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Credit cooperatives in the Italian legislation

(Relevant topic: Plurality of co-operative law)

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Abstract

The Banking Law of 1993 regulates the exercise of banking activities undertaken by cooperative societies, and it provides for two categories: the “popular bank” and the “credit cooperative bank” (BCC), which present common features but differ very much under the substantial profile. While BCCs achieve a complete correspondance to the legal model of “prevailing mutuality cooperative” as regulated in the Civil Code, popular banks got progressively closer to joint stock companies, with no concern for the “system mutuality”. This diversity brings about differences in regulations, particularly with regard to profit distribution and to transformation and merger policy. Although BCCs came to be a valuable alternative in the credit context, some law provisions may threaten the preservation of their genuine mutualistic nature.

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1. Credit cooperatives between the Civil Code and the Banking Law of 1993

The legislative evolution that, since the beginning of the 90s’, characterized credit cooperatives, flowed into the Banking Law of 1993 (*Testo Unico delle leggi in materia bancaria e creditizia, T.U.B.*);¹ banking activities performed by cooperative companies are exclusively reserved to two models: the popular bank (*banca popolare*) and the

¹ Law n. 385, 1st september 1993, which deals about credit cooperatives in section V, subsection I, articles 29 to 37.

credit cooperative bank (*banca di credito cooperativo, BCC*).² According to the law, these models have both common features and distinctive elements, but differ particularly in terms of intensity of the mutualistic character.

With Law n. 310/04 (art. 150*bis*), the general provisions about cooperatives established with the company law reform of 2003 (Law n. 6/03), and specific banking regulations have been finally matched and coordinated; at present, all Civil Code provisions which don't affect substantial profiles of the banking law are enforceable to credit cooperatives.

BCC lay within the category of "prevailing mutualism cooperatives":

- their statutes have to contain the "mutualistic clauses" required by art. 2514, Civil Code, so that the profit-making goal is strongly limited;³
- they have to act as an "open door" cooperative, encouraging greater and effective participation in the management and fairly motivating the refusal of a member;
- they have to comply with the strict effectiveness criteria established by art. 35 T.U.B., to respect the boundaries of territorial jurisdiction and the recruitment of members, which have to work and operate within the same geographical area where the bank operates.

On the contrary, popular banks are not subject to provisions referring to the "prevalence" condition, and, consequently, they cannot benefit from tax relief, while BCC can. In general, joint stock company's regulations are enforceable to popular

² Before law n. 385/93, even though provisions on cooperative banks were substantially correspondent, there was no specific reference to the mutual goal for popular banks, so that they could progressively open to the market and get closer to a more profit-oriented company's model. In particular, this process has been facilitated by Law n. 207/92, dealing with nominal value of shares, maximum limit of individual partnership, approval clause; and by Law n. 481/92, which allowed mergers and transformations of popular banks (even if that was, at the time, prohibited for cooperatives in general).

³ Art. 2514, Civil Code, requires 4 statutory conditions for the cooperative to be a "prevailing mutualism" one:

- interest of share capital may not be higher than the interest rate prescribed by law (2.5 more than the maximum interest on postal bonds);
- reserves cannot be distributed among members;
- unclaimed assets cannot be distributed among members at the moment of dissolution but must be transferred to Mutual Funds;
- return on financial instruments subscribed by regular members may not be higher than two points more than the maximum limit for dividends.

banks, unless they are incompatible with banking provisions or with the cooperative nature.⁴

Although with some differences, all regulations referring to the structural profiles of the cooperative company are instead applicable both to popular banks and to BCCs: the “one man one vote” rule; the limitation on partnerships; the “open door” principle and the variable capital; the enrollment in the Cooperative Register; the necessary statutory provisions with requirements for the admission of new members; the balance sheet report where the board of directors illustrates the criteria which has been followed to achieve the mutual goal.

2. “Structural mutuality” of popular banks

Even if it is acceptable that in some cooperative companies mutual goal be softened and not coincident with prevailing effectiveness with and for members, and even co-existing with a profit-making goal, however respectful of the typical governance structure, popular banks are deeply different from BCCs. Actually, it has always been in doubt that popular banks really presented the specific social goal they should, and, for sure, their evolution trend could legitimately support the opinion that, notwithstanding their gender qualification, they should be considered cooperative companies in the form but not entirely in the substance.

⁴ The following provisions don't apply to popular banks:

- member's rights to check the register of the board of management and of the executive committee, because this would be uncompatible with the banking secret;
- the loss, for any reasons, of the “prevalence” condition, because it doesn't involve popular banks;
- the allocation of net profits, the regime of reserves, the admission of new members, the appointment of managers, since specific regulations are included in the Banking Law;
- the possibility of setting up with the form of a limited company, because banking activity is reserved to medium to large enterprises;
- the subjection of the surveillance by a special authority appointed for cooperatives, because popular banks are subject to the control of the Bank of Italy.

Of course, for the same reasons, some of these provisions don't apply either to credit cooperative banks, because they are “substituted” by the imperative regulation of the Banking Law.

In particular, all regulations which require to cooperatives the yearly contribution as well as the final devolution to Mutual Funds, are not applicable to popular banks; the extraneousness to any kind of “system mutuality” is, thus, absolute, and this outlines a category which is much different from any other.

It is possible to assert that popular banks pursue a mutual goal, but this statement needs appropriate remarks. First of all, art. 150*bis*, c.1, declaring that art. 2545*quinquies* of the Civil Code is not applicable to popular banks, allows the whole profit distribution to members: the pursuing of a mutual goal in popular banks is thus unbound from the adoption of precise statutory provisions aimed to restrict the dividends.

Secondly, according to the law, the distribution of rebates to members is optional; as a matter of fact, the rebate is not the main reason which push individuals to enter the cooperative bank, because they rather obtain mutual advantages in the promotion of the local economies through bank activities and services. The law-makers chose therefore to provide popular banks with a structure suitable to convey its “internal mutuality” but only if wanted (a sit is well known, this is, on the contrary, an absolutely mandatory feature in the cooperative model of the Civil Code).⁵

In popular banks, the profit-making goal is not necessarily instrumental to the mutual goal, but it may be autonomously pursued by members as well as by corporate bodies, even within the limitations deriving from those structural profiles that popular banks have to undertake anyway.⁶

As a logical consequence, popular banks had, and still have, the possibility to follow an evolving trend towards joint stock company’s model. As a matter of fact, they may fall

⁵ The “one man one vote” rule, along with the limitation for individual capital share, for example, being an obstacle to radical changements in the property structure of the company, allows a more effective democracy in the governance and equality of conditions for members, as well as a stronger protection of minorities.

⁶ It is thus possible that the popular bank doesn’t perform credit activities prevailingly in favor of its own members; mutuality lays in the availability of banking services for members, if they will decide to make use of these services is not the focus.

within companies which uphold to capital markets, and, when required conditions occur, they may be listed in the Stock Exchange.⁷

It is thus legitimate to talk about a kind of “pseudo-autonomous” regulation of popular banks, based on a cooperative functional frame, from one side, and, from the other side, on a financial structure closer to those banks that undertake the form of joint stock companies, as it is proved by the lucrative features of social partnerships and by the possibility of direct conversion in banks other than cooperative, as we will see.

The “autonomy” of the legal framework referred to popular banks makes it evident the diversity from BCCs, especially with regards to assets’ profiles.

2.1. Free profit distribution and free allocation of reserves

Art. 32 T.U.B., requires that, each business year, at least 10% of net profit be allocated to legal reserve: this constraint is a logical consequence of the specifically cooperative formal nature, even if it is much lower in quantity than the one established both for BCCs and cooperatives in general.

For the remaining part, profits may be freely utilised; the likely destinations will be pointed out in the statute, which thus plays a central role in determining how the company’s asset can be employed. As law makes it clear, these are not compulsory but just optional choices, so that popular banks could distribute to members the whole gained profit, or completely invest it for a business auto-financing.

Although it is expressly named only with regard to BCCs, the re-evaluation of share capital using profits is deemed to be allowed for popular banks too, since the operation doesn’t convey any risk of exceeding the limits on individual shares which have to be calculated in percentage of the equity capital.

⁷ The first access of popular banks to the Stock Exchange Market was during the 70’s, and was parallel to the enforcement of Law n. 49/77, which established the “Mercato ristretto” and allowed the official negotiation of their securities. Later, in the 90’s, particularly with Law n. 207/92, they entered the main market.

If quoted in the capital market, popular banks are subject to the “Testo Unico delle disposizioni in materia finanziaria” (T.U.F.) of 1998, which prevails over any kind of general rules. Many articles of this law refer to cooperative companies, even if they become enforceable only to popular banks, whose statutes may contain the necessary provisions established by the Stock Exchange Market Authority (Consob) for quotation.

At last, as art. 2529, Civil Code, allows to cooperatives in general, it is accepted, even if not unanimously, that popular banks could underwrite and redeem its own shares within the limit of distributable net profits, that is 90% of the total, and of available reserves, outcoming from the last and regularly approved balance sheet.

With regard to reserves, it is not clearly established any permanent indivisibility for those which popular banks are free to set up, unless, of course, a similar provision be in the statute or voted by the general meeting; in both cases, anyway, it would be necessary and enough a changement in the statute or a meeting's decision to "free" reserves. It is important to underline that, in any circumstances, not even if the statute would establish a limitation in the distribution of reserves, popular banks can not profit from a favorable fiscal regime, because tax advantages are strictly connected to the mandatory devolution of assets to Mutual Funds at the moment of dissolution or transformation, which is not required for popular banks, as we said.

Again, within the limits of "structural" regulations due to the mutualistic model, reserves of popular banks may have specific assignments: for example, they may be put aside for a later increase of share capital, for a future distribution to members, or for financing corporate development. At the end, given that reserves are virtually distributable at any moment, the closeness of popular banks to lucrative companies must be pointed out again.

2.2. Transformations and mergers of popular banks

Art. 31 T.U.B., admits transformations and mergers involving popular banks and resulting in a joint stock company. According to the provision, the operation is subject to the approval of the Bank of Italy, when some conditions occur: the "interest of creditors", the "need of financial reinforcement" and the "rationalization of the (banking) system". These requirements are more specific than the principle of "healthy and cautious management", as requested for mergers and divisions among banks, so that art. 31 has to be qualified as a special provision, prevailing over general ones.

As we said, since popular banks are totally excluded from the possibility of gathering resources under privileged tax rules, it is not necessary to subtract the assets to the

company resulting from the transformation or the merger and to devolve it to the “system mutuality”, as it is, on the contrary, strongly established for cooperatives in general, as well as for BCCs.

The non-existence of the mandatory devolution is justified by a logical reason, that is to give priority to the needs of the credit network rather than to the mutualistic one; as a matter of fact, if transformations or mergers help to restore crisis situations that might have influence on the stability of the banking system, which is obviously more important than the maintenance of no more efficient cooperatives, the devolution of assets to Mutual Fund would cut off part of the resources, so that the goal to be pursued would inevitably be compromised. Nevertheless, since the same problem is faced with regards to BCCs, which, on the contrary, have to comply with the final devolution like any other cooperative, it is clear that popular banks have been the object of a precise legislative choice, aimed to outline a company model that is characterised by some mutualistic features, but wants to be very different from cooperatives from a substantial point of view; in other terms, a model that could be a useful alternative to the typical “profit-oriented governance”.

3. “Substantial” mutuality of BCCs

Differently from any remark referring to popular banks, there is no more doubt about the mutualistic nature of BCCs, both under the structural and the functional profiles, as it is unanimously recognized by literature.

BCCs are described like “cooperatives inspired by mutual principle in the higher measure recognized by the legal order”.⁸ Neither they can suppress the “mutuality clauses”, nor they can abandon the mutualistic “prevalence” in other ways: their nature of “prevailing mutualism cooperatives” is essential to obtain from the Bank of Italy the authorization to exercise banking activities (art. 14 T.U.B.).

The assumption on which this provision is based deals with the need to avoid that the eventual shift to the category of “non-prevailing mutualism cooperatives” would

⁸ Law n. 310/04.

produce a bound over indivisible assets, which is inconsistent with the stability required by the banking activity.

The observance of the statutory provisions listed in art. 2514 of the Civil Code, and the “effectiveness” criteria stated in art. 35, T.U.B., is required in order to benefit from tax relief;⁹ this demonstrates that BCCs must be mutualistic in the substance, not being relevant and enough a formal frame within operating as an apparent cooperative, and it testifies the specific role assigned to them in the banking legal order.

3.1. Distinctive features: “mutual exchange” and “localism”

In BCCs, the correspondance between *nomen iuris*, mutual goal and regulations is, and has to be, full and complete. The terms “credit cooperative” must appear in the company’s name, in order to make it immediately evident the mutualistic character of the activity, which, from a substantial point of view, is given by the obligation to exercise credit prevalingly in favor of members.¹⁰ Mutuality of BCCs is, thus, identified with the criteria pointed out by banking provisions.

The essential character of the mutual exchange (“*gestione di servizio*”) is, nevertheless, emphasized by the exception provided by art. 35 T.U.B.: the Bank of Italy may authorize, for a limited time, individual BCC to exercise its prevalent activity in favor of third parties, different from members, when stability reasons require it;¹¹ outside of

⁹ As art. 28 T.U.B. states.

Art. 35 T.U.B. requires the BCC to practice its credit activities prevalingly in favor of its members; all regulations dealing with banking activities and territorial jurisdiction are established by the Bank of Italy and must be contained in the statute.

¹⁰ Bank of Italy, 21 april 1999, n. 229, then updated on 9 april 2004.

¹¹ It seems appropriate to remind that, at EU level, the tax treatment applied to cooperatives had raised, in the past, doubts about its legitimacy, even if they never resulted in formal charges. During a proceeding in 1999, based on a complaint lodged by some EU companies who felt damaged by some of the major italian cooperatives, the European Commission said that the tax exemption of undistributable reserves was not to be considered as a selective advantage, but a special arrangement implementing the logic of the tax system and, therefore, a general measure which did not fall within Article 87, par. 1 of the EC Treaty. In very recent times, presumably as a result of company reform law, EU Commission started an investigation to ascertain the alleged incompatibility of italian fiscal regulations with the EU provisions on state aid regime. The problem aroused with regards to consumer and production cooperatives, but, because of the derogation that can be authorised by the Bank of Italy, it might refer also to credit

the derogation period, or when the temporary exception reveals itself as not useful for the readjustment of the economical and financial situation, then the BCC won't have any other alternative than dissolving or merging with other entities, since it cannot perform without mutualistic features.

Substantial mutuality must also rise from the strong territorial connection required by the law. The territorial jurisdiction is established by the Bank of Italy, and must be reported in the statute; the area includes every municipal districts where the bank has its registered office, every branch office and the neighboring area, in order to guarantee the continuity of the territory. Through these provisions, BCCs are assigned an important role as a mean of development of local economies: membership is subject to the existence of a link with the area in which the bank operates, so that it is necessary to reside, or to perform continuously in the territorial jurisdiction of the BCC (art. 34, c.2). This is what it has been called the "cooperative localism".

Nevertheless, it is important to underline that "prevailing mutualism" in BCCs is characterised by specific features, which thus shape a distinctive mutuality model, partially different from cooperatives in general, and, even more, from popular banks: for the "prevalence" judgement, what is really relevant is the credit allocation, and not the savings' raising activity, being, this last, a service that may be oriented towards members or not members, without distinction. The mutualistic advantage, which aims individuals in entering a BCC, is not a credit right, because this depends from the "credit merit" and not from membership; it simply consists on the perspective to obtain credit services from the bank, that means to benefit from interest rates lower than the ones offered by the BCC to non members. Eventually, it can concern other financial services, and, for example, turn into rebates. As we said about popular banks, also for BCCs rebates are accidental, that means not essential in qualifying the mutual goal.

cooperative banks, to verify if the privileged tax treatment applied to BCCs could be legitimately maintained even when they are allowed to temporarily behave as "non prevailing mutualism cooperatives". The Court of Justice stated that fiscal provisions applying to cooperatives are not to be considered as illegal state aids, because they are a direct consequence of the particular *status* assigned to cooperatives by the italian legal order.

This latest profile is also proving the exceptionality of banking law, which has to prevail because of superior reasons of stability of the system; it is thus competence of the Bank of Italy to establish how rebates have to be distributed, in order to avoid detriment to the auto-financing of involved banks. Rebates for members have, thus, to be severely identified in the balance sheet and their amount can not exceed 50% of the total net profit remaining after compulsory allocations; they also have to be distributed, at least for half of the amount, through re-evaluation of capital shares, and not as money refunds to members.

On the other side, the BCC could perform with non members, even in the absence of specific statutory provisions, because, as we said, what is really relevant is that credit granting be prevailingly in favor of members.

3.2. Allocation of profits and reserves: the “external mutuality”

In BCCs, obligations concerning corporate assets consist in the 70% of the total amount of annual net profits to be allocated at legal reserve; this quota is definitively higher than the one required both for popular banks and for cooperatives in general, and has been fixed also because of the common practice, traditionally followed by BCCs, of non-distributing dividends and setting aside reserves of such a measure.

BCCs have also to assign 3% of the same annual net profits to Mutual Funds; as for cooperatives in general, this is a law requirement, and not a simple legal charge in order to benefit from favorable tax treatment, and it is the feature which characterizes the contractual model of the cooperative company.¹²

Moreover, this percentage has to be calculated on the whole budget surplus, before mandatory destinations to the legal reserve.

The remaining part of net profits is freely distributable to members within statutory limitations, as established by art. 2514, c.1, Civil Code, both as a direct assignment, and

¹² The part exceeding 70% of net profits, as well as other reserves, is subject to normal taxation.

as a re-evaluation of capital shares with uncharged increase of the capital;¹³ it is also possible, for the BCC, to underwrite its own shares.

The full correspondance of BCCs to the legal model of the “prevailing mutualism cooperative”, and the explicit enforcement of art. 2545*ter*, Civil Code, implies that other possible reserves, statutory-based or decided by the general meeting, have to be considered as never distributable to members, neither during company’s life, nor when dissolution occurs; at that moment, it will be the time for devolution to Mutual Finds.

If these reserves have got a specific mutual destination, or not, or even if they have a “credit nature”, because, for example, net profits flowed into the “General Banking Risks Fund”, nothing changes: mandatory final devolution still remains.¹⁴

With no doubts, such a wide amount to be linked into the legal reserve, finds its origin, and still its reason, in the “public order” needs of the credit system: on one side, localism and mutual exchange make it practically impossibile for BCCs to diversify market risks; on the other side, the initial capital required from the Bank of Italy for the constitution of a BCC, which has to be not less than 2 million euro, is much lower than the one required for other banks, and, even though the aim is to facilitate access to the market for those “meritorious” companies characterized by a mutual attitude, obvious problems of under-capitalization may follow.

In practice, the higher percentage of resources to be allocated at the legal reserve is functional to compensate the “shortage” of the BCC’s own assets; but, in the meantime, it has to be interpreted as a mean of company’s autofinancing as well as a firm orientation towards the “system mutuality”, that means a strong limitation of distributable dividends.¹⁵

¹³ In this case, it is deemed that the maximum amount of the individual share capital, which is established in 50.000 euro (art. 33 and 34, T.U.B.) may be exceeded (art. 2545*quinquies*, Civil Code)

¹⁴ Moreover, as we said, not being possible for BCCs to issue financial instruments ex art. 2536, Civil Code, (nor can they issue those instruments provided by law n. 59/92) because they are considered inconsistent with the basic principles of the credit system, distributable reserves for investors will not exist, as, instead, it happens for common cooperatives.

¹⁵ It has to be considered that BCCs, as other banks, may profit from different possibilities of capitalization; they can, for example, issue bonds, as now established by art. 11, T.U.B.

4. BCCs and “heterogeneous mergers”

Heterogeneous mergers involving BCCs and resulting in a joint stock company or in a popular bank are qualified by the dominant literature as exceptional hypothesis, to be allowed only when the severe conditions required by art. 36 T.U.B. occur; as before, the provision substitutes the general “healthy and cautious management” criteria, applying to other kinds of banks when willing to undertake such an operation (art. 57 T.U.B.).

Furthermore, considering that BCCs necessarily have nature of “prevailing mutualism cooperative”, that means they are excluded from the possibility of transformation (art. 2545*decies*, Civil Code), the provision has, again, to be considered exceptional.

Merger is legitimate if the requirement of the “stability” co-exists with the one of the “interest of creditors”; the abandonment of the cooperative model, both through merger as through indirect transformation, is thus possible only in crisis situations; this doesn’t necessarily mean a state of insolvency, but a condition serious enough to affect the bank liquidity and, consequently, its earning capacity, that cannot be otherwise overcome and that would inevitably lead to dissolution.

This is not, anyway, a decision belonging to members, and not even their unanimous consent could substitute the necessary approval of the Bank of Italy, which is subject, as we said, to the occurrence of the conditions required by the law.

In other terms, the mutual aim can be sacrificed to the banking needs only when the economic stability is so compromised that the interest of creditors may be in danger; this condition is aimed to satisfy the general interest to the preservation of the bank enterprise, and it has, thus, to prevail over the protection of mutuality.

The opposite hypothesis of the incorporation of a joint stock company bank, or a popular bank, in a BCC, is not regulated by the law, but it has to be deemed totally legitimate, since it produces a strengthening of the incorporating BCC and,

consequently, it doesn't compromise neither the stability of the system nor the preservation of mutuality.¹⁶

Obviously, there are no technical or economic problems for mergers between BCCs, which are exclusively subject to the surveillance of the Bank of Italy and to common banking regulations.

4.1. Some controversial issues

a) The role of the Bank of Italy

As we said, the function of the Bank of Italy is to check over the priority of involved interests, so that the protection of mutuality will have room only when it is not prejudicial to other goals, generally given by stability, efficiency and competitiveness of the credit system.

The banking law, which is clearly focused on the joint stock company's model, could thus favor a process of prospective merging of BCCs, as well as popular banks, with common (meaning in the form of joint stock companies) banking enterprises, with the suitable consequence of weakening the cooperative's identity. For this reason, the advisability of assigning to the Bank of Italy the role to evaluate, with a certain degree of discretion, those situations that imply the survival of cooperative banks, has been understandably criticized: even behaving with absolute fairness, the Bank of Italy could not have, eventually, the necessary "sensibility" to reach a good compromise, and thus act with too much autonomy in the judgement.

b) The transformation from BCC to popular bank

Considering the previously outlined remarks about the nature of popular banks, there is no agreement on this issue.

¹⁶ According to articles 31 and 36, T.U.B., the approval of the Bank of Italy is required, so that law provisions referring to maximum and minimum limits of capital shares, to mandatory allocation of net profits, and to any other conditions consistent with the mutual goal, have to be complied.

From one side, if the company's model is deemed to be the same as a BCC, the transformation has to be considered legitimate, because it doesn't give rise to any change, neither in the structure nor in the function. The operation will be thus allowed any time and art. 36 T.U.B. wouldn't be applicable.

From the other side, if it is deemed that popular banks don't share the cooperative model, the operation, even though it cannot be considered as a strictly technical transformation, it is not a merely statutory amendment but a real change of the object (which would be forbidden even with the unanimous consent of members), that would also affect the structural profiles of involved companies.

It is obvious that transformations, which don't bring any contribution of capital from another bank enterprise, is not suitable to overcome a crisis situation, that, instead, is the only occurrence that may justify the "sacrifice" of a BCC through merging with other banks (and, of course, after the approval of the Bank of Italy). Allowing the transformation of a BCC in a popular bank would thus be equivalent to allow a kind of "double-steps" transformation in a joint stock company.

The different wording of art. 36, which refers to mergers only, from art. 31, which refers also to transformation for popular banks, comes thus to an explanation.

Even though a law clarification on the issue would be extremely necessary, it seems correct to assume that, out of any consideration about contractual identity or diversity, only a merger is legitimate for BCCs, because it is forbidden for them to abandon their specific mutualistic form, not even to undertake the "not prevailing mutualism cooperative" one.

c) The possibility of "indirect transformation"

Since the cooperative company can be a joint stock company's shareholder (art. 18, law n. 72/83), a BCC may, for example, contribute its bank concerns in a joint stock company and, in the meantime, modify its object carrying out other financing activities, not restrained to banks, prevalently towards members. This situation not only would be legitimate but would also resolve the problem of undistributable reserves, which would

remain in the assets of the cooperative and not transferred to another company that, perhaps, could distribute them to members.

As a matter of fact, there is no logical restraint in allowing BCCs to parcel out a part of their business and assign it to a newly established company or even to an existing bank of different nature; this would be division, which is provided both by the Civil Code (with general provisions) and by art. 57 T.U.B.. Since there is no law prohibition, it is reasonable to allow, at least in principles, the operation also for BCCs, of course when conditions required for any other bank occur.

However, we have to consider that, in this case, the approval by the Bank of Italy is not subject to the existence of a particular crisis situation which implies appropriate evaluations with regards to the interests of creditors and the stability of the system, as for mergers; in other terms, the practicability of a division, even when it produces a readjustment in the enterprise similar to the one that could be obtained with a merger operation, could be not subject to any evaluations regarding the protection of the mutual goal; in a word, it can be much easier.

It is clear that no problems arouse if the division results in companies of the same nature; with regards to BCCs, because of reasons due to the preservation of assets, it is necessary to distinguish depending on the survival of the dividing company:

- if the BCC still exists after the division and keeps holding undistributable reserves, the operation is totally legitimate, because the mutualistic advantage for members is maintained and the “system mutuality” (which is interested in the protection of undistributable assets) is accomplished;
- in the opposite case, the practicability of the division should be subject to the unanimous consent of members, who give up to the mutualistic model they had been chosen before, and to the retroactive submission to taxation of assets.

d) The devolution to Mutual Funds

Due to the express equalization with “prevailing mutualism cooperatives” and to the enforcement of art. 2545*undecies*, Civil Code, it is absolute for BCCs the obligation to

devolve to Mutual Funds the total company's equity except members' shares and distributable profits. This is the devolution to the "system mutuality".

It is important to underline that, while the annual 3% allocation to Mutual Funds is a direct effect of the mutualistic nature of the BCC, the 70% legal reserve has a different origin; at least for the amount exceeding what is established by the Civil Code for cooperatives in general, this obligation can be explained in terms of strengthening the BCC's assets, in order to offer better protection to creditors and to increase the economic stability of the credit system.

However, the idea to lessen this really high amount to be allocated already aroused during preliminary works for the company's law reform; it was then suggested not to require final devolutions in the case of mergers involving BCCs, because of the needs of assets' stability of the banking system. The issue is still present.

The sole possible solution seems to turn to cooperative provisions of the Civil Code, which admit that if the capital of the company resulting from transformation is not adequate, the lacking part can be retained from the amount due to Mutual Funds (art. 2545*undecies*).

In other terms, the strong tie with the "system mutuality" determines, from one side, the mandatory obligation to devolve the entire assets that it has been possible to accumulate because of the cooperative nature of the BCC (that means because of favorable tax treatment), and that is thus belonging to the cooperative movement; on the other side, the needs of the credit system may require a derogation. Since the transformed BCC is subject to those provisions applicable to the company's model resulting from the transformation, it would be thus reasonable that the part of the legal reserve exceeding the amount required by the Civil Code for mutuality relevance, be available for the capital of the rising company.

If the merger's result is a popular bank, nothing changes with regards to the mandatory devolution to Mutual Funds of the assets of the BCC involved in the operation; this will have to be immediate, because the BCC will disappear and, in the future, the external mutuality won't be expressed anymore.

In general, we have to notice that in case of mergers and/or transformations, the judgement must be oriented in assuring, as much as possible, the survival of the cooperative bank, even if under a different company's model; however, on the other side, even cautiously and exceptionally, the shift from BCC to joint stock company is practicable. The legal order shows a kind of "concelead" favor for business reorganizations even when they could lead to abandon the mutuality model.

5. Final remarks: credit cooperative banks between localism and banking development

In the last few years the strategy of credit cooperatives has been oriented towards the improvement of their nature, and substance, of mutual banks, that means:

- focusing the activities predominantly towards members rather than pursuing private speculation;
- supporting and guiding members belonging to local communities with transactions and services of the bank, in order to improve economic, moral, and cultural conditions of the territory;
- promoting the development of the cooperation, the importance of saving and the social cohesion;
- valorising the full cooperation system.

In order to achieve these goals, BCCs continued to offer credit support to members notwithstanding the economic crisis, and extended the range of available financial products and services, taking into account the importance of the network entities.

To be stronger and reliable even in a critical context, they also had to reinforce the so called "auditing culture", improving internal checks and risk management, and, above all, improving the level of protection offered to clients, especially to those with a small amount of savings through the Deposit Guarantee Fund and the Bond Holders Guarantee Fund; these are both unique and original initiatives for the credit system.

Results have been encouraging and showed how mutualistic values may make the difference in precarious times, because when big banking institutions fail to offer support when customers need it more, the personalized services offered by credit

cooperatives are an added value.¹⁷

At this point, the question to be answered concerns the possibility for BCCs to maintain their distinctive mutualistic character even when forced to develop into more complex structures, in terms of financial effectiveness, as they inevitably are.

Specifically, for how long they will they be able to behave as “genuine” mutual companies, that means be mutualistic in the substance and not only in the form, making use of their massive resources (think about the 70% legal reserve) for achieving mutual goals and not to operate as any other bank, without surrender to external pressures and, for example, shift towards a lucrative company?

¹⁷ In 2008, credit cooperative banks recorded growth in all of the key aggregates. In November, market share in terms of loans to domestic customers was 7.4%, while market share relating to direct savings reached 8.9%. There was a parallel increase in the number of branches, members and customers: in December 2008, there were 432 BCC, with 4118 branches (representing 12% of the entire banking system) across 98 provinces; 940 thousands members, and more than 5.5 million customers. Also the increase in the number of employees continued (+4.4%) against less lively growth by other banks (+0.7%).

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