

EUROPEAN COOPERATIVE SOCIETY AND RECENT DEVELOPMENTS OF COOPERATIVE LEGISLATION IN SLOVENIA

Franci Avsec, Primož Žerjav
Cooperative Union of Slovenia, Ljubljana, Slovenia

Abstract

The present Slovenian Act on Cooperatives from 1992 defines a cooperative as member-centered economic organization. According to its transitional provisions, the capital base of cooperatives has been not only stabilized through transformation of the existing social capital into indivisible reserves, but also expanded through the restitution of formerly nationalized property and assignment of capital shares in 45 listed food processing companies. Following the model of the European Cooperative Society, interesting options (like investor members, minimum capital) have been introduced for the national cooperatives. However, some issues remain unresolved, relating to the diversification of cooperatives and their access to various activities, their equal treatment in the system of state aids and the appropriateness of a more detailed incentive and control system for cooperatives with indivisible capital.

1. Introduction

The cooperative movement in Slovenia developed in the legal framework that was conceived for a larger political entity - as long as Slovenia did not acquire the legislative competence in the field of cooperatives. However, also after Slovenia gained independence (in 1991), other legal systems influenced the shaping and development of the cooperative law.

On the territory of the present Slovenia, cooperatives grew in a mass movement in the last two decades of the 19th century. In the initial phase and further development of the movement until the Second World War, the most important were credit cooperatives which managed to eradicate the usury which threatened the existence of numerous farmers, craftsmen and workers, followed by supply, marketing, housing, manufacturing and other cooperatives (Schauer, 1945).

The first Cooperative act which entered into force on the territory of the today Slovenia was the Austrian Act on Cooperatives from 1873 which is, with subsequent amendments, still valid in the today Austria (Gesetz vom 9. April 1873). After the disintegration of the Austro-Hungarian Empire, this Act continued to be applied on the major part of the present Slovenian territory which became a part of the Kingdom of Serbs, Croats and Slovenes, later renamed into the Kingdom of Yugoslavia.

Since the civil law, including the cooperative law, was not unified in the new state, there were several legal areas where different laws applied in the first two decades of the new state. Besides the already mentioned Austrian Act, in the extreme northeastern part of the today Slovenia, in the region called Prekmurje (separated with the rest of national territory by the river Mura), the main legal source for cooperatives was the Hungarian Commercial Code, adopted in 1875 for the Hungarian part of the monarchy.

It was not until 1937 when the Act on Economic Cooperatives unified the cooperative law in the Kingdom of Yugoslavia.

Compared to the liberal conception of the Austrian Act on Cooperatives which was counterbalanced by the system of mandatory auditing of all cooperatives at least each second year, the Yugoslav Act on Economic Cooperatives from 1937 introduced several solidaristic principles into cooperatives and also into movement as a whole. This conception found its expression in the limited return on cooperative shares and indivisibility of cooperative reserves even in a case of the winding up of a cooperative (when the assets remaining after the payment of all debts and reimbursement of members' shares had to be transferred to a cooperative union since each cooperative had to adhere to one auditing cooperative union, Čeferin, 1975).

After the Second World War, the cooperatives were constitutionally defined as a support to the leading role of state sector in economy and their primary role, assigned to them by the politics, was the gradual and voluntary socialisation of small-scale private production.

The first postwar years were important for further development of cooperatives not only because of the radical agricultural land reform and nationalisation of industry, but also due to more targeted measures towards cooperatives. In 1947, the Slovenian authorities decided to wind up all credit cooperatives, their unions and subsidiaries which had been the backbone of the pre-war cooperative movement. Also the pre-war cooperative unions were liquidated and their property confiscated or nationalised. Cooperatives in other economic sectors, although formally not wound up, also lost their former role and importance.

In that time, the most numerous and economically important were cooperatives in agriculture, and to some extent, in housing and handicraft. Since the agricultural land reform left the major part of land in private property of middle and small farmers, agricultural cooperatives represented an important mechanism through which political authorities could influence and guide the development of this economic sector.

After the conflict between Yugoslavia and Informbiro (1948), a strong political campaign was launched for establishment of productive cooperatives in agriculture following the Soviet examples (kolhoses). This instrumentalisation of cooperatives, connected with numerous infringements of the voluntary principle, finally failed, so that the major part of the agricultural land and forests remained to be private, although a new land maximum for farmers' holdings (in principle, 10 hectares of arable land) was introduced in 1953 beside the former one laid down by the land reform in 1945 (in principle, 45 hectares of agricultural land and forests per holding).

After the collapse of productive cooperatives and the introduction of self-management system, the farmers' cooperatives assumed the role of service cooperatives, marketing the products of private farmers and supplying them with the agricultural inputs and various consumption goods. They soon acquired a considerable economic strength in a more liberal economic environment. However, during the gradual development of social property concept and formally increasing governance rights of employees, agricultural and other cooperatives began to lose their distinctive features towards other economic organisations. Their members became more and more deprived of their governance rights, being gradually pushed in the role of external cooperators. This development achieved its peak in the beginning of the sixties, when all cooperative unions were abolished and the cooperatives were legally and *de facto* put on the same foot with the so called social enterprises. Many food processing and other cooperative enterprises (founded by the cooperatives and their unions) attained complete independence, while their founders lost their property and governance rights.

A decade later the politicians became aware that the agricultural policy had to be changed in order to enable more potentials in the private sector. The legislative and economic policy became more favourable to agricultural cooperatives. The Act on Association of Farmers (1972) was the first piece of the Slovenian cooperative legislation, while three years earlier (1969) a special act allowed the operation of the so called »savings and loan services« as

units which dealt with gathering of savings from farmers and employees and granting credits to rural population within the agricultural cooperatives and other agricultural and forestry organizations.

Slovenia gained independence in 1991. The political emancipation was accompanied by deep changes of the socioeconomic system. One piece of legislation of that time which introduced new provisions about the organisational forms in economy and regulated the adjustment or transition to the new system, was also present Slovenian Act on Cooperatives from 1992.

2. The present Slovenian Act on Cooperatives from 1992

The Act on cooperatives from 1992 contains organisational provisions dealing with the establishment, governance, operation and winding up of cooperatives and cooperative unions, on one hand, and on the other hand, transitional provisions, dealing with the adjustment of the existent cooperatives to the new provisions.

The Act was modelled primarily upon the cooperative legislations from Austria and Germany, which served as a model also for the codification relating to commercial companies a year later (Act on Commercial Companies, 1993).

The Act defined the cooperative as a member-centred organisation which aims at enhancing the economic interests of its members, while the number of members is variable. The cooperatives are based on free entry and withdrawal of members (reflected in the variable number of members) and equal rights of members to participate and govern the cooperative (Art. 1). In addition, the Act provides that a cooperative enters into transactions through which it directly performs its promotional aim, prevalently with its members (Art. 2).

The Act is quite brief, leaving a lot of room for autonomous regulation in the statutes of individual cooperative.

According to the Act, each member has one vote, if not provided otherwise in the statutes (Art. 18), and has to subscribe and pay at least one cooperative share the amount of which is laid down by the statutes, which may require also several compulsory shares or allow voluntary shares (Art. 35). After the termination of membership, the monetary value of a share has to be returned to a former member or his universal legal successor what means that also those part of equity, which is financed through member shares, is variable (Art. 39).

The only mandatory provision relating to the surplus of a cooperative requires that at least 5% of the annual net surplus is to be put into obligatory reserves (Art. 43), while the rest of the surplus may be distributed among the members (in proportion with their business done with the cooperative, if not provided otherwise, Art. 45).

While obligatory reserves may not be decreased by payments to the existing or former members as long as the cooperative is not put into liquidation, other (voluntary) reserves may be used for that purpose, if so provided by the statutes of a cooperative (Art. 44).

The Act provides for a flexible structure of governing and other bodies of a cooperative, taking into account that cooperatives may have only the minimum number of members (three) or may function as a mass organizations with no upper limit for membership.

The governance of a cooperative is based on the two-tier system so that besides a general meeting, a management and supervisory organ are mandatory bodies in each cooperative. A managing board is obligatory only for cooperatives with ten or more members, while other cooperatives may elect only a president. The supervisory organ may also consist of several persons (supervisory board) or of one person only (auditor). Besides these mandatory or conditionally mandatory bodies, each cooperative may have a managing director who is responsible for the conducting the daily business of the cooperative in accordance with the

legislation, statutes and decisions of the general meeting and the managing board (Art. 14 and 30).

The Act introduced obligatory auditing in all cooperatives which had to be performed at least once every two years. According to the provisions in force until the third Amending Act from 1009, auditing in cooperatives could be carried out by cooperative unions or auditing companies which both had to fulfil the requirements laid down by auditing legislation. After the first Auditing Act (1993) was adopted, also the Cooperative Union of Slovenia got a licence to perform the auditing in cooperatives.

The Act transitional provisions about the adjustment of cooperatives with the social capital to the new economic system based on the private property laid down that the social capital in cooperatives was to be transformed into indivisible reserves, permanently earmarked for cooperatives. In this respect the legislator actually leant on the solution, adopted by the Yugoslav Act on Economic Cooperatives from 1937. However, the solution digressed from the main method privatization of other enterprises where the social capital was assigned on various conditions (partly for consideration, partly gratuitously) to natural and legal persons.

Another important legislation for privatization process was the Act on Denationalization Act which regulated the restitution of the former nationalized property, primarily in kind, if possible, to the individuals as former owners or their heirs and to the religious communities. According to the general provisions about the denationalization, cooperatives were also liable to restitute the property which had been transferred to them after nationalisation, on equal terms as enterprises with social capital. However, individual members could not claim the restitution of cooperative property, since it had been, due to the concept of the pre-war legislation, to a major extent indivisible among members. In order to take account of these specificities, the Act on Cooperatives contained special provisions granting cooperatives and their unions the right to claim the restitution of formerly nationalized cooperative property, initially belonging to cooperatives and their unions and afterwards being nationalised or otherwise transferred without consideration to noncooperative organizations.

Besides, cooperatives which had been engaged in business transactions with the 45 food processing enterprises individually listed in the Act were granted a share up to 45% of the social capital belonging to these enterprises. This solution should represent the compensation for the lost property rights of agricultural cooperatives towards food processing industry during the system of social ownership.

The process of ownership transformation was not without frictions. Also the enterprises where cooperatives were going to acquire capital shares initiated a proceeding before the Constitutional Court which assessed the constitutionality of the provisions concerned and their conformity with the International Pact on economic, social and cultural rights. The Constitutional Court rejected the demand to proclaim the unconstitutionality of these provisions (Decision Nr. U-I-46/92 – 55 from 9. 12. 1993, Official Gazette of RS, no. 3/94):

»Since the search for ways and conditions for privatisation is, according to the Constitution, in the competence of the legislature, it must have in the transitional period, insofar as it relates to society, sufficient space to implement and establish its legal, economic, social and political aims in a way which it itself considers the most suitable, though it may not, of course, violate basic constitutional principles or constitutional provisions, including the right to equality before the law. It must be stressed, however, that equality before the law is not absolute, but only relative, otherwise it would not be possible to imagine an effective legal system, since the legislature would have no possibility of distinguishing among subjects and situations. The principle of equality binds the legislature to deal equally with related situations, which is not a bar to treating differences differently....

In this case it concerns different subjects and different circumstances and from this point of view, it is not possible to conclude that the legislature violated the principle of equality, or article 14 of the Constitution. The level of ownership share is a matter of relativity which the Constitutional Court is not competent to judge.«

The privatization of enterprises with social capital was carried out relatively (compared with the denationalization) fast. The implementation of special provisions regarding to the participation of cooperatives in the privatization of 45 companies revealed a great level of fragmentation of agricultural cooperatives compared to the food industry. On average, eight cooperatives were given capital shares (which jointly should not exceed 45%) in a one enterprise listed in the Act on Cooperatives (Avsec and Nose, 2001).

Due to various reasons, the relative share of cooperatives could be and was regularly lower than the percent laid down by the Act (45%; for instance, denationalization claims which had priority before other methods of ownership transformation).

The results of this process could be characterised as mixed.

Some enterprises went into bankruptcy proceedings or compulsory compositions, where cooperatives as well as other shareholders, completely or partly lost their shares. In some enterprises, cooperatives sold their shares to other investors. However, there were also several enterprises where cooperatives not only maintained, but also managed to increase their share.

Since the cooperatives could stand in a denationalization process as a liable person as well as a rightful claimant, the denationalization caused the property to shift in both directions: out of and into cooperatives.

The Act on Cooperatives has been amended so far three times.

The first Amending Act dealt with non substantial adjustment of privatisation scheme in favour of cooperatives with some provisions of later adopted Act on Ownership Transformation of Enterprises.

The second Amending Act from 2007 regulated the status restructuring of cooperatives with detailed provisions about mergers (by acquisition or by formation of a new cooperative), partial or complete divisions or changing the organisational form (conversions).

The third Amending Act from 2009 introduced the provisions about the European Cooperative Society (Societas Cooperativa Europaea, SCE), since the Regulation 1435/2003/EC did not regulate all aspects of SCE exhaustively, but laid down some issues connected with SCE which had to or might be resolved by the national legislation of each Member State. Slovenia became a full Member of the European Union on May 1st, 2004.

3. The implementation and influence of European Cooperative Society Regulation in Slovenia

The third Amending Act to the Act on Cooperatives did not only regulate some aspects of the SCE with their registered office in Slovenia, but also introduced some novelties for domestic, national cooperatives in order to enable them to use some institutes from the Regulation 1435/2003/EC (SCE-Regulation).

The provisions about SCE in this new chapter lay down, inter alia, the competent authorities for completion of formalities required for a formation of a SCE and for the transfer of registered office in another Member State. Since the SCE Regulation refers to national cooperative law regarding the admissibility of assets distribution among the members in case where a SCE is wound up, the Act on Cooperatives prescribed that an SCE which intends to transfer its registered office to another Member State, must transfer its indivisible property,

insofar it has any of such property, to a cooperative union in order to prevent SCEs to distribute assets which are indivisible in Slovenia among members through transfer of the registered office in a state such a distribution is allowed to national cooperatives (Art. 56.a-56.v).

The Act also opted for some alternative solutions opened to the Member States by the SCE-Regulation.

Thus, the Slovenian Act opted for appointment and removal of a management organ of the SCE mandatorily by the general meeting, following the provisions about national cooperatives (Art. 56.z).

The administrative organ and managing directors in a one-tier system were regulated upon the model, set up by the Act on Commercial Companies (Art. 56.ž-56.ae).

The Amending Act also transferred some institutes from the SCE-Regulation as options to national cooperatives.

First, the admissible object of a cooperative was broadened to encompass not only the enhancement of members' economic interests but also the development of economic or social activities of the members (conf. Art. 1(1) of the Act on Cooperatives).

The most widely discussed issue during implementation of the SCE-Regulation – probably not only in Slovenia – concerned the option whether the membership of persons who do not expect to use or produce the SCE's goods and services (investor members) should be allowed. In this regard, the Slovenian legislator followed as example the reforms of the domestic cooperative law which took place paralelly with the implementation of the SCE-Regulation in Austria and Germany. The reason to allow investor (non-user) members in national cooperatives was the tendency to assure the national cooperatives a comparable position vis-avis SCE with registered office in Slovenia, since the domestic cooperatives could consider their position less favourable and competitive without that option. However, the investor members may have at maximum 25% of the total number of votes belonging to the present or represented members on the general meeting, if the statutes of the cooperative do not provide a smaller percent of votes or do not exclude the voting right of investor members at all (Art. 23(4) of the Act on Cooperatives).

The Slovenian legislator allowed national cooperatives also to lay down a minimum capital under which the subscribed capital may not be allowed to fall as a result of repayment of the shares to members who ceased to belong to the cooperative. If the minimum capital is laid down an amount not smaller than provided by the Regulation (30.000 EUR) and the obligatory reserves are equal to or greater than this amount, the cooperative is no longer obliged to allocate each year at least 5% of the net profit for obligatory reserves (conf. Art. 39.a of the Act on Cooperatives with Art. 65 of the Regulation 1435/2003/EC).

Paralelly with the implementation of European public limited company, the legislator allowed free choice between the one- and two-tier system also to domestic public limited companies. However, regulation of these two options required a new Act on Commercial Companies to be adopted (ZGD-1, 2006). If similar option had been provided for domestic cooperatives, such extensive changes of the text would have been necessary that also a new Act on Cooperatives Act should have been adopted. Arguing that the flexible two tier system can be quite close to the one tier system provided in the SCE Regulation (especially in case with auditor with narrower responsibility than a supervisory board), the legislator did not allow domestic cooperatives to opt for one-tier system.

The SCE-Regulation provides that an SCE with registered office in a Member State with specific auditing body for cooperatives is automatically included in that system, provided that the auditing body meets the criteria of the Directive relating to the statutory auditing. Also the Directive 2006/43/EC lays down that in a case where a cooperative is required or permitted under national provisions to be a member of a non-profit-making auditing entity,

»an objective, reasonable and informed party would not conclude that the membership-based relationship compromises the statutory auditor's independence, provided that when such an auditing entity is conducting a statutory audit of one of its members, the principles of independence are applied to the auditors carrying out the audit and those persons who may be in a position to exert influence on the statutory audit« (Preamble, recital 11).

However, the Slovenian authorities took a different view, according to which a cooperative union as an auditing entity for affiliated cooperatives may not be considered as independent. Therefore, the already before the Act on Cooperatives was amended for the third time, third Auditing Act which implemented Directive 2006/43/EC provided that a cooperative union which obtained the licence for auditing according to the previous act, may perform services of auditing cooperatives for a maximum period of 12 months after this Act enters into force (till June 15, 2009). The governmental proposal of the third Amending Act to Act on Cooperatives consequently foresaw the cancellation of the whole chapter regulating specific system of cooperative auditing.

On the other hand, the cooperative circles strived to preserve the cooperative auditing and its adjust the provisions to the Directive 2006/43/EC similarly as it had been done in Austria and Germany.

Despite the suspensive veto brought by the State Council against the Third Amending Act, due to the abolishment of the specific system of cooperative auditing, the State Assembly overrode the veto by confirming the adopted Act with absolute majority.

4. Some open and unresolved issues

Although the Act on Cooperatives as well as the SCE-Regulation are exclusively dedicated to the status of national and, respectively, supranational cooperatives, they are not the only piece of legislation which is relevant for establishment and operation of cooperatives. In the everyday business environment, cooperatives have to abide also with an extensive volume of legal norms, reaching from sectorial regulations to the tax, competition and labour legislation. Therefore, the influence and importance of cooperative legislation for cooperatives are often overestimated, since some solutions from other, although seemingly or actually neutral regulations may actually foster or hinder the cooperative development.

One of the open issues is rather asymmetrical or disproportionate presence of cooperatives in various economic sectors. The data about the number of registered cooperatives in branches of the national economy show that the registered cooperatives are most numerous in primary industries (agriculture, forestry and fishing), that is to say, the sectors, the share of which is gradually declining, followed by the wholesale and retail trade and housing. In the field of other tertiary activities, which are the most propulsive sectors of modern economies, cooperatives are still very rare or even not existing (for example, in education).

Table 1: Number of cooperatives and commercial companies in various economic sectors in Slovenia (as of 31. 12. 2009)

Alphabetical code	Activity	Number of registered cooperatives	Number of commercial companies and cooperatives	Share of cooperatives

A	Agriculture, forestry and fishing	108	482	22,41%
B	Mining and quarrying	1	77	1,30%
C	Manufacturing	35	7.209	0,49%
D	Electricity, gas, steam and air conditioning supply	1	278	0,36%
E	Water supply; sewerage, waste management	10	311	3,22%
F	Construction	23	9.376	0,25%
G	Wholesale and retail trade; repair of motor vehicles and motorcycles	90	14.951	0,60%
H	Transportation and storage	10	2.635	0,38%
I	Accommodation and food service activities	3	2.754	0,11%
J	Information and communication	3	2.938	0,10%
K	Financial and insurance activities	1	1.233	0,08%
L	Real estate activities	80	1.971	4,06%
M	Professional, scientific and technical activities	24	11.228	0,21%
N	Administrative and support service activities	6	1.728	0,35%
O	Public administration and defence; compulsory social security ¹	3	10	30,00%
P	Education	0	602	0,00%
Q	Human health and social work activities	4	883	0,45%
R	Arts, entertainment and recreation	1	594	0,17%
S	Other service activities	5	878	0,57%
Total		408	60.138	0,68%

Source: Agency for Public Evidence and Services (AJPES).

When the economic importance of cooperatives in terms of annual turnover is assessed, the asymmetrical development of cooperatives in Slovenia is even more obvious. Although cooperatives in the wholesale and retail trade achieve, according to the latest available data, the highest turnover, the comparison of the officially gathered data and of the annual report from Cooperative Union of Slovenia shows that farmers' cooperatives which are voluntary members of Cooperative Union of Slovenia realized approximately 85% of the total turnover of all cooperatives in Slovenia.

Table 2: Active cooperatives, their employees and turnover in Slovenia (2009)

¹ The statistically highest percent that represent three cooperatives which were organized as local action groups, established by local communities, development agencies and agricultural cooperatives to implement local development strategies.

Alpha-betical code	Activity	Number of active cooperatives	Number of employees	Turnover in 2009 (EUR)
A	Agriculture, forestry and fishing	82	510	103.998.228
B	Mining and quarrying	0	0	0
C	Manufacturing	26	276	34.489.175
D	Electricity, gas, steam and air conditioning supply	1	0	0
E	Water supply; sewerage, waste management	10	0	149.077
F	Construction	15	44	15.993.407
G	Wholesale and retail trade; repair of motor vehicles and motorcycles	82	2.413	559.376.890
H	Transportation and storage	8	39	7.464.922
I	Accommodation and food service activities	2	0	98.364
J	Information and communication	2	1	223.968
K	Financial and insurance activities	1	0	73.844
L	Real estate activities	35	60	4.868.050
M	Professional, scientific and technical activities	17	41	5.267.043
N	Administrative and support service activities	6	3	202.082
O	Public administration and defence; compulsory social security	3	2	489.169
P	Education	0	0	0
Q	Human health and social work activities	4	1	293.927
R	Arts, entertainment and recreation	0	0	0
S	Other service activities	3	5	3.236.615
Total		297	3.394	736.224.761
Agricultural, forestry and fishing cooperatives affiliated to Cooperative Union of Slovenia		76	2.973	624.163.838
Share of these cooperatives		26%	88%	85%

Source: AJPES.

There are at least two reasons for such situation. First, the entrepreneurs and the public know relatively little about the potential of cooperatives in a market economy to take into account these legal form. It could be concluded that stereotypes about cooperatives as something

which is connected with the former economic system and/or agriculture are still very influential, also among the policy makers.

The second reason is to be found in legislation which forbids cooperatives to carry out certain activities, for instance, banking services. So for instance, cooperatives in Slovenia are not allowed to perform banking services. According to the legislation, a bank in Slovenia may shall be organised as a public limited company or European public limited company (Banking Act, 2006, Art. 38).²

The justification of such measures could be questioned on the basis of constitutional principle of equality before the law³ and freedom of entrepreneurial initiative⁴.

While assessing the constitutionality of the Amending Act to the Construction Act which excluded the cooperatives from carrying out construction activities, the Constitutional Court took the standpoint that the cooperatives differ from commercial companies to such an extent that the principle of equality is not infringed if the legislator excludes cooperatives from carrying out some business (Decision no. U-I-306/98 from 11.04.2002, Official Gazette RS, No. 37/2002 and OdlUS XI, 60):

»The legislature had sound reasons for such discrimination due to the fact that the economic function and the purpose of cooperatives differ from other commercial subjects.«

The standpoint of the Constitutional Court is difficult to understand since it implies that the specific purpose and function of cooperatives could be opposed to the public interest, while the mere profit seeking aim which is characteristic for commercial companies involve speculative elements which would be more probably at odds with the public interest. As market actors, also cooperatives must realize a positive difference between the revenue and expenses (surplus or profit), in order to be successful. However, the surplus (profit) as a market success is only a necessary, but not already a sufficient condition for promotion of members' economic interests. In addition, it could be said that commercial companies differ between themselves more than in comparison with a cooperative which in an original way combines the elements of several types of companies.

The issue is important also to SCEs, since provisions restricting the activities of national cooperatives, apply automatically to an SCE.⁵

² On the other hand, there are 38 primary and secondary credit cooperatives from Austria and two from Italy, who are allowed due to their licence obtained in their home country to perform banking services in Slovenia on the basis the EU banking legislation. See, Banka Slovenije, Kreditne institucije držav EGP v Sloveniji, URL: <http://www.bsi.si/poslovanje-bank-in-podjetij.asp?MapaId=523> (30. 7. 2010)

³ Conf. Art. 14 of Constitution of the Republic of Slovenia:

»In Slovenia everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political, or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance. All are equal before the law.«

⁴ Conf. Art. 74 par. (1) and (2) of Constitution of the Republic of Slovenia:

»Free economic initiative shall be guaranteed.

The conditions for establishing commercial organisations shall be established by law. Commercial activities may not be pursued in a manner contrary to the public interest.«

⁵ Conf. Art. 8(2) of the SCE Regulation: »If national law provides for specific rules and/or restrictions related to the nature of business carried out by an SCE, or for forms of control by a supervisory authority, that law shall apply in full to the SCE.«

On the other hand, the Court of European Union takes a more rigorous position assessing the restrictions on freedom of establishment which may require an undertaking to take a specific legal form. Such restrictions must be applicable without discrimination on grounds of nationality and may be justified only »by overriding reasons in the general interest, provided that the restrictions are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective«.⁶

The second open issue is that cooperatives are often omitted as potential beneficiaries of various state aid schemes. So, for instance, only commercial companies and individual entrepreneurs, are mentioned by the Supportive Environment for Entrepreneurship Act (2007).

According to the transitional provisions of the Act on Cooperatives from 1992, the capital base of cooperatives was not only stabilized through transformation of the existing social capital into indivisible reserves, but also expanded through the restitution of formerly nationalized property and assignment of capital shares in 45 listed food processing companies.

Table 3: Indivisible reserves, members' shares and capital of cooperatives in Slovenia (as of 31. 12. 2009)

Alphabetical code	Activity	Capital (EUR)	Indivisible reserves (EUR)	Members' shares (EUR)	Percent of indivisible reserves in the total capital
A	Agriculture, forestry and fishing	61.319.773	48.124.778	1.765.306	78,48%
B	Mining and quarrying	0	0	0	0,00%
C	Manufacturing	26.655.636	16.129.208	2.897.400	60,51%
D	Electricity, gas, steam and air conditioning supply	4.000	0	4.000	0,00%
E	Water supply; sewerage, waste management	450.428	396.162	54.161	87,95%
F	Construction	5.265.550	686.754	914.542	13,04%
G	Wholesale and retail trade; repair of motor vehicles and motorcycles	132.882.072	75.973.083	4.155.103	57,17%

⁶ See, for instance, Judgment of the Court (Grand Chamber), 19 May 2009, joined cases C-171/07 and C-172/07, Apothekerkammer des Saarlandes et al., 2009 ECR I-4171.

H	Transportation and storage	107.484	212.650	41.494	197,84%
I	Accommodation and food service activities	472.796	323.150	3.874	68,35%
J	Information and communication	-16.101	0	300	0,00%
K	Financial and insurance activities	578.311	0	561.431	0,00%
L	Real estate activities	3.470.150	1.983.422	351.166	57,16%
M	Professional, scientific and technical activities	33.138.479	19.079.515	10.579.526	57,58%
N	Administrative and support service activities	42.046	0	38.801	0,00%
O	Public administration and defence; compulsory social security	37.458	0	37.130	0,00%
P	Education	0	0	0	0,00%
Q	Human health and social work activities	1.301.872	1.624.488	3.691	124,78%
R	Arts, entertainment and recreation	0	0	0	0,00%
S	Other service activities	972.198	504.957	19.925	51,94%
Total		266.682.152	165.038.167	21.427.850	61,89%

Source: AJPES

Although cooperatives in some economic sectors do not dispose of indivisible capital which is permanently earmarked for cooperative purposes, the share of indivisible reserves which may not be distributed among members also in a case of winding up of a cooperative, is relatively high. After the third Amending Act to the Act on Cooperatives, only middle-sized and large cooperatives are subject to the auditing of the annual accounts. This external control does not encompass the small cooperatives, which may also have serious deficiencies in their internal control systems. Therefore, it is highly questionable, if only mandatory auditing can adequately monitor and protect the property, permanently earmarked for future cooperative generations. On the other side, the indivisibility of some reserves puts serious restrictions on the management, while the maintaining and increasing of the indivisible reserves have wider socially beneficial effects that go beyond the interests of actual membership and could be supported by appropriate measures.

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