antitrust law is irrelevant for those cooperatives whose tasks can only be efficiently managed on the base of uniform conditions and also require a concentration of forces within a certain area. (cf. Mösenbacher 2014, p. 59 ff.)
Already § 2 (1) KartG 2005 suffices in the most cases for the exemption of restrictions of

competition realized within the cooperative framework from the prohibition of § 1 KartG 2005.

This exception is, according to § 2 (1) KartG 2005, linked to the fact that agreements restricting competition are either connected with an appropriate consumer participation or a contribution to the promotion of technical or economic progress. Furthermore, it does not apply if such agreements between cooperative members are not essential for achieving the goal of making contribution to technical and economic progress or if they open up possibilities of eliminating competition in respect of a substantial part of the products concerned. The conditions for exemption contained in § 2 (1) are the same as those of Article 101 (3) TFEU. (cf. Mösenbacher 2014, p. 71 f.)

Pursuant to § 2 (2) l. 3 KartG 2005, agreements between members of cooperatives, and between members and the cooperative, are exempt from the prohibition of § 1 KartG 2005 insofar as they are justified by the fulfillment of the promotional mandate of cooperatives. (cf. Mösenbacher 2014, p. 73)

It cannot be derived from the actual or alleged abuse of power by individual cooperatives that cooperatives fundamentally restrict competition and are per se to be classified as cartel-like bodies. According to § 1 KartG, agreements between companies are ineffective if they restrict competition. Cooperatives typically have the opposite effect. If occasionally individual provisions of the articles of association of cooperatives are to be classified as restrictive of competition (e.g. space protection, purchase and delivery obligations of members), this does not mean that cooperatives per se are to be described as cartels. (cf. Hamm 1981, pp. 13, 18)

Cooperatives are exempt from substantive antitrust law only from the provisions on cartels and vertical distribution restraints. The provisions on non-binding association recommendations, market dominance and mergers also apply to cooperatives. (cf. Mösenbacher 2014, p. 73)

Since 01.03.2013, the rules on minor agreements (Bagatellkartelle) in Austria have been harmonized with European law to a great extent. In 2022, the Federal Competition Authority independently issued new guidelines on the application of the Austrian legal exception regarding sustainability cooperation. (cf. Leitlinien zur Anwendung von § 2 (1) KartG auf Nachhaltigkeitskooperationen - Nachhaltigkeits-LL) This concerns the question of the relationship between competition on the one hand and environmental and climate protection on the other hand. (WKO, n.d.)

6.2. Legal Basis for the Cooperative Cooperation

According to Münkner (2017), “The autonomy of cooperatives in cooperating, federating or networking is more a matter of freedom of association than of cooperative legislation.” (p. 331)

As independent companies, cooperatives and their networks or federations have access to the means developed for collaboration between companies. However, not all forms of economic cooperation designed for investor-led organizations are consistent with the special nature of cooperatives. Thus, the cooperative cannot strengthen its market position by leveraging its unique image and intrinsic drivers, i.e. member-promotion, member-devotion, and member-support. By moving closer to corporations and away from the cooperative model, these companies put at stake their cooperative character and demutualize the assets accumulated by generations of cooperative members. They can survive as a company, but not as a cooperative. (cf. Münkner 2017, p. 331 f.)

In an economic system based on market and competition, private law elements are essential regulatory factors. Even if the law on business organisations provides for certain standards and rules, private initiative and freedom of association are fundamental dynamic elements of the legal system. Private economic activities are encouraged and regarded as the main driver of economic development. The state creates a legal framework within which such private initiatives can be implemented. On the other hand, private initiatives are limited when it is necessary to ensure a balance between legitimate interests and the rights of all parties, for example through agreements, property rights, binding rules of private law and if necessary through public law including penal law. The Constitution is part of this framework. (cf. Schultz & Reinhardt 1981, p. 392) Cooperatives can take various forms of cooperation between companies: strategic alliances, franchising, networks, including cooperatives and subsidiaries. Whether cooperatives can be part of the combinations (Konzern) remains controversial. The question of whether a cooperative can rely on other cooperative or non-cooperative organizations in a dependent manner can be answered differently from a legal or cooperative perspective. (cf. Münkner 2017, p. 332)

When it comes to the vertically integrated systems (Verbund), in contrast to a unitary enterprise (Einheitsunternehmen), which only has legally dependent operating units, and in contrast to a combination (Konzern), in which several legally independent companies are combined under a common management, they are characterized by the fact that all members of the system are linked to each other under formal organizational terms in such a way that at least one company influences the internal decision-making of the participating companies, resulting in a lasting partnership-based cooperation. The type and extent of influence can vary greatly. A link under company law must at least be reflected in a participation under company law. A boundary is drawn at the mere acquisition of the participation in order to distribute dividends to the cooperatives or at the acquisition of the participation that is only an end in itself and only serves the purpose of unrestricted accumulation. On the other hand, the principle of self-help in the promotion of the economy does not aim to prohibit third-party influence, provided that third-party is not contrary to the promotional interests of the members. Cooperative autonomy and the principle of cooperative self-administration therefore do not oppose the integration of a cooperative into an economy-promotion group through a contract based on organizational law. (cf. Beuthien 2018, p. 110) Therefore, a vertically integrated cooperative system is nothing alien to cooperatives and also nothing atypical. (cf. Brazda & Schediwy 2021, p. 4 f.)

6.3. Vertically Integrated Cooperative System (Verbund)

Vertically integrated cooperative systems have existed in various forms since the birth of cooperatives. In the early days there were joint associations, such as the General Association of Austrian Commercial and Economic Cooperatives (later ÖGV), but in 1922 the Schulze-Delitzsch credit cooperatives went one step further and founded the Austrian Central Cooperative Fund as a liquidity equalization office. This central institution was there to ensure the second-level funding purpose in a turbulent economic period at the time. (cf. Borns 2015, p. 39)

The development of cooperatives of producers, traders or consumers in the industrialized countries had already shown in the 1960s that the changes in competitive structures in the course of economic growth also force cooperatives to further develop their service relationships, i.e., above all the size of their operations in order to realize material or non-material benefits. (cf. Brazda & Schediwy 2021, p. 6) The vertically integrated cooperative system is not precisely defined either legally or in terms of cooperative science and is still characterized by its ambiguity. (cf. Brazda & Schediwy 2021, p. 1)

Increasingly intense competition has made the cooperatives use the means and techniques of the capitalist economy in order to fulfill their promotional mandate more efficiently. On the one hand, changes in market conditions have required the formation of larger operating units or restructuring. On the other hand, cooperatives, especially in the money sector, have founded regionally limited secondary cooperatives with other cooperatives with the same business purpose and the same interests, or supported them by joining later, and entrusted these central institutions with the fulfillment of certain business tasks. Each affiliated cooperative updates the statutory promotional mandate such that it has to act in an entrepreneurial and market-shaping manner, particularly in an integrated system, i.e., by utilizing all the economic advantages of it. (cf. Brazda & Schediwy 2021, p. 2)

On the other hand, according to Brazda & Schediwy (2021), "the development of holding companies and holding-like structures is increasingly being accelerated by crisis-related super-mergers. The vertically integrated cooperative system was originally structured as an inverted combination (Konzern) or a holding company turned upside down. It arises due to the fact that the representatives and propagandists of a cooperative foundation wave realize relatively quickly that they need a common network of institutions in order to survive in the long run in competition and to provide their members with substantial promotion.." (p. 16)

In the consumer cooperative sector, for example, several classic integrated systems have been replaced by mega-mergers (Austria, Finland, Sweden) and some have even disappeared. As mentioned, there is no general, legally binding definition of a vertically integrated system (Verbundbegriff). One speaks of affiliated companies, when legally independent companies in certain relation economically interact with each other. A close business relationship under the law of obligations is not sufficient. Only when there is a link under organizational law (influence on the internal decision-making of the companies involved) does a vertically integrated company system (Unternehmensverbund) exist, although no specific degree of influence is prescribed by law. (cf. Beuthien 2018, p. 110; cf. Brazda & Schediwy 2021, p. 2)

Regardless of a specific cooperative sector, primary cooperatives of the same type, usually predominantly consisting of natural persons, have been acting together with secondary cooperatives formed by them since their foundation, in which other natural persons and companies of other legal forms, usually AGs or GmbHs, which are founded entirely or predominantly by cooperatives, can also participate (two-tier structure). In this context, Dülfer speaks of an operating/economic system and a secondary system. (cf. Dülfer 1995, pp. 38, 97)

Secondary cooperatives, on the other hand, can merge into tertiary or central cooperatives, which often do not have the legal form of association of a cooperative (three-tier structure). In a cooperative business association, it is not only cooperatives that have to be affiliated. It is also possible for companies promoting the economy that have a different form of association, in particular that of a stock company, to participate. According to § 1 (2) GenG, cooperatives have both vertical and horizontal freedom of system integration, i.e., cooperatives can also participate in a company or cooperative of a higher tier for the purpose of promoting their members. The problem is that neither the primary nor the secondary or tertiary cooperative concept is defined by law.

If other cooperative interest associations are added to the tier structure, then the cooperative business association is functionally referred to as a bottom-up vertically integrated cooperative system, which is promotion inducing. (cf. Beuthien 2018, S. 111)

However, the business operations of the primary cooperatives are not transferred in whole or in part to the secondary or central cooperative. They remain legally independent, establish a long-term network of service relationships with their secondary or central cooperative on the basis of membership (on a cooperative, contractual or participation basis) and make use of a regional and national umbrella organization supported by them. In contrast, the auditing associations are referred to in their auditing function as a cooperative association that safeguards the promotion. (cf. Beuthien 2018, p. 111) Cooperatives are members of regional or supra-regional auditing associations. (cf. Brazda & Schediwy 2021, p. 3)

As a guideline for a cooperation with a specific purpose in the vertically integrated cooperative system association serves horizontally the solidarity principle, and vertically and laterally subsidiarity principle. Within the vertically integrated cooperative system association, solidarity is understood as loyalty to the integrated system. The subordinate unit makes use of the support provided by the superordinate tier. The subordinate unit, in turn, should only use the resources available to it in the service of its members and should, in principle, be obliged to provide them with the requested support. According to the principle of subsidiarity each system member should do what other members cannot do or cannot do as well. (cf. Beuthien 2018, p. 111) Subsidiarity is therefore a principle of delegation, which sets a primacy for the lower unit. (cf. Pester 1993, p. 123)

From a legal perspective, a further distinction is made between a core system and an annex system in the cooperative business association. In addition to the primary cooperatives, the core integrated system brings together the higher-level members (regardless of their legal form) at the regional or central level and the cooperative audit and interest associations that directly aim for promotional goals. While the annex system includes those legally independent commercial companies that have affiliated with each other through capital or corporate contracts, which only indirectly support the promotional goals of the core system members and thus make it possible to better fulfill the promotional mandate. (cf. Beuthien 2018, p. 112; cf. Brazda & Schediwy 2021, p. 4)

The binding factor between the members of the vertically integrated cooperative system

association is their promotional purpose, i.e., their promotional economic objective under § 1 GenG, which they pursue directly or at least indirectly. With its purpose, cooperatives distinguish themselves from both the public service principle and the orientation towards isolated capital interests and emphasize the principle of self-help, under which the economic conditions of the members are to be improved through the cooperatives. On the one hand, the basic idea of promotional cooperation is propagated in a vertically integrated cooperative system association. On the other hand, there is a tension between the legal promotion mandate of the primary cooperatives and the legal determination of a integrated system program. It is viewed critically that the vertically integrated cooperative system is not legally recognized as an entire complex, but only in its individual manifestations such as primary, secondary and tertiary cooperatives, central institute or auditing association. (cf. Beuthien 2018, p. 110)
In economic terms, a business association (Verband) is a purpose-oriented group whose main task is to pursue certain interests of its members. According to the objectives set, a distinction is made between market and economic associations. Therefore, the market-related primary, secondary and tertiary cooperatives, and other central cooperatives and cooperatively supported central cooperatives can be understood as market associations, and the cooperative associations acting in terms of economic policy as economic associations. (cf. Aschhoff 1965, p. 11)

6.4. § 30a BWG – Vertically Integrated System of Credit Institutions

6.4.1. Introduction to § 30a BWG

The legislator has stipulated in § 30a BWG that the interests of vertically integrated system of credit institutions must be placed above those of the individual primary banks. This ensures that directives issued by the integrated system are placed above the due diligence obligations of the management of a primary bank under stock company law and supervisory law. In return, the primary banks only have to comply with the supervisory regulations within the integrated system and not at individual level as before. In addition, the liability risk is to be reduced through joint liability of the members for each other. This development can be seen as a reaction to the increasingly changing conditions of global competition, regardless of whether these are changes in customer behavior, interest rates or technological developments. Regardless of all developments, the aim of the members of the cooperative bank remains the same: to offer their region and their members banking services at good conditions and to minimize their liability. In order to guarantee this external freedom, it may be in the interests of the owners to partially waive their internal freedom. (cf. Borns 2015, pp. 45 ff.)

The introduction of § 30a BWG created a consolidation requirement for the vertically integrated system of credit institutions (KI-Verbund), which must be clearly separated from the group of credit institutions (KI-Gruppe) regulated in § 30 BWG. In addition to the objective of increasing financial market stability through consolidated supervision in the system (cf. Dellinger & Stempkowski 2020, § 30a Rz 1) the part of it was to enable the system of credit institutions to benefit from synergy effects through a uniform organization and the use of a common infrastructure and to increase the competitiveness of the members. (cf. Stock 2012, p. 267)

6.4.2. Brief Historical Overview

The first Vertically Integrated System of Credit Institutions in the context of § 30a BWG has existed at European level since 1972, when Rabobank was founded. The Rabobank was established from the local Raiffeisen banks and the cooperatively organized farmers' credit banks. The result was the affiliation of all member banks to a central institution and joint liability within the system. This development was supported by the European legislator in the form of supervisory exemptions under Article 2 (4)(a) of the 1st Banking Co-ordination Directive of 12.12.1977, with which the European legislator legally recognized the "Rabobank model" for the first time. However, the European regulations contained requirements that the cooperative structures had to meet even before 15.12.1977, if they decided to adopt the Rabobank model:

- All cooperative banks in the integrated system are in the same member state and are permanently subject to a central organization that is also based in the same member state.
- The liabilities of the central organization and affiliated banks were henceforth regarded as joint liabilities or the central organization alone could guarantee all liabilities of the vertically integrated system of credit institutions.
- The central organization must be granted authority to issue instructions by the member banks.
- The solvency and liquidity of the vertically integrated system of credit institutions are monitored by means of consolidated accounts. (cf. Dellinger & Stempkowski 2020, § 30a Rz 2)

These restrictions were only lifted over 30 years later with Directive 2009/111/EC, as the

European legislator came to the conclusion that such restrictions would distort competition. (cf. Dellinger & Stempkowski 2020, § 30a Rz 4)

A distinction is made at European law level between the following cooperative structures:

- "highly integrated cooperative groups" - vertically integrated systems of credit institutions (KI-Verbund) according to Article 10 CRR and Art. 21 CRD IV (so-called "Rabobank model");
- "integrated cooperative groups" - institutional protection system according to Article 113 (7) CRR; and
- "other cooperative networks" pursuant to Article 400 (2) (d) CRR. (cf. Dellinger & Stempkowski 2020, § 30a Rz 3)

In Austria, the introduction of the BWG was the first time that the inclusion of a consolidation requirement for the vertically integrated system of credit institutions was provided. (cf. Dellinger & Stempkowski 2020, § 30a Rz 5)

Despite the absence of an explicit statutory provision, the Banking Act (cf. Dellinger 2014, p. 43 f.), also recognized the vertically integrated system of credit institutions as a practiced form of organization in the literature (cf. Kastner 1986, pp. 205 f.; cf. Dellinger 2014, pp. 42 ff.; etc.), in judicature (cf. OGH 20.6.1991, 6 Ob 6/91, cf. OGH 24.11.1994, 6 Ob 31/92), as well as in its variants as an "integrated cooperative group" (cf. Dellinger & Stempkowski 2020, § 30a Rz 3; cf. § 22a (9) in BGBl I 2006/141), and as an "other cooperative network". (cf. § 23 (13) l. 6, § 25 (10) l. 5 and (13), § 27 (6) lit. 6 in BGBl I 2006/141) In addition, §§ 61, 62 and 92 ff. refer to the cooperative auditing association or the "Sektorverbund" (§ 92 (7) BWG) as an organizational unit. (cf. Dellinger & Stempkowski 2020, § 30a Rz 3)

It was not until the amendment to the Austrian Banking Act BGBl I 2012/20, which came into force on 27 March 2012, that the vertically integrated system of credit institutions was explicitly regulated by law as a real alternative form of organization to the all-encompassing control combination. This provision does not exclude other forms of decentralized cooperation (such as the mere "liquidity network as defined in § 25 (13) as amended by BGBI I 2006/141 (now § 27a) or the institutional protection system as defined in Article 113 (7) CRR. It can be assumed that the term "Sektorverbund" used in § 92 (7) BWG now includes all three organizational forms of the cooperative association. (cf. Dellinger & Stempkowski 2020, § 30a Rz 6)

Since the entry into force of § 30a BWG, in practice it became quickly apparent that the isolated regulatory approach of such a system and especially the necessary authority to give instructions raised complex civil law questions regarding the admissibility and extent of company control. (cf. Stempkowski 2015, p. 83) The need for regulation was intensified by the high level of sensitivity regarding potential liability of the governing bodies of credit institutions, which was not least due to the massive increase in regulatory "fit and proper" requirements. (cf. Hofinger, Karner & Stempkowski 2014, p. 345) However, it was ultimately the inherent tension between the independent corporate interests of the affiliated (cooperative) credit institutions and the integrated system that led to discussions and subsequently to the regulation § 30a BWG being revised several times within a short period of time. With the amendment to BGBl I 2014/98 on 1.1.2015, however, the character of the system structure was massively changed at the expense of the affiliated credit institutions and the democratic balance of interests in favour of a dominant central organization. The original advantage of the independence of the participating credit institutions compared to the controlling group according to § 30 BWG was therefore largely lost. (cf. Dellinger & Stempkowski 2020, § 30a Rz 6a)

6.4.3. Definition and Core Elements of § 30a BWG

For more than two decades, it has been debated whether the so-called "Rabobank model", "primary bank consolidation" (Primärbankenkonsolidierung) and a vertically integrated system of credit institutions constitute a combination or a group of credit institutions according to § 30 (1) BWG. It has been clarified by Article 10 CRR/Art. 21 CRD IV and § 30a (2) BWG that it is not explicitly a credit institution group. The main difference to the combination and the credit institution group according to § 30 (1) BWG can be seen in the following table:

Vertically Integrated System (Verbund)	Combination (Konzern)
Voluntary association	(Reciprocal) shareholdings
Cooperation within the framework of (cooperative) self-administration by means of system establishments	Dominant influence of a company over its subsidiaries
Monitoring of rules within the framework of cooperative self-administration	Strong control rights

Table 1.

(cf. Hofinger & Pomper 2018, p. 406)

According to § 30a (1) BWG, credit institutions (plural, i.e. at least two) with a registered office in Austria and with another credit institution with a registered office in Austria as a central organization to which they are constantly assigned can form a vertically integrated system of credit institutions, under the condition that the requirements of Article 10 CRR are fulfilled. It is therefore clear that the formation of such a system requires the cooperation of at least three credit institutions, with one of them assuming the role of the central organization. (cf. Dellinger & Stempkowski 2020, § 30a Rz 7)

A vertically integrated system of credit institutions is an association of several credit institutions with registered offices in Austria, one of which is the central organization with certain rights and obligations, to which the others are permanently assigned. This allows the assigned credit institutions to be exempted from compliance with certain supervisory provisions under § 30a (6) BWG. The fact that these tasks are performed collectively by the central organization at a consolidated level in accordance with § 30a (7) and (10) BWG is aimed towards enabling economic synergy effects, increasing the competitiveness of credit institutions (cf. Moser 2012 p. 293; cf. Stock 2012, pp. 133, 267), and making an overall contribution to greater financial market stability. (cf. Hofinger & Pomper 2018, p. 407)

The associated credit institutions (die zugeordneten Kreditinstitute - ZKI) (§ 1 (1) BWG) of an Austrian vertically integrated system of credit institutions according to § 30a BWG (cf. BGBl 1993/532 as amended by BGBl I 2019/46), that take deposits (§ 7 (1) l. 3 ESAEG), are obliged to belong to a protection scheme (§ 1 (1) ESAEG) and to pay contributions to it. (§ 8 ESAEG) This secures deposits up to an €100,000 in case of default of a central credit institution or in case of a deposit protection. (see §§ 9 & 13 ESAEG). The corresponding legal regulations are set out in the Austrian Deposit Guarantee and Investor Compensation Act 8 (Einlagensicherungs- und Anlegerentschädigungsgesetz - ESAEG). (cf. BGBl I 2015/117 as amended by BGBl I 2019/46)

The main objective of the vertically integrated system of credit institutions is to ensure that the liabilities of its members are joint liabilities and that the solvency and liquidity of its members are guaranteed. Each member of this legal system is fully liable for the liabilities of the other members. (cf. § 30a (1) l. 2 in conjunction with Art 10 (1) lit a CRR) The vertically integrated system of credit institutions is therefore a joint liability system. Its main purpose is to protect creditors and prevent the bankruptcy of its members. The protection of members is intended, among other things, to ensure that a deposit guarantee case does not even occur within the vertically integrated system of credit institutions. Thanks to this joint liability system, the members of this legal structure can offer their creditors security in addition to the statutory deposit guarantee. (cf. Ortner & Saric 2021, p. 410)

In accordance with European legal requirements, the vertically integrated system of credit institutions is based on three pillars:

- Joint liability system according to § 30a (1) l. 2 BWG;
- Liquidity system according to § 30a (10) BWG; and
- Authority of the central organization to issue instructions to the affiliated credit institutions according to § 30a (1) l. 3 BWG. (cf. Stehlik 2012, p. 6)

The requirement that all liabilities of the members in the vertically integrated system of credit institutions are joint obligations or that the central organization has unlimited liability for the liabilities of the individual credit institutions assigned to it can be met by guaranteeing the receivables or by establishing the required contingent liabilities, e.g., by contract. (cf. Hofinger & Pomper 2018, p. 407)

In the directive, the liquidity system is still a prerequisite in the Austrian implementation draft as part of the tasks of the central organization. The central organization has to monitor compliance with the relevant regulatory provisions of the BWG and, in particular, carry out consolidated liquidity monitoring and management in the system with the aim of constant maintenance of the solvency and liquidity of all members and the entire system. (cf. Stehlik 2012, p. 6)

Under the restriction that instructions are only permissible to the extent that they are necessary to fulfil the statutory tasks of the central organization and thus to ensure compliance with banking law requirements (cf. Dellinger & Stempkowski 2020, § 30a Rz 13), the central organization has the right to issue instructions to the assigned credit institutions. Based on the responsibility of the central organization, it follows that the authority to issue instructions not only has the character of setting standards, but also of enforcing them. (cf. Stehlik 2012, p. 7)

The explicit provision that the central organization's right to issue instructions cannot be held against the own responsibility of the management board of an AG according to § 70 AktG or its duty of care and responsibility according to § 84 AktG makes it clear that the instructions must be implemented by the affiliated credit institutions, regardless of their legal form. As a minimum, the central organization has the authority to issue instructions in the following areas:

- Ensuring the administrative, technical and financial supervision of the assigned credit institutions;
- Ensuring compliance with all applicable regulatory provisions, in particular ensuring the liquidity and capitalization of the vertically integrated system of credit institutions;

- Ensuring that the managers of the affiliated credit institutions have the necessary corporate management skills ("fit and proper");
- Ensuring a supervisory regulatory reporting system;
- Definition of risk policy and principles, measurement and control processes (incl. stress testing) for the vertically integrated system of credit institutions and the affiliated credit institutions;
- Definition of internal control procedures for for the vertically integrated system of credit institutions and the affiliated credit institutions;
- Definition of criteria or rules for the ongoing business activities of the affiliated credit institutions;
- Definition of criteria or rules under which circumstances financial support is provided to the affiliated credit institutions;
- Definition of criteria regarding new establishments and/or cross-border activities. (cf. CEBS's guidelines regarding revised Article 3 of Directive 2006/48/EC 2010, Rz 29 f.; cf. Dellinger & Stempkowski 2020, § 30a Rz 40 ff.; cf. Hofinger & Pomper 2018, p. 408 f.)

In addition, it is conceivable that the rights to issue instructions could be extended to those areas in which the central organization may have to issue instructions in order to ensure compliance with supervisory regulations within the vertically integrated system of credit institutions. (cf. Hofinger & Pomper 2018, p. 409 f.)

According to § 30a (1)(2) BWG, the formation of a vertically integrated system of credit institutions requires an agreement that regulates the core elements in particular, that we have mentioned above. Furthermore, due to the extensive interventions in the autonomy of the affiliated credit institutions and the comprehensive range of duties of the central organization, the agreement must be approved in the general meeting of all credit institutions involved. Furthermore, the reduction of supervisory control to the consolidated level associated with the vertically integrated system of credit institutions requires official approval by the supervisory authorities.

In addition to the comprehensive exemption of the affiliated credit institutions from supervisory provisions and reporting obligations, the consolidated view is the most essential legal consequence from a supervisory perspective. § 30a (6) and (7) BWG stipulate which specific provisions the individual credit institution assigned to the central organization is exempt from complying with and which provisions must be complied with within the framework of the agreement. For example, the affiliated credit institutions are exempt from compliance with § 4 (3) l. 3 and 4 (granting of concession), § 5 (1) l. 5 (initial capital), § 10

(Austrian credit institutions in member states), § 16 (EEA infringements of Austrian credit institutions), §§ 23 to 24a (capital conservation buffer, countercyclical capital buffer, global systemically relevant institutions, systemically relevant institutions, systemic risk buffer, distribution restrictions, capital conservation plan), § 25 (liquidity), § 39 (2) (administrative, accounting and control procedures), § 39 (3) l. 3 and 4 (capital adequacy requirements), § 39a (ICAAP), § 69 (3) (limitation of interest rate risk) and § 70 (4a) to (4d) (supervisory powers) as well as parts 2 to 8 of the CRR (own funds, own funds requirements, large exposures, exposures from transferred credit risk, liquidity, debt, disclosure). (cf. Hofinger & Pomper 2018, p. 410 f.)

In contrast, the entire vertically integrated system of credit institutions has to comply with the provisions of § 39a BWG and Parts 2 to 8 of the CRR on a consolidated basis (§ 30a (7) BWG). Also, the notification and reporting obligations applicable to the vertically integrated system of credit institutions according to §§ 73 to 75 BWG are to be fulfilled by the central organization. The specific knowledge required due to increased regulatory requirements can be used collectively by the central organization (cf. Dellinger & Stempkowski 2020, § 30a Rz 23), which leads to a reduction in administrative expenses for the local credit institutions. At individual level, affiliated credit institutions are exempted from compliance with regulatory provisions (especially risk-weighted assets, liquidity, etc.). The central organization is responsible for compliance with all regulatory provisions at consolidated level of the vertically integrated system of credit institutions. § 30a (8) BWG provides as the central consolidation provision of the the vertically integrated system of credit institutions that "the central organization is to be treated as the superordinate institution and each affiliated credit institution and each contributing legal entity that is liable with all of its assets for an affiliated credit institution pursuant to § 92 (9) BWG or § 8a (10) KWG, is subject to uniform management with the affiliated credit institution and whose activities are limited to shares administration, is to be treated as a subordinate institution." (cf. Hofinger & Pomper 2018, p. 411)

6.5. Acts of Reorganisation

6.5.1. Introduction

Like any other company form, a cooperative is subject to continuous development. For instance, it can make economic sense for two cooperatives to join forces and merge. It is also conceivable to go the other way and split up. Accordingly, the cooperative has a wide range of reorganization possibilities available. Beforehand, it must be considered whether this should take place by way of singular succession, i.e., assets and debts are transferred individually with the consent of the respective contractual partner, or by way of universal succession, i.e., assets and debts are transferred by a single act (uno actu). Practical examples of universal succession include merger of cooperatives, demerger of cooperatives and merging conversion (die verschmelzende Umwandlung). (cf. Pomper 2022, p. 130) The merging conversion in accordance with §§ 2 ff UmwG is very similar to a merger. In this case, the company/assets of a corporation (AG, GmbH) are transferred to the main shareholder, who must hold at least 90% of the shares, and the transferring corporation ceases to exist. (cf. Weiß 2014, p. 745)

For credit cooperatives, § 92 BWG provides the option of transferring the company or banking part of the business operations to a stock company.

As a way of individual succession, cooperatives generally have the option of a company transfer according to § 38 UGB. In practice, for example, an association could sell its business or part of its business to a cooperative. However, the current government's program also includes an evaluation and examination of a simplified and tax-neutral conversion of associations into cooperatives, which is intended to result in an association conversion law. (cf. Regierungsprogramm 2020-2024, pp. 29, 59) Auditing associations in the legal form of an association can already be converted into a cooperative under § 19a GenRevG. In general, special attention must also be paid to tax law aspects in the case of cooperative reorganizations. In this respect, reference should be made to the definition of assets under § 12 (2) UmgrStG. (cf. Pomper 2022, p. 130)

6.5.2. Merger of Cooperatives

The merger of cooperatives is regulated by the provisions of the Cooperatives Merger Act (GenVG). (cf. Dellinger & Schellner 2022, p. 21) Under the GenVG, cooperatives of the same liability type can be merged by way of universal succession. The same type of liability means that the cooperatives to be merged have limited, unlimited or share liability. (cf. Weiß 2014, p. 747) In the case of different types of liability, the same type of liability must first be adopted by a general meeting resolution according to § 33 (3) GenG. (cf. Nowotny 2017, Rz 5/155) Differences in the number of subscribeable shares and the amount of the nominal value of the business shares as well as coverage obligations do not prevent a cooperative merger.

(cf. Keinert 1988, Rz 506)
The GenVG distinguishes between merger by absorption and merger by new formation. (cf. Dellinger & Schellner 2022, p. 21)
A merger by absorption occurs when an existing cooperative (absorbing cooperative) absorbs one or more other cooperatives (transferring cooperatives) in such a way that the absorbing cooperative continues to exist while the transferring cooperatives cease to exist. According to Weiß (2014), "the wording of the law in § 1 (1) l. 1 GenVG seems to indicate that each individual merger would also be a separate act of resolution from the perspective of the absorbing cooperative. This is not the case. If an absorbing cooperative is to merge with several transferring cooperatives, a uniform resolution of the general meeting and a uniform registration in the commercial register are sufficient on the part of the absorbing company". (p. 748) § 219 l. 1 AktG in the version prior to the EU-GesRÄG 1996 was also formulated in the same way as § 1 GenVG. Nevertheless, the view expressed here was already recognized for the AG at that time. (cf. Schiemer 1986, § 219 Rz 1; cf. Dellinger & Oberhammer 1996, § 88)
Merger by new formation enables cooperatives that cannot agree on which one should cease to exist and which should continue to exist to merge as desired. The merger by new formation provides that the cooperatives to be merged can form a new (absorbing) cooperative, in which the cooperatives to be merged are then absorbed.
The possibly considerable disadvantage of merger by new formation lies in the multiple real estate transfer tax due, because all participating cooperatives must transfer their properties as the transferring cooperative, which triggers real estate transfer tax in each case, whereas in the case of merger by absorption, the tax is only due for the properties of the transferring cooperative, but not for the absorbing cooperative. It therefore makes sense to designate the cooperative that owns the most properties as the absorbing cooperative, even if it is actually regarded as the "one to be absorbed", e.g. due to economic considerations. In order to make this arrangement more appealing to the members of the economically stronger cooperatives who regard their cooperative as the absorbing one, it can be decided in the course of the merger that the firm of the transferring cooperative will be continued in accordance with § 22 UGB. The need to obtain new authorizations under public law, such as concessions, can also be disadvantageous. Whereas in the case of a merger by absorption, the public-law authorization of the absorbing cooperative remains, in the case of merger by new formation the absorbing cooperative does not have an existing authorization but must apply for one. (cf. Weiß 2014, 748 f.)

The board of directors of the participating cooperatives have to conclude a written merger agreement (§ 3 GenVG). This must be approved by the general assemblies of the participating cooperatives (cf. Weiß 2014, p. 754) The merger resolution requires a majority of at least 2/3 of the submitted valid votes (§ 2 (1) GenVG). Before the resolution is passed, an appointed auditor must examine whether the merger is compatible with the interests of the members of the cooperative and the interests of the creditors. The auditor's expert opinion must be read out at the general meeting (§ 2 (2) GenVG). § 9 GenVG grants those members who were not present at the general meeting or who voted against the merger and recorded an objection in the minutes an extraordinary right of termination (right of withdrawal). Upon entry of the merger in the commercial register, all assets and all liabilities of the transferring cooperative are transferred to the absorbing cooperative by way of universal succession (cf. Weiß 2014, p. 760; cf. Nowotny 2017, Rz 5/155), and the transferring cooperative ceases to exist (§ 5 (1) GenVG). The members of the transferring cooperative acquire membership of the absorbing cooperative by act of law (§ 7 (1) GenVG).

The exchange of the shares held in the transferring cooperative into shares in the absorbing cooperative can generally be done at nominal value (§ 7 (2) GenVG). Therefore, no company valuation and no determination of the "true value" of the shares is required to set the exchange ratio. As the members are generally only entitled to compensation at nominal value anyway, their status does not deteriorate as long as the nominal value of their shares remains the same after the merger. A company valuation is only required if the articles of the participating cooperatives provide for a substantial participation of the members (cf. Weiß 2014, p. 769; cf. Dellinger & Schellner 2022, p. 21)

6.5.3. Demerger of Cooperatives

Under Austrian law, only very limited options were previously available to cooperatives for reorganizations. Under the GenVG, cooperatives could merge with each other and, according to §§ 2 ff UmwG, become universal successors by means of a merger or merging conversion. However, there is no provision for the "reverse case" of a cooperative changing its legal form into a stock company. An exception to this is § 92 BWG, which allows credit cooperatives to transfer their company or banking part of business operations to a stock company (AG) by way of universal succession. While corporations (Kapitalgesellschaften) have long been able

to split their assets, this was not possible for cooperatives until 2019. Due to these limited reorganization options, the flexibility for cooperatives was restricted, which was a disadvantage compared to corporations. This was changed by the GenSpaltG (cf. BGBl I 2018/69) which came into force on 01. January 2019. The possibilities for reorganization by demerger that exist for corporations were also made available to cooperatives.
Since then, cooperatives can transfer their assets to one or more new or existing cooperatives by way of universal succession. In addition, the GenSpaltG enables cooperatives to split off parts of their assets to an existing corporation. This law has intended to make the cooperative form overall more attractive. This means that cooperative demergers are eligible for the benefits of the Reorganization Tax Act (UmgrStG). In this sense, the UmgrStG was extended to include demergers under the GenSpaltG. The same conditions and legal consequences apply to them as under the SpaltG. (cf. ErläutRV 254 BlgNR 26. GP 11)
The GenSpaltG is of considerable importance because it allows cooperatives to transfer operations / parts of operations or capital shares in a tax-neutral manner and by way of partial universal succession. The allowed split-off (Abspaltung) of a cooperative into a corporation across all legal forms should be pointed out. This allows cooperatives to unbundle several divisions by way of universal succession. The possibility of splitting cooperatives is also important in the banking sector because there are many credit institutions in the legal form of a cooperative and some cooperatives as parent companies of credit institutions in the legal form of a corporation. The GenSpaltG enables credit cooperatives, for example, to spin off their shareholdings or banking operations into the more fungible legal form of a corporation. This not only makes possible subsequent reorganizations easier, but also generally promotes attractiveness on the (capital) market. In terms of content and structure, the new GenSpaltG is very similar to the SpaltG which applies to corporations. Deviations arise from the conceptual differences between corporations and cooperatives. (cf. Ritt-Huemer & Simonischvili 2019, p. 328 f.)
From a legal point of view, these differences are mainly due to bonds in cooperative merger law and are essentially rooted in the nominal value principle under cooperative law. According to this principle, it is generally very easy to join and leave cooperatives at nominal value because members are more interested in promotion during their membership than in the prospect of an increase in assets through an increase in the value of their participation. (cf. Dellinger 2014, p. 505) The cooperative demerger is prepared by a demerger plan (in the case of demerger for absorption: demerger and takeover agreement), which must have a certain minimum content. (§ 2 GenSpaltG) (cf. Ritt-Huemer & Simonischvili 2019, p. 338)

The cut-off date for the closing balance sheet is not allowed to be more than nine months before the registration in the commercial register (§ 2 (3) GenSpaltG). A closing balance sheet in accordance with the UGB must also be prepared if the cooperatives are not otherwise required to prepare balance sheets, i.e., a balance sheet has to be prepared but not a profit and loss account or notes. (cf. ErläutRV 254 BlgNR 26. GP 3; cf. Pomper 2022, p. 141) In the case of the demerger, the board of directors of the transferring cooperative has to submit a demerger report. (§ 4 GenSpaltG). If it is a cooperative with a mandatory supervisory board, the supervisory board of the transferring company has to examine the planned demerger on the basis of the demerger report and the audit report of the demerger auditor and submit a written report. § 118 (3) AktG applies accordingly. (§ 6 (1) GenSpaltG). The obligation to register a demerger with the competent commercial register court is regulated in § 13 GenSpaltG, whereby § 15 GenSpaltG, in addition to the entry in the commercial register, also regulates its legal effects. According to § 16 (1) GenSpaltG, the board of directors of the new cooperative has to immediately enter the members of the transferring cooperative in the register of members of the new cooperative, after the entry of the demerger in the commercial register. § 16 (2) states that in the case of a disproportionate demerger (nicht verhältniswahrenden Abspaltung), the entry according to § 16 (1) is only to be made with regard to those members who are members of the new cooperative according to the demerger plan (§ 2 (1) l. 13 GenSpaltG) or due to the exercise of the right to vote according to § 9 (1) l. 2 GenSpaltG. (cf. Ritt-Huemer & Simonischvili 2019, p. 334).

Depending on whether the transferring cooperative remains in existence or not, a distinction is made between two types of demergers: "split-up" (Aufspaltung) and "split-off" (Abspaltung). Depending on whether the absorbing cooperative already exists before the demerger, a distinction is made between demerger for absorption and demerger for new formation.

Therefore, there are four demerger possibilities (§ 1 (2) GenSpaltG):

- split-up for new formation (the transfer of the assets of the split-up cooperative by way of universal succession to two or more cooperatives newly formed in the course of the demerger; the transferring cooperative ceases to exist);
- split-up for absorption (the transfer of the assets of the split-up cooperative by way of universal succession to two or more already existing cooperatives; the transferring cooperative ceases to exist);
- split-off for new formation (the transfer of one or more assets by way of universal succession to one or more newly formed cooperatives in the course of the demerger; the transferring cooperative remains in existence);

- split-off for absorption (the transfer of one or more assets by way of universal succession to one or more existing cooperatives; the transferring cooperative remains in existence). (cf. Dellinger & Schellner 2022, p. 22)

A special case of a split-off for absorption is made possible by §§ 21 f GenSpaltG. Under these provisions, the absorbing legal entity can also be a corporation under certain conditions, and it has to be a proportionate spin-off. (cf. Ritt-Huemer & Simonischvili 2019, pp. 329, 338)

If the transferring cooperative is a credit cooperative that wants to split off its (partial) banking operations, the special requirements of § 21 (2) GenSpaltG must be observed. The reference to § 92 (7) BWG makes it clear that the absorbing subsidiary corporation has to belong to the same vertically integrated system sector (Sektorverbund) (consisting in particular of a professional association, a statutory auditing association, a central institution and, if still applicable (only in the savings bank sector), a sectoral protection scheme), as the transferring cooperative. We speak figuratively of an "vertically integrated system sector clamp" (Verbundklammer). (cf. Dellinger & Schellner 2016, § 92 BWG Rz 36 ff.) Fortunately, the GenSpaltG does not include the controversial liability order for the transferring legal entity under § 92 (9) BWG. (cf. Dellinger & Schellner 2016, § 92 BWG Rz 56; cf. van Husen 2001, p. 671 ff.) The reference to § 60 (2) (second sentence) BWG further clarifies that the absorbing subsidiary corporation will also be audited by an auditor appointed in accordance with cooperative law, who will perform the tasks of the bank auditor. (cf. ErläutRV 254 BlgNR 26. GP 8) Demergers of credit cooperatives always need a special approval of the FMA (§ 21 (1) l. 6 BWG). (cf. Dellinger & Schellner 2019, p. 109)

The shares are always granted to the members of the transferring cooperative and not to the transferring cooperative itself (unless they are not granted in exceptional cases, which can only occur in the case of demergers for absorption). (cf. Dellinger & Schellner 2022, p. 22)

All four demerger possibilities that we have mentioned can be carried out in a proportionate or disproportionate manner.

Like the SpaltG (which is the demerger law for corporations), the GenSpaltG also distinguishes between proportionate and disproportionate demergers. In addition, the GenSpaltG also recognises the term nominal value demerger.

A proportionate demerger means that the members of the transferring cooperative participate in the new and/or acquiring cooperative in the same proportion as they participate in the transferring cooperative (§ 11 (1) GenSpaltG). For proportionate demergers, there is certain easiness, e.g. the simplified determination of the exchange ratio (§ 2 (2) GenSpaltG), lower (or "normal") quorums for resolutions (§ 8 (1) GenSpaltG), no demerger report by the board of directors, no demerger audit by the supervisory board and no interim balance sheet (§ 11 (1) GenSpaltG).

A disproportionate demerger means that the members of the transferring cooperative do not participate in the new and/or acquiring cooperative in the same proportion as they participate in the transferring cooperative. In accordance with § 8 (3) GenSpaltG, higher quorums are required for disproportionate demergers (90% instead of the usually required 2/3 majority) and there is a right of termination or election for members who do not agree (§ 9 GenSpaltG), who can decide to remain or become members of another participating cooperative than provided for in the demerger plan.

In contrast to the SpaltG, the GenSpaltG also recognises the concept of a nominal value demerger. If the cooperative articles of the participating cooperatives do not provide for a participation in the substance of the members either in the case of the withdrawal of a member (cf. Dellinger 2014, p. 504 f.) or in the case of the liquidation of the cooperative (cf. Dellinger 2014, p. 429), the demerger can be carried out as a nominal value demerger. Instead of the exchange ratio determination based on a valuation of the participating companies, the demerger is carried out at nominal value. This means that the exchange ratio (both in the case of proportionate and disproportionate demergers) can be determined in a simplified manner in such a way that the total share capital of the individual members after the demerger (usually consisting only of the shares contributions) is the same as before the demerger (§§ 2 (2) & 3 (2) GenSpaltG) The easing provisions of § 11 (1) GenSpaltG apply to nominal value demergers (no demerger report by the board of directors, no demerger audit by the supervisory board and no interim balance sheet). (cf. Dellinger & Schellner 2019, pp. 107 f.)

The same requirements and legal consequences under reorganisation tax law apply to cooperative demergers as for demergers under the SpaltG. Thus, the authoritativeness of company law has also been incorporated into law for cooperative demergers. (cf. ErläutRV 254 BlgNR 26. GP 11) This means that Art VI of the UmgrSTG (demerger) is applicable as soon as the demerger has been entered in the company register based on the GenSpaltG. Whether the entry was made correctly is a preliminary question under company law that is not reviewed by the tax authorities. (cf. Hirschler 1999, § 32 Rz 7; cf. Waitz-Ramsauer 2017, § 32 Rz 32) The application of the UmgrStG results in book value continuation, i.e., the acquiring cooperative has to continue the tax values from the transfer balance sheet that has to be prepared by the demerging body according to (§ 33 (6) in conjunction with § 34 (1) UmgrStG). (cf. Hirschler 1999, § 34 Rz 1; cf. Waitz-Ramsauer 2017, § 34 Rz 32) Hidden reserves can therefore not be disclosed. Book profits and book losses are generally tax neutral. (cf. Hirschler 1999, § 34 Rz 4; cf. Waitz-Ramsauer 2017, § 34 Rz 1, Rz 20) § 34 (2) l. 2 (first sentence) UmgrStG contains a special provision initially relating to corporations in the event where the absorbing company has a participation in the split-off company. This affects upstream split-offs, e.g., if assets are split off from a subsidiary to the parent company, this reduces the value of the subsidiary; accordingly, value of the subsidiary as stated in the parent company's balance sheet must also be adjusted. As a result, the book value of the participation has to be reduced in the same proportion as the market value of the subsidiary is reduced as a result of the demerger (§ 34 (2) l. 2 (first sentence) UmgrStG). (cf. Hirschler 1999, § 34 Rz 6; cf. Waitz-Ramsauer 2017, § 34 Rz 21) A fair market value determination is therefore required. A market value assessment is also to be carried out within the scope of application of the GenSpaltG if the absorbing legal entity is a corporation. (cf. ErläutRV 254 BlgNR 26. GP 11) However, if the absorbing legal entity is a cooperative and the demerger can be carried out as a nominal value demerger, it is allowed to forgo the determination of the market value. (cf. Dellinger & Schellner 2019, pp. 109 f.)

The auditor's expert opinion must be obtained for every demerger under the GenSpaltG, which as a conditio sine qua non requires the confirmation of positive market values of the assets allocated to all participating cooperatives and cannot be replaced even by a resolution of persistance (Beharrungsbeschluss) (§ 8 (2) GenSpaltG) (cf. Dellinger & Schellner 2019, p. 107) The expert opinion also includes statements on the compatibility of the demerger with the interests of the members and the interests of the creditors of the cooperatives involved in the demerger. Furthermore, the expert opinion must address the viability of new cooperatives and cooperatives that continue to exist, the fulfilment of the promotional mandate of the participating cooperatives and, in the case of disproportionate demergers, the appropriateness of the equity ratio. (cf. ErläutRV 254 BlgNR 26. GP 4) If the auditor opposes the demerger for certain reasons, the demerger is however still possible in certain cases through the adoption of a resolution of persistence, which requires two general meetings held at least one month apart and majority votes of at least two thirds of the votes cast. (§ 8 (3) GenSpaltG) On the other hand, as we have already mentioned above, the lack of confirmation of a positive market value is an absolute obstacle to the demerger, which cannot be replaced by a resolution of persistence due to creditor protection reasons. (cf. ErläutRV 254 BlgNR 26. GP 5; cf. Pomper 2022, p. 141 f.)

Besides the already existing elements from the SpaltG (liability for demerger, security claim) and the auditor's report, creditor protection in the GenSpaltG is supported by the personal

liability of the organ members (cf. Ritt-Huemer & Simonischvili 2019, p. 338)
From the capital market-led viewpoint and mindset, the GenSpaltG is 'fully in line' with the trend towards a single European banking and capital markets union. From a human perspective, the opportunities to generate and shift income from the labour of others through financial participation are increasing. This intensifies social (distribution) conflicts, which are absent within organisations without conflicting interests between capital and performance relationships. The argument of "attractiveness on the (capital) market", which is appropriate in today's world, very quickly turns against those who do not (or cannot) play in this game. However, the advantages of purely financial participation are outweighed by regional and local presence and stable employment opportunities and an adequacy in supply. It would therefore be desirable for cooperatives to at least make careful use of the demerger law through their management, to achieve consensual feedback from members and to be aware of the social shaping power of the assets of each cooperative in the market and in competition. (cf. Blisse 2020, pp. 318 f.)
On the question whether the cooperatives should split, Dr Holger Blisse answers "No, not at the cost of giving up cooperative self-help, self-administration and self-responsibility in the regional and local area of the (credit) cooperatives." (cf. Blisse 2020, p. 319)
According to Dr Holger Blisse (2020), “only when the promotion of members takes precedence over the interests of (capital) market participants, capital and partnership shares remain in the right proportion to each other and the cooperative as a legal form will maintain its balance, its relationship to its members and the assets built up over generations will also be available for the future service provision of the cooperative." (p. 319)
Such an understanding contributes to the long-term existence of the "old" cooperatives, which have a balancing effect on the market and competition. This can be successfully realized in practice if the cooperative auditing associations continue to see their auditing, support and advisory function as "protecting cooperative assets that have grown", supported by an approach under cooperative law that works in the same direction. (cf. Blisse et. al 2019, p. 28; cf. Blisse 2020, p. 319)

6.5.4. § 92 BWG - Introduction to Stock Company (Change of Legal Form)

6.5.4.1. Historical Idea and the Development of the Introduction to Stock Company

The situation of modern cooperatives has changed due to certain factors. In particular, the ongoing growth process of companies has increased the fundamental importance of capital for companies in general and for cooperatives in particular. (cf. Henzler 1971, pp. 97 ff.; cf. Neumann 1975, p. 32; cf. Seuster 1970, pp. 345 ff, 347 f.; cf. Engelhardt 1971, pp. 12 ff, 56 ff, 67 f.) Furthermore, cooperatives, like their competitors, have to face competition, which is why they are not exempt from finding solutions to the challenge of rationalization pressure. (cf. Neumann 1975, p. 32; cf. Henzler 1963, pp. 222 f.) A consequence of this is the need to realize investments, which require appropriate financing options. (cf. Henzler 1971, pp. 99 ff., 102 ff.; cf. Henzler 1963, p. 229; cf. van Husen 2003, p. 141) Another specific problem of modern cooperatives is the membership composition. The previously known homogeneity of cooperative members is disappearing. Instead, what stands out is the “heterogeneity of the members” (cf. Neumann 1975, p. 33), which can be seen particularly in the area of credit unions. With many different members, the interests of a cooperative member will often shift in the direction of capital interests. (cf. Neumann 1975, pp. 33 f.) For this reason, there has been discussion of an "ambivalent relationship" between cooperatives and stock company law. (cf. Steding 2002, pp. 449 ff.)

Already in 1868, Otto von Gierke held the position of a gradual transformation of the cooperative, which reflected the increasing importance of capital. (cf. von Gierke 1868, p. 1032) In the same work, in connection with the discussion of the essence of cooperatives and stock associations, he even addressed the possibility of the conversion of a cooperative into a stock company. (cf. von Gierke 1868, pp. 1077 f.)

Schulze-Delitzsch also addressed the conversion of a personal cooperative into a capital cooperative in some cases in which it was intended to switch from personal liability to mere capital liability. (cf. Schulze-Delitzsch 1869, pp. 87 ff.; cf. van Husen 2003, p. 142)

Ritter von Scharschmid, a member of the House of Deputies, also referred in this direction in his speech on the occasion of the discussion of the Austrian Cooperatives Act in the session of the House of Deputies on 13 June 1872: "Personal liability, the feeling of personal responsibility, only comes through unlimited liability when property and person coincide. This is the important difference between personal cooperatives and capital cooperatives, which Schulze-Delitzsch emphasises so vividly." (cf. Kaserer 1873, p. 112; cf. van Husen 2003, pp. 142 f.)

The conversion of a cooperative into a stock company (AG) represents the final step in a long-lasting development in which the legal form of the cooperative has become too narrow for the players. (cf. van Husen 2003, pp. 144 f.) At the same time, the increasing importance of capital becomes significant. (cf. Menzel 1966, pp. 62 f.) This development of securing the existence of the cooperative only on the basis of the available capital and apart from the personal liability of the members has continued steadily and led to an economic strengthening of the cooperatives. This has also changed the appearance of modern cooperatives. (cf. van Husen 2003, p. 145)

6.5.4.2. § 92 BWG

The purpose of § 92 BWG includes the transfer of banking companies or banking part of the business operations of the legal entities listed in § 92 (2) BWG, which are not to be categorised as corporations (Kapitalgesellschaften) in terms of their legal form (or were before their possible transfer), to stock companies (AG) by way of universal succession. (cf. van Husen 2017, § 92 BWG Rz 3) This means that the BWG is intended to cover only the banking sector of companies of the respective legal entities. (cf. van Husen 2017, § 92 BWG Rz 14)

This regulation is part of the economic supervisory law (Wirtschaftsaufsichtsrecht). (cf. van Husen 2009, pp. 305 ff.)

One reason for this provision was the legislator's intention to promote the legal form of the AG in the banking sector. At the same time, however, the legislator was also interested in strengthening the equity base of the affected and largely decentralised legal entities with banking operations. Since an AG primarily raises capital on the organised capital market of a stock exchange, its financing options are considered superior to other legal entities and forms. A conversion into an AG therefore seemed desirable to the legislator for those legal entities mentioned in § 92 BWG for which access to the capital market is largely closed due to their legal form. (cf. van Husen 2017, § 92 BWG Rz 4)

§ 92 BWG goes back to the preceding provision of § 8a KWG, which was introduced into the Austrian legal system as part of the 1986 amendment to the KWG (cf. BGBl 1986/325; cf. Androsch 1985, ÖBA p. 383). This amendment had several goals, including improving the functioning of the Austrian banking industry, expanding creditor protection and increasing risk-bearing capacity. Legislative efforts were focused on strengthening the equity base as the central solution approach. (cf. van Husen 1995, pp. 69 f.) This approach also included entrenching the reorganization possibility mainly mortgage banks, savings banks and cooperatives into AG under corporate law. (cf. van Husen 2017, § 92 BWG Rz 6)

The concerns of the decentrally organised credit cooperatives at the time about the possibility of the vertically integrated system sector being weakened if individual banking institutions were to convert into an AG (cf. Hofinger 1993, p. 3), were confronted by the legislator with the sector affiliation. (cf. Zawischa 1986, ÖBA pp. 388 ff.) This sector affiliation was also adopted in § 92 BWG, whereas according to § 92 (7) BWG, the AG must belong to the same sector association as the transferring credit institution. (cf. van Husen 2017, § 92 BWG Rz 10) The advantages of the AG, such as the fungibility of the shares, which are said to be reasons for a contribution to an AG, do not match the original idea of legal entities in non-corporate legal form, which are typically organised as groups of companies in decentralised sectors. (cf. van Husen 2017, § 92 BWG Rz 7)

The cooperatives belong to respective cooperative associations such as the Raiffeisen system or the Schulze-Delitzsch system. In the case of Raiffeisen cooperatives in particular, the three-tier structure of local primary cooperatives, secondary cooperatives structured according to provinces and provincial auditing associations, and the Austrian Raiffeisen Association, with nation-wide responsibility, inherently ensures a decentralised organisation in the form of a vertically integrated cooperative system. (cf. Dellinger 2014, pp. 42 ff.; cf. van Husen 2017, § 92 BWG Rz 33)

In the case of cooperatives, a reorganisation into an AG usually leads to the formation of a cooperative AG, unless the cooperative has no intention of leaving the cooperative sector. In the case of a cooperative AG, registered shares with restricted transferability (cf. Hofinger 1993, p. 76 f.) are usually issued for reasons partly comparable with savings banks, in order to ensure the continued capital participation of the cooperative holding company, which means that, as a result, comprehensive fungibility of the shares like that of a public company cannot be achieved. (cf. Hofinger 1993, p. 14; cf. van Husen 2017, § 92 BWG Rz 8)

Goods or trading operations are not to be contributed. (cf. ErläutRV 934 BlgNR 16. GP) The contribution of the entire "company" therefore refers to cases in which the entire company is of a banking nature. If, on the other hand, there is also a goods or trading operation, then only the banking part of the business is to be contributed. (cf. Nickerl, Portisch & Riefel 2000, SpG § 1 Rz 12) Historically, the reference of the banking part of the business was primarily aimed at credit cooperatives with goods business: in the cooperative sector in particular, the model of "mixed cooperatives" was previously widespread, which ran a goods business in addition to a banking business. The legally provided partial contribution of operations was intended to ensure that mixed cooperatives only contributed their banking operations and not also their goods or trading operations to the new bank-AG. (cf. ErläutRV 934 BlgNR 16. GP; cf. ErläutRV 1130 BlgNR 18. GP 153)

This model of partial universal succession, which was originally intended primarily for the unbundling of such mixed goods cooperatives, is now used primarily for the establishment of holding structures in which the banking operations are transferred to an AG, while the shareholding management and often also real estate assets and any other parts of the business remain with the transferring legal entity (the cooperative holding company or the share management savings bank). If such a holding structure is not desired, the transferring legal entity can be dissolved and liquidated in the course of the contribution (cf. Roth & Fitz 1993, pp. 428 f.), or afterwards. (cf. Dellinger & Schellner 2016, § 92 Rz 3)

A difference between cooperatives and other legal entities mentioned in § 92 BWG is that only members of cooperatives are able to exercise ownership rights in their cooperative by means of their cooperative share, while the other legal entities covered by § 92 BWG are to be described as "ownerless legal constructs" (cf. Hofinger 1993, p. 14; cf. van Husen 2017, § 92 BWG Rz 21)

The only legal forms listed in § 92 BWG that could clearly be considered to be purely privately organised legal entities (apart from the ownerless saving bank associations) are credit cooperatives as legal entities under private law, where a close relationship under public law was already avoided to a large extent at the time of formation and which also have cooperative members who can exercise shareholder rights. For credit cooperatives in particular, a crucial consideration is the matter of sector loyalty and of the future structure with a remaining non-corporate holding company or the choice of a pure change of legal form without a remaining holding company. In this context, the retention of the participation capital should also be mentioned as a legally unresolved problem. (cf. van Husen 2017, § 92 BWG Rz 55)

According to § 92 (3) BWG, the following contribution (Einbringung) possibilities are available:

- Into a stock company (AG) to be established as its only shareholder;
- Into a stock company that carries on banking business and belongs to the same professional association as the contributing credit cooperative;
- Into a stock company to be established, into which several credit institutions belonging to the same professional association simultaneously contribute their company or the banking part of their business operations. (cf. Dellinger & Schellner 2022, p. 23)

In the case of cooperatives, the resolution regarding the contribution has to be adopted by the general meeting with the majority required for mergers. The reference to the majority requirements under merger law is particularly essential for cooperatives because the GenG does not provide any special regulations for the contribution of banking operations. According § 2 (1) GenVG, the general meeting decides with a 2/3 majority of the valid votes cast. (cf.

Siebenbäck 2014, p. 378; cf. Weiß 2014, p. 750) § 2 (2) GenVG states that a written contribution report must be obtained from an auditor, which must be read out before the resolution is passed (cf. Hofinger 1993, pp. 6 f.), in which the auditor hast to address whether the contribution is compatible with the interests of the cooperative members and the creditors of all participating cooperatives. According to § 31 GenG, the general meeting has a quorum if at least 10% of the members are present. (cf. Dellinger & Schellner 2016, § 92 Rz 25)

As a rule, the contributing credit cooperatives remain in existence and usually withdraw to a pure holding function. From this point on, the fulfilment of the promotional mandate is no longer carried out directly by the asset management holding cooperative, but by the bank AG. The change of the company purpose to asset management requires an amendment to the articles of association, which according to § 27 GenRevG requires the written approval of the auditing association (or a court-issued exemption from this approval requirement) (cf. Hofinger 1993, p. 7.), and is often accompanied by a change of company name. (cf. Dellinger & Schellner 2016, § 92 Rz 26)

§ 92 (6) BWG provides for an automatic transfer of the licence to the bank AG (cf: Schneider 2004, p. 10), which now manages the operational banking business. This raises the question of costs (cf. Zawischa 1986, ÖBA pp. 396 f.) In certain cases, it may be advisable for the co-operative holding company to continue to have a banking license, which makes it possible to leave any participation capital with the co-operative or even to subscribe to new capital. (cf. van Husen 2001, p. 135; cf. van Husen 2017, § 92 BWG Rz 163)

The provision of § 92 (7) BWG, according to which the AG belongs to the same vertically integrated system sector as the contributing credit institution, is summarized under the keyword "vertically integrated system clamp" (Verbundklammer). In the absence of a legal definition of the term "vertically integrated system" (Verbundbegriff) in the GenG, it must first be clarified what constitutes a vertically integrated system sector (Sektorverbund). The essential characteristic of a vertically integrated system (Verbundmerkmal) is its organised decentralization - at least in the cooperative sector, it is a formation of legally and economically independent, similarly oriented units that participate in a higher-level unit in the sense of a lasting partnership-based cooperation in order to be able to better promote their own members as a whole through their services while observing the principle of subsidiarity. (cf. Dellinger 2014, p. 44; cf. Scharinger & Rummel 1996, p. 10) An orientation guide as to which legal entities belong to the vertically integrated system sector (Sektorverbund) is provided by the list in § 92 (7) BWG, which states that, in addition to the contributing credit institution (and the other credit institutions of the same level) and the acquiring AG, the "professional association", the "statutory auditing association", the "central institution" and the "sectoral protection scheme" under § 93 BWG are to be included in the vertically integrated system sector (Sektorverbund). Due to the merely demonstrative character of this list, other legal entities can also be included in the sector group. (cf. Dellinger & Schellner 2016, § 92 Rz 36)

In the political discussion about § 92 BWG, the "vertically integrated system clamp" (Verbundklammer) was initially controversial and a change of sector was basically possible. Only when a cooperative was transferred to an AG for the purpose of changing its legal form was a change of sector prohibited. (cf. Hofinger & Stehlik 1993, pp. 108 f.) In the end, the sectoral affiliation was upheld and the § 92 (7) BWG system clamp is intended to ensure that the AG into which the cooperative bank was transferred also belongs to the vertically integrated system (Verbundzugehörigkeit) (cf. Hofinger 1993, p. 11), under current law. The Parliamentary Finance Committee (Finanzausschuss) (cf. AB 1170 BlgNR 18. GP 2.), therefore also stated that the "unity of the sectors was maintained". The system clamp is also made clear in § 92 (3) BWG, which, in addition to the pure case of contribution with a change of legal form with the formation of a new AG, also lists the contribution of a cooperative into an existing AG of the same professional association (Fachverband) or the contribution of several cooperatives of the same professional association into a new AG to be established. The order of the professional association affiliation therefore also fulfills the function of the system clamp. The classification of the specialist associations is based on the current "Specialist Organization Regulations" (Fachorganisationsanordnung). The legal requirement of vertically integrated system loyalty (Verbundtreue) is intended to prevent a decentralized credit institutions from leaving the association and is therefore to be encouraged from a cooperative perspective. (cf. van Husen 2017, § 92 BWG Rz 165 f.)

§ 60 (1) BWG states that the annual financial statements of each credit institution and the consolidated financial statements of each group of credit institutions under § 59 (1) BWG, including the accounts, the management report and the group management report under §§ 59 and 59a (1) BWG, must be audited by a bank auditor. Since not only the legal form of an AG, but in also the legal form of a co-operative can be considered for banks, this raises additional problems, unless the legislator only wants to allow general auditors or auditing firms as bank auditors, which was not the case. Rather, in § 61 (1) BWG, the auditing bodies of legally responsible auditing institutions such as the cooperative auditors were also approved as bank auditors. This ensured an audit of the annual financial statements of each credit institution independent of its legal form. (cf. van Husen 2017, § 92 BWG Rz 241)

Therefore, in the case of credit cooperatives, the bank audit must generally be carried out by auditors from the legally responsible auditing organizations (§ 61 (1) BWG in conjunction with §§ 1 ff. GenRevG). The cooperative auditing associations are not auditing companies within the meaning of §§ 65 ff WTBG and do not have the central characteristic of auditing companies of being able to carry out audits themselves. This is because the auditor is always in charge of the audit and never the auditing association that commissions the auditor, meaning that the auditing association itself cannot act as an auditor. (cf. Dellinger & Schellner 2016, § 92 Rz 42) In the case of bank AGs that have emerged from credit cooperatives by way of § 92 BWG contribution and which continue to belong to the relevant vertically integrated system sector (Sektorverbund) under § 92 (7) BWG and are members of the statutory auditing association, the bank audit is also carried out by the auditors of the legally responsible auditing organizations. In these cases, § 61 (2) declares § 268 (4) UGB (formerly § 271 (1) UGB as amended prior to URÄG 2008) is not applicable. This would otherwise also have stipulated that only chartered accountants (Wirtschaftsprüfer) or auditing firms (Wirtschaftsprüfungs-gesellschaft) could act as auditors for the AG that emerged from the contribution. At the same time, § 60 (2) BWG (added by BGBl I 2000/33) stipulates that in the case of a credit institution in the form of a cooperative (and in the case of a banking AG that emerged from this), "the auditing body (auditor) of its statutory auditing institution appointed in accordance with the rules of cooperative law shall perform the tasks of the bank auditor under § 60 BWG". This regulation is therefore intended to clarify "that the auditor who has to carry out the audit in accordance with the cooperative rules must be the same auditor who also has to carry out the audit procedures in accordance with the banking law rules". (cf. AB 157 BlgNR 21. GP 4) The audit of the annual financial statements of the bank AG is therefore the responsibility of the authorized auditors of the competent auditing association, who in their function as bank auditors are not only entitled but also obliged to audit the corporation. (cf. Perkounigg & Kessler 2014, p 581; cf. Dellinger & Schellner 2016, § 92 Rz 42)

The statutory responsibility of the auditor as bank auditor for the AG according to § 60 (2) (sentence 2) exists as long as the affiliation to the professional association exists. As this affiliation can be maintained even after the dissolution of the cooperative, the responsibility of the auditor can also be maintained. The question is how the auditor must proceed and whether the "normal" bank audit is sufficient or whether a management audit (Gebarungsprüfung) and an audit of the fulfilment of the promotion mandate are also required and permitted. The law requires an audit to be carried out as a management audit if companies are under the uniform

management of the cooperative or if the cooperative has rights at the company in accordance with § 244 (2) UGB (§ 1 (2) GenRevG as amended by BGBl I 2015/22).
In these cases, the auditor has, for example, those rights of inspection to which he is entitled with respect to the cooperative, also in relation to the subsidiaries (§ 4 (1) GenRevG). It follows that the audit is only to be carried out as a management audit, even against the will of the management of Bank AG, as long as such a relationship exists. If such a relationship is maintained, the auditor has to prepare two separate reports. The result of the management audit must be recorded in a management audit report addressed to the cooperative holding company, whereas the audit report containing the audit opinion according to § 273 UGB and the annex to the audit report according to § 63 (5) BWG are primarily addressed to the managing directors and the supervisory bodies of the audited Bank AG. If such relationship is abandoned, a voluntary audit to be carried out as a management audit would only be possible by mutual agreement. (cf. Dellinger & Schellner 2016, § 92 Rz 43)
According to § 92 (8) (first sentence), the activity of the contributing credit institution is "limited to asset management with regard to the banking business contributed". The purpose of the shareholding management is the share equity received in the course of the contribution. In addition to share management, the holding institution may conduct further business, as the § 92 (8) (first sentence) does not forbid the assumption of additional functions. (cf. Nickerl, Portisch & Riefel 2000, SpG § 1 Rz 8; cf. Zawischa 1986, ÖBA p. 400; cf. Dellinger & Schellner 2016, § 92 Rz 44) With regard to credit cooperatives, the additional question arises as to whether a withdrawal of the contributing cooperative to a pure holding function is compatible with its promotional mandate. Since under § 1 (2) GenG the participation in another legal entity can be a mean of promotion under certain conditions, it is clear that the cooperative may use a participating company to provide promotional services. The only question is whether the cooperative is obliged to fulfil at least parts of its promotional mandate directly itself or whether it can transfer this entirely to another legal entity. (cf. Dellinger 2014, p. 30) Kastner and Keinert correctly consider a pure holding cooperative, which only serves capital management, to be not allowed. (cf. Kastner 1986, pp. 121 f.; cf. Keinert 1988, Rz 141)
A cooperative that only manages capital assets could only promote its members by distributing the earnings, i.e., it would be a manifestation of the impermissible dividend cooperative. (cf. Dellinger 2014, p. 41) In contrast, the possibility of promoting members exclusively through the participation in promoting companies should be recognized. (cf. Dellinger 2014, p. 42) Here it is not a matter of pure capital assets, but rather about the

provision of bank AG's business operations aimed at business transactions with the members. If participation in an AG can be a mean of promoting the cooperative members, it is not understandable why it should not also be the only mean. In particular, this must apply in the case of a contribution according to § 92 BWG, where the legislator has even explicitly stated that it is permissible to withdraw to a pure holding function. (cf. Dellinger 2014, p. 42; cf. van Husen 2001, p. 135) The contributing cooperative is therefore not obliged to maintain its own promotional business operations after the contribution has been made but can fulfil its promotional mandate indirectly through bank AG. (cf. Dellinger & Schellner 2016, § 92 Rz 45; cf. van Husen 2001, p. 135)

According to § 92 (9) BWG, the contributing legal entities, provided they remain in existence, are liable "with all their assets for all present and future liabilities of the AG in the case of its insolvency". Also, multiple contributing legal entities are jointly and severally liable. (cf. Dellinger & Schellner 2016, § 92 Rz 55)

If the transferring legal entity is already dissolved at the time of the contribution, continued liability is excluded from the start. § 92 (9) BWG assumes that the contributing party remains in existence. In addition to liability for old liabilities, § 92 (9) BWG also provides for comprehensive pro-futuro liability for new liabilities. In this context, the question arises to what extent the continuing liability of the contributing legal entity depends on an actual participation in bank AG. A wide variety of legal opinions are held in this regard. According to the strict wording of the provision, the contributing legal entity is liable into the future, regardless of the extent of its participation. The holding company would (in case it continues to legally exist) be liable for all existing and new liabilities of bank AG even if it has disposed of all its shares to bank AG. (cf. Jaeger 2005, p. 108; cf. Nickerl, Portisch & Riefel 2000, SpG § 2 Rz 7) In the view of Dellinger and Schellner (2016), such outcome is not appropriate. (§ 92 BWG Rz 56) At least in the case of complete disposal of the participation (sale of the last share), continued liability for new liabilities arising thereafter does not appear to be objectively justified in any way. According to Dellinger (2016), "§ 92 (9) should be teleologically reduced for such a case" (§ 92 BWG Rz 56). A statutory continued liability for new liabilities according to § 92 (9) would be unbereable where the holding company no longer has any influence or information rights in the AG due to the total lack of participation. (cf. Dellinger & Schellner 2016, § 92 Rz 56)

In the case of the dissolution of a cooperative, the cooperative's coverage obligation has to be considered. For the limitation of any claims, § 55 (1), § 78 (1) and § 80 GenG apply, from which a three-year limitation period is derived. The maturity of the coverage obligation would be seen as a liability fund for the creditors. (cf. van Husen 2017, § 92 BWG Rz 275)

7. The Current State of the Austrian Cooperative Law and Outlook for the Future

Considering that the cooperatives of the early days were often seen as a counter-model to capitalism and with some interpreters of cooperative understanding still holding this view today, the environmental conditions have changed, mainly due to factors such as increasing capital requirements, increasing competition and the greater degree of heterogeneity of members compared to those times. Therefore, the situation is different today. (cf. Neumann 1975, p. 32)

There has been criticism of the constant alignment with stock companies, also with reference to the fact that economically larger entities already favour the legal form of the stock company (AG). (cf. Blisse 2021, para 1 ff.)

In regard to all reform considerations, sufficient differentiation and the preservation of cooperative principles should carefully be taken into consideration. (cf. Pomper 2022, p. 362)

The mixture of traditional cooperative and capitalistic aspects introduced a number of contradictions into cooperative law. (cf. Neumann 1975, p. 34)

In order to present the current state of the Austrian law, we are going to summarize a few points from our work compared to the desired cooperative principles.

In chapter 1.1 we presented the cooperative principles, on which the cooperative law is to be based on. We have stated, that by adopting the cooperative form of organisation, it is expected to follow the cooperative principles: Voluntary and open membership; democratic control by members; economic participation of members; autonomy and independence; education and information; cooperation between cooperatives and concern for the community and that those principles are guided in their work by organisational and personal cooperative values. (cf. Münkner 2013, p. 41), in combination with the organizational values of solidarity, justice, equality and mutual assistance and the member values of honesty, openness, social responsibility and concern for others (International Cooperative Union (ITUC) Declaration on Cooperative Identity) (cf. p. 2)

In chapter 2.1. we presented the historical development of the cooperative law in Austria with all its amendments and changes, as well as the tendencies towards alignment with AG and GesmbH. Just to name a few examples, we can see how the identity concept of customers and members repealed with the amendment of 1974; or GenRÄG 2006 (cf. e.g., § 5a (2) l. 1 GenG – inclusion of investing or non-using members); or election of a financial expert that has not to be a member of the cooperative (§ 24c (6) l. 1 GenG – this is justified a lot in the literature, as there is the opinion, that otherwise there would be no possibility to find a financial expert; nevertheless it deviates the principle that an office holder is to be chosen by the members among themselves, who is familiar with the interests of the members based on his own experience in the cooperative); or how the democratic principle was called into question with the introduction of § 32 GenG (that the General Assembly has a quorum after half an hour, regardless of the number of members present). (cf. pp 10. ff.). Also, with the URÄG 2008 added paragraph 3 to § 1 GenG, that allows the possibility of cooperatives to promote the social activities of members as the main purpose, where the people benefiting from the social activity of the cooperative do not need to become members since the cooperative can be established with the purpose of helping others, makes the characterization as a self-help organisation inappropriate. (cf. chapter 2.6.; cf. Dellinger 2014, p. 32).

In chapter 3.1. we presented the principal-agent conflict specific to cooperatives which is particularly evident in large cooperatives, as well as how, on the one hand, through the expansion of non-member business the cooperative becomes less dependent on members as customers and, on the other hand, through the enhanced build-up of reserves, less dependent on members as capital investors. Also, the structural conflict on the horizontal level, between (only or primarily) members interested in promotion, and investing members, who have (only or primarily) capital appropriation interests, is evident, and typically leads to a distribution conflict that is contrary to the purpose of promotion. (cf. pp. 24 ff.)

When it comes to taxation, the cooperative has increasingly aligned with corporation, where it becomes doubtful whether the characteristics of the cooperative legal form are still sufficiently considered by the remaining cooperative specific regulations in the Corporate Tax Act. (cf. chapter 4.4., pp. 50 ff.)

Regarding reporting obligation for cooperatives, we can see that with URÄG 2008 the difference to the law on stock companies was eliminated. (cf. chapter 5, pp. 60 ff.)

Concerning external control, in chapter 5.3., we can see how the original justification for the compulsory audit, where the cooperative members were not sufficiently qualified as members of the board of directors and the supervisory board, where the external auditor had to protect the cooperative members from its own inexperience, shifted towards the need for external control in the terms of an effective funding purpose control, as the modern large cooperatives, as a rule, have a professional management from outside, which can pursue certain interests at the cost of the promotional interests of members. (cf. pp. 64 ff.)

Lastly, the conversion of a cooperative into a stock company (AG) represents the final step in

a long-lasting development in which the legal form of the cooperative has become too narrow for the players. (cf. chapter 6.5.4. pp. 99 ff.; cf. van Husen 2003, pp. 144 f.)
Many of these amendments distorted the clear picture of the specific cooperative structure, by introducing elements from company law, which were mainly intended to assist large and expanding cooperatives, particularly in meeting their growing financial resource needs. (cf. Münkner 2017, p. 315)
With this short summary and everything that we have presented in this work, the current state of the Austrian cooperative law should be clear.
When it comes to outlook for the future, we can already see that with the EAG (Erneuerbaren-Ausbau-Gesetz - Renewable Energies Expansion Act), the legal framework conditions for a decentralised basic supply from renewable sources were established, whereby cooperatives seem to be the optimal legal form in this context, which also finds the support in the government programme. (cf. Pomper 2022, pp. 22 ff., 361; cf. Regierungsprogramm 2020-2024, p. 80)
The government programme (cf. "Regierungsprogramm 2020-2024"), also provides for further reforms to cooperative law. For example, the possibility of a simplified conversion of associations into cooperatives in the form of a tax-neutral legal form change is being evaluated. (cf. Regierungsprogramm 2020-2024, pp. 25, 59) This could be particularly relevant with regard to renewable energy communities in the form of associations, for which a change of legal form to a cooperative could become interesting in the course of (economic) development. As part of the reform debate, there have also been suggestions that the audit requirements for small cooperatives should be simplified. There have been appeals for every second audit of small cooperatives (§ 221 (1a) UGB), to be carried out as a simplified audit in order to save costs. ("City of Collaboration", 2021) Even though this demand might seem attractive at first from a cost perspective, it is discussable as the sufficient control in economically challenging times is of central importance, especially for newly founded cooperatives, including ones that make use of the newly organization possibilities under company law. (cf. Pomper 2022, pp. 361 f.)
As the part of the reform, there have been appeals for also non-banks to be able to exclude the obligation to make additional contributions (cf. Dellinger & Schellner 2022, p. 24.; "City of Collaboration", 2021)
What we also have to mention is that from 2016 to 2023 three new auditing associations were recognized, namely Rückenwind, Renew and Federal Auditing Association for Limited-Profit Housing Associations. This is a very noteworthy to mention, considering the fact, that the last

auditing association before that was recognized in 1946. (cf. chapter 5.4.3, pp. 73 ff.) Further legal developments in this regard will be very important to follow in the future, considering the seriousness of a role of an auditing association.
Moreover, there have been appeals that the cooperative is also often the most favorable solution for start-ups. (cf. Schneider 2022, pp. 1 ff.)
The future outlook of the cooperative law in Austria depends strongly on the interests of people in power that have direct or indirect influence on legislature. The main question in my opinion arises, if the people that are influential in cooperative law field really have interest to stay faithful to cooperative principles, or they just want to use the cooperatives as a “legal dress”, where in reality they want to pursue their capitalistic interests.
As the Hiez (2017) rightly states, “a big proportion of existing research on cooperative law has been done by members of cooperative themselves, or by legal practitioners working with cooperatives”. (p. 2) If the cooperatives these authors work for have tendencies towards stock companies and move away from cooperative model, especially in the case of large cooperatives, it is from concern how the cooperative law is going to develop, in case such authors have influence on it, as they normally want to pursue interests of their cooperatives.

8. Conclusion

This work presents the Austrian cooperative law principles, constructed on the base of the methodology developed by the PECOL Project. (cf. chapters 1.2 & 1.3.), for which the project group believes to be the most optimal method to write about a national cooperative law. (cf. Hiez, 2017, p. 7) According to Hiez (2017), “the purpose of such structure is to focus on the main questions raised by cooperative law. (p. 7) The core part of the works consists of 5 main chapters (Definition and Objectives of Cooperatives, Cooperative Governance, Cooperative Financial Structure, Control of Cooperatives and Cooperation Among Cooperatives), with the addition of “Introduction” chapter at the beginning and "The Current State of the Austrian Cooperative Law and Outlook for the Future" chapter at the end, which at the same time answers our research questions. The main goal of this work was to add the national report of Austria to the existing national reports based on this methodology and collected in "Principles of European Cooperative Law" book. Since this work is written in English (like other national reports of the project group), it should serve the international purposes and help the further research. We hope this work will be from the use to other research in the field of cooperative law in Austria.

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