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TRANSACTIONS WITH INTEREST REGULATION FOR A SUSTAINABLE COOPERATIVES DEVELOPMENT

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Abstract

A cooperative as a form of association of persons on the basis of the realization of coinciding interests is, in legal terms, a corporation that unites participants with special specifics. Such participants (members) are united on the basis of the rights of participants only with the condition of direct labor activity in the structure of the cooperative. Throughout the entire history of the existence of a cooperative - a cycle has been traced with a logical causal relationship from the emergence to degradation of cooperatives, their degeneration into other organizational and legal forms of legal entities due to the dominance of individual participants, their usurpation of powers, redistribution of benefits and assets in their benefit, and ousting the remaining members from among those involved in the management of the cooperative. Ordinary members are gradually removed from real management and the equitable distribution of profits, right up to the liquidation of an insolvent cooperative. It is precisely due to this systematically observed trajectory of the functioning of the cooperative that this legal form is reluctant to use when there are many advantages. Flaws that were still fatal in nature are by no means inevitably concomitant with the cooperative form of business organization, provided that the latest legal tools. The solution consists in recommending the application in practice and the subsequent inclusion in the legislation of a mechanism for regulating related-party transactions and the normative provision of its proper regulation. Recommendations have been developed by authors to improve the legislation on cooperatives.

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Keywords: Conflict of interests, cooperatives, corporations, property protection, related-party transactions, transaction ability.



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1. Introduction

It is quite obvious that the cooperative form of organizing the activities of legal entities has great potential for ensuring employment of the population, solving consumer and social problems, including aggravated stratification of the population. In addition, in the latest digitalization of the economy, cooperatives are opening up new perspectives (Fronzaglia, Guedes, & Santos, 2008). Despite this, at the moment, the number of production cooperatives is 0.34% of the total number of registered commercial organizations, consumer - 13.6% of the number of registered non-profit organizations (Herald of State Registration, 2019).

According to Sukhanov (2014a), the head of the working group of the Council on the Codification and Improvement of Civil Legislation, during the reform of the legislation on legal entities in 2014 (Civil Code of the Russian Federation: Part 1, 1994) "... the Ministry of Economic Development of Russia (and in its person - public authority as a whole) voluntarily or involuntarily disregards such organizational and legal forms of entrepreneurial activity as production cooperatives ...". Analyzing the bill proposed by the indicated Russian ministry from the point of view of the domestic legislator borrowing the legal constructions of Anglo-American law (we are talking about the emergence of economic partnerships, investment partnerships in Russian law and, above all, the inclusion of limited liability companies as non-public companies), the most authoritative Russian civilist concludes that such changes can lead to the disappearance of industrial and consumer cooperation in the domestic Twain legal order (Sukhanov, 2014a).

In view of the indicated trends in the development of legislation on legal entities and trends in legal policy, as well as in the absence of state support for cooperatives, it seems that degeneration awaits the cooperative form of organizing business. The reason for the degradation of cooperatives is the withdrawal of assets by their most "strong" members. Withdrawal of assets is carried out through the conclusion of civil transactions, by their legal nature similar to transactions with related parties. The article explores the question of whether it is possible to mechanically extend the institution of interest to a cooperative type of corporate organization or if adaptation of this institution is required, and what it consists of.

2. Problem Statement

By itself, the withering away of non-competitive forms of business organization should not encounter barriers in its path, however, it is the cooperative form that, among others, also performs social functions that have now received priority in business valuation. The social orientation of business is determined by state policy based on the principles of the Russian Constitution, as well as international obligations of the Russian Federation, where social standards become dominant in determining development strategies. In this regard, the regulatory support of a cooperative form of business organization in the form of improving the legislation on cooperatives is vital for a wide range of people not covered by the infrastructure of megacities.

Foreign and Russian legal studies of the cooperative movement and cooperatives are mainly devoted to determining the legal nature of cooperatives, the history of their emergence, or, much less

frequently, the study of corporate governance. Legislative proposals are concentrated around stimulating the use of the organizational and legal form of cooperatives by civil society participants, which only temporarily prevents their transformation into other, less socially oriented forms. This state of affairs led the authors to search for the true cause of the long-known problem of the degeneration of the cooperative form of business organization and attempt to overcome it through the use of a prohibition mechanism for concluding interested-party transactions without an appropriate cooperative legal form of approval.

3. Research Questions

The solution of the problem was carried out through the identification, systematic study of the following issues:

- 3.1. Are existing provisions on transactions with a conflict of interest effective, enshrined in only some special laws on cooperatives?
- 3.2. Is it possible to take into account the existing legal regulation of transactions with interest in business companies when reforming the legislation on cooperatives regarding transactions with a conflict of interest?
- 3.3. What legal mechanisms can prevent the degeneration of cooperatives?
- 3.4. What changes should be made to cooperative legislation so that the institution of transactions with a conflict of interest works more efficiently and solves the problem?

4. Purpose of the Study

The purpose of this work is to develop an effective mechanism for the legal regulation of transactions with interest in cooperatives by analyzing the existing legal regime of such transactions in cooperatives and in economic societies in Russia and abroad to prevent the degradation of cooperative organizations.

This analysis may be useful for reforming cooperative legislation. At the moment, the Draft “unified” Law “On Cooperatives” (Regulatory legal acts: Official site for posting information on the preparation of regulatory legal acts, 2019) is at the development stage, therefore it is very timely to fill it with norms ensuring the stable functioning of this organizational – the legal form of the corporation and the protection of the rights and legitimate interests of its participants – members of cooperatives.

5. Research Methods

5.1. Identification of the true legal nature of a production and consumer cooperative as a basis for finding solutions to the problem of degeneration of cooperatives

Russian legislation has developed a legal definition of a production and consumer cooperative. So, a production cooperative (artel) is an association of citizens, members of a cooperative, on a voluntary basis in order to carry out production or other economic activities on the basis of personal labor and other participation of such citizens and their unification of property share contributions (Civil Code of the Russian Federation: Part 1, 1994, paragraph 1 of article 106). The definition of a consumer cooperative

given by a domestic legislator includes a sign of the voluntariness of such an association, the property basis of which is share contributions; however, unlike the cooperative, the legal form under consideration is used to satisfy the material and other needs of its members, which can be not only citizens, but also legal entities (Civil Code of the Russian Federation: Part 1, 1994, paragraph 2, Article 123). In addition, we note that the legislator makes rather strict requirements for both types of legal entities regarding the formation of governing bodies and their competence.

At the same time, both types of cooperatives, based on criteria developed by the legislator, relate to corporate legal entities, since the founders of the organizations in question have a membership right in them and form their highest governing body (Civil Code of the Russian Federation: Part 1, 1994, paragraph 1, Article 65). From the above definitions it is not clear which element, property or personal, is of primary importance in the activities of these corporations.

At present, the following positions dominate in civilian literature regarding the legal nature of a cooperative: production and consumer cooperatives are exclusively a union of individuals, since the purpose of such corporations is to satisfy the material and other goals of its members (Abova, 2000; Bystrov, 2012); they are both an association of individuals and an association of capitals (Shitkina, 2017); the priority of personal (labor) participation of cooperative members over participation through the contribution of capital (Sergeyev, 2013; Gongalo, 2017); the ambiguity of determining the legal nature of a cooperative as a predominantly personal or property corporation is implicitly emphasized (Dolinskaya, 2018); production cooperative - at the same time both a union of individuals and a pool of capital, since its activities are based on the personal participation of its members, taking into account their contribution to the organization's production activities (Karelina, 2011); a special kind of capital with a hierarchical management system (Sukhanov, 2014b). An analysis of foreign cooperative legislation does not allow an unambiguous answer to the question about the legal nature of cooperatives (Shilova, 2013; Orlov, 2015).

We believe that consumer cooperation occupies an intermediate position between the association of individuals and the association of capital. First, a consumer cooperative is created by combining members' property shares (Civil Code of the Russian Federation: Part 1, 1994, paragraph 2 of article 123). Secondly, members of a cooperative, taking, although not always frequent, personal participation in the activities of the corporation, have a legitimate interest in deciding on the distribution of profits among themselves, and accordingly the size of their share contribution, as well as in obtaining other material benefits (RF Law, 1992, part 21, article 1, paragraphs 5, 6, part 2, article 4, part 7, 9, article 5, parts 4-6, 9, article 11, article 24). Thirdly, the consumer cooperative has a structure of governing bodies, strictly defined by law. In addition, economic studies show that consumer cooperatives are important in the development of entrepreneurial structures in many countries of the world (Lutfullin & Krasnov, 2014).

Thus, the conducted legal and economic-legal analysis shows that each type of cooperative has its own characteristics, both from the point of view of legal status and from the standpoint of the economic purpose of using such legal forms by participants in economic relations in Russia and abroad. Moreover, even a strict classification of cooperatives as associations of individuals or associations of capital will not be able to unequivocally choose the optimal management model and determine the appropriate mechanism to support the viability of this model. We believe that the legal nature of the cooperative form of business organization is an important but not decisive element in deciding on measures to overcome

the dying of cooperatives. Based on the practical experience of corporate governance, the search for a solution seems to be more effective in improving the organization of activities that are mediated in the legal sense by corporate governance procedures. Such procedures have been developed and optimized in relation to business companies, which gives hope for the possibility of choosing the most acceptable of them and adapting to the legal nature of cooperatives.

5.2. Application of instruments of the institute of transactions with interest in overcoming the problem of degeneration of cooperatives

The intermediate position of cooperative organizational forms between associations of individuals and associations of capital allows us to talk about the formation of a two-component factor of sustainability, socio-psychological, the basis of which is the personally motivated approach of members of cooperatives, that is, corporate governance entities. Therefore, it is necessary to formulate rules aimed at preventing conflicts of interest. The quintessence of exacerbating conflicts of interest in corporations is concentrated in the institution of transactions with interest. In cooperative organizational and legal forms, the relevance of this institution is no less than for business companies, but is still not in demand for reasons that are inexplicable to us. A fragmented reference to the rules on related-party transactions is contained in part 4 - 8 of art. 38 of Russian Federation Law, (RF Law, 1995a), Art. 16 of RF Law (RF Law, 2009b). In addition, rather abstract recommendations of a recommendatory nature regarding the procedure for transactions with interested parties in credit consumer cooperatives are contained in part 4.5 of the Basic Standard on Credit Consumer Cooperative Corporate Governance (Basic Standard on Credit Consumer Cooperative Corporate Governance, 2017), adopted by the Bank of Russia. The latest novelties in the provisions of the Law on Production Cooperation were introduced by the Russian FL (2009a) and were devoted to contesting conflicts of interest concluded on behalf of the cooperative. No changes were made to the similar rules of the Federal Law "On Credit Cooperation" at all.

The Institute for the Approval of Interested Party Transactions ensures the stability of a legal entity by protecting the interests of members (participants). Approval or disapproval prevents corruption, prevents the withdrawal of assets from the organization, the conclusion of transactions with counterparties on unfavorable conditions, etc. In foreign law and order, the legal regulation of conflicts of interest transactions in cooperatives is given significant attention (Marin, 2016; Fried, Kamar & Yafeh, 2018). In view of the above, rules on transactions with interest in cooperative organizations will undoubtedly require updating, taking into account the current legislation on business companies and the practice of its application, harmonization with the new edition of part one of the Civil Code of the Russian Federation.

5.3. Realization of the results obtained, allowing to ensure the sustainability of the cooperatives, by introducing the developed proposals into the Draft Federal Law "On Cooperatives" dated 03.03.2017, No. 02/04 / 03-17 / 00063162

The rules for concluding and contesting transactions by cooperative organizations are significantly outdated and require harmonization with the Civil Code of the Russian Federation. Internal corporate cooperative procedures should not affect the rights and legitimate interests of third parties.

It is necessary to bring part 8 of Art. 38 of the Law on Agricultural Cooperation and Part 5 of Art. 16 of the Law on Credit Cooperation in accordance with Art. 174 of the Civil Code of the Russian Federation, as well as the abolition of the mandatory preliminary approval of an interested-party transaction and the introduction of a procedure for sending a notice of such a transaction and the consequences of not sending such a legally significant message for further consideration of this legislative proposal in the Draft Federal Law “On Cooperatives” of March 20, 2017. No. 02/04 / 03-17 / 00063162 (Regulatory legal acts: Official site for posting information on the preparation of regulatory legal acts, 2019).

An adjustment of the procedural rules on the redistribution of the burden of proof of the subjective good faith of the counterparty in a transaction from the last (defendant) to the plaintiff is necessary (RF Law, 1995a, paragraph 6, paragraph 8, article 38).

It is necessary to differentiate the rules on contesting major transactions and related party transactions (RF Law, 1995a, part 8 of article 38), because despite the fact that they relate to transactions with a conflict of interest, nevertheless, when constructing rules regarding the recognition of them as invalid, rather, it is assumed that the compositions of invalidity indicated in the Civil Code of the Russian Federation (*lex generalis*) should be taken into account (Civil Code of the Russian Federation: Part 1, 1994, Articles 174, 173. 1).

In view of the complexity of contesting related-party transactions, it seems important to provide rules on the possibility of dealing with a tort claim on behalf of a cooperative with a person who actually determines the activities of the cooperative, or with a member of the cooperative management bodies; in this case, one should be guided by the approaches developed in judicial practice relating to the recovery of losses from persons included in governing bodies.

6. Findings

For the qualification of persons potentially interested in the transaction, only the presence of direct interest matters, while there is no talk of indirect interest (RF Law, 1995a, part 4, article 38; RF Law, 2009b, part 1 of article 16 ; Baitenova, Vasilyeva, Kokhanova, & Solomkin, 2009). In the context of the proposed innovations, the status of persons qualified as controlled and (or) controlling should be normatively determined. From the literal interpretation of Part 1 of Art. 16 of the Law on Credit Cooperation, Part 4 of Art. 38 of the Law on Agricultural Cooperation, it follows that this person can only be a representative. The identified gap in legal regulation makes it possible to conduct malicious loss-making transactions with the participation of beneficiaries and intermediaries, including those who are relatives of persons with a conflict of interest with the cooperative.

The norm on classifying transactions with interest on the basis of an application submitted by at least 10 percent of the members of the cooperative or at least 20 percent of the associate members of the cooperative that the transaction is an interested party transaction (RF Law, 1995a, part 4, article 38) seems redundant, since in this case there is no objective criterion for qualifying a transaction as one in which there is an interest. Consequently, even associate members who do not take personal labor part in the activities of the cooperative are given the opportunity to block any transactions of the cooperative. Moreover, interested associate members are not removed from the application, which jeopardizes the

rights and legitimate interests of the cooperative itself and its “full” members. A side effect is an increase in the transaction costs of the organization.

An imperative norm establishing the obligation to notify a potentially interested person of the board of a credit cooperative (RF Law, 2009b, part 4 of article 16), the general meeting and the audit commission of an agricultural cooperative (RF Law, 1995a, part 5 of article 38) about an interested party transaction, is currently declarative in nature, as it is not provided with a mechanism for implementation. The deadlines for sending such notices, the consequences of the lack of notification to the relevant authorities, as well as the obligation to notify controlling (controlled) legal entities and individual entrepreneurs by such a person have not yet been established. We believe that the lack of notification of the relevant management bodies about an interested party transaction that turned out to be unprofitable for the company should entail the activation of the presumption of loss of the transaction for the cooperative, as provided for by laws on business companies (RF Law, 1998, paragraph 4, clause 6, article .45; RF Law, 1995b, paragraph 1.1, article 84).

We believe that the bodies authorized to approve transactions with potential interest can act in both types of cooperatives only on the board of the cooperative, and if there is no quorum or all board members are persons interested in the transaction, the general meeting of cooperatives should approve such a transaction. Since paragraph 2 of Art. h. 3 tbsp. 13, 106.5 of RF Law (RF Law, 1992) contain rules on the exclusion of a member of a cooperative, one of the forms of liability of a member of a cooperative for an interested party transaction is logical and its exclusion from a cooperation for failure to fulfill obligations or causing substantial harm to it, which should be indicated in the relevant provisions of laws; at the same time, it is important to take into account the positions of the higher courts on this issue (Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation, 2012).

We note the importance of providing an annual report to the meeting of members of the cooperative, which would contain information on all transactions and the voting results on the issue of consent to their completion by the cooperative, which will ensure effective monitoring of the activities of members of the cooperative’s governing bodies. In this regard, the legislative experience of the United States is interesting, where a draft law on amending the annual report on concluded agreements to members of the condominiums and housing cooperatives management council was reviewed recently (Assembly Bill A8261A: The New York State Senate, 2018; Habitat Magazine, 2018).

7. Conclusion

Cooperatives play an important role in the development of the economies of many countries. Both consumer and production cooperatives are an effective tool to counteract unemployment and ensure the basic needs of the population. At the same time, cooperative organizational forms require substantial state support. The solution to the problem of degradation of cooperatives in the Russian legal system and the effectiveness of their activities, among other measures, is seen in the reform of the legislation on related-party transactions, since this institution prevents the withdrawal of assets from a legal entity by "strong" members (member) to the detriment of the interests of shareholders and the organization itself . The legislative proposals set forth in this article will help in the development of a unified Law "On Cooperatives", which is currently underway.

References

- Abova, T. E. (Ed.). (2000). Cooperatives as subjects of civil law. Moscow: Institute of State and Law Russian Academy of Sciences. [in Russ.].
- Assembly Bill A8261A: The New York State Senate. (2018). Retrieved August 01, 2018, from <https://www.nysenate.gov/legislation/bills/2017/a8261/amendment/>
- Baitenova, A. A., Vasilyeva, Yu. N., Kokhanova, M. A., & Solomkin, A. A. (2009). Commentary to the Federal Law of July 18, 2009 N 190-FZ “On Credit Cooperation” (itemized). Retrieved from <http://www.consultant.ru/>. [in Russ.].
- Basic Standard on Credit Consumer Cooperative Corporate Governance. (2017). Retrieved from <http://www.consultant.ru/>. [in Russ.].
- Bystrov, G. (2012). Reforming the Institute of a Cooperative in the Draft Federal Law “On Amendments to the Civil Code of the Russian Federation”. *Legislation and Economics*, 9, 32. [in Russ.].
- Civil Code of the Russian Federation: Part 1. (1994). Received from <http://www.consultant.ru/>. [in Russ.].
- Dolinskaya, V. V. (2018). Economic Activity and Its Types. *Laws of Russia: Experience, Analysis, Practice*, 3, 3-15. [in Russ.].
- Fried, J. M., Kamar, E., & Yafeh, Y. (2018). *The Effect of Minority Veto Rights on Controller Tunneling European Corporate Governance Institute (ECGI)*. Law Working Paper No. 385/2018. Retrieved July 05, 2018, from SSRN: <https://ssrn.com/abstract=3119426>.
- Fronzaglia, T., Guedes, V. G. F., & Santos, E. (2008). The role of agriculture cooperatives interaction with public research on technological change in Brazil”, 5th Meeting of Latin American Cooperative Researchers, pp. 1-21, August 2008. Retrieved from https://www.academia.edu/270045/186-THE_ROLE_OF_AGRICULTURAL_COOPERATIVES_INTERACTION_WITH_PUBLIC_RESEARCH_ON_TECHNOLOGICAL_CHANGE_IN_BRAZIL
- Gongalo, B. M. (Ed.) (2017). Civil law: textbook (vols. 1-2). Vol. 1. (2nd ed.). Moscow: Statute. [in Russ.].
- Habitat Magazine. (2018). Retrieved July 15, 2018, from <https://www.habitatmag.com/Publication-Content/Board-Operations/2017/2017-June/Conflict-of-Interest>.
- Herald of State Registration. (2019). *Russian Legal Entities’ Statistics*. Retrieved from http://www.vestnik-gosreg.ru/info_ul/. [in Russ.].
- Information letter of the Presidium of the Supreme Arbitration Court of the Russian Federation. (2012). Review of the practice of consideration by arbitration courts and disputes having an exception to a participant from a limited liability company. *Bulletin of the Supreme Arbitration Court of the Russian Federation*, 8, August 2012. [in Russ.].
- Karelina, S. A. (2011). Production cooperative in the structure of market economy (problems of legal regulation) (lecture within the framework of the course “Business Law”). *Business Law. Application Business and law in Russia and abroad*, 3, 48. [in Russ.].
- Lutfullin, Yu. R., & Krasnov, A. A. (2014). Retrospective analysis of consumer cooperation as the basis of entrepreneurship in rural areas. *Modern problems of science and education*, 6, 395. [in Russ.].
- Marin, M. (2016). *Organizational Form and Financial Stability: Lessons from Cooperative Banks in the US and UK*. Banking and Finance Law Review. Retrieved July 05, 2018, from SSRN: <https://ssrn.com/abstract=2728106>.
- Orlov, V. G. (2015). Alternatives to capital-oriented corporations under Russian law. In R. W. Hillman, & M. J. Loewenstein (Eds.), *Research Handbook on Partnerships, LLCs and Alternative Forms of Business Organizations* (pp. 412-428). Northampton, Massachusetts, USA: Edward Elgar Publishing.
- Regulatory legal acts: Official site for posting information on the preparation of regulatory legal acts. (2019). *Draft federal law “On Cooperatives”*. Retrieved from <http://regulation.gov.ru/projects/List/AdvancedSearch#npa=63162>. [in Russ.].
- RF Law. (1992). *On Consumer Cooperatives (Consumer Societies, their Unions) in the Russian Federation*. Adopted 19.06.1992 N 3085 (version from 02.07.2013). Rossiyskaya Gazeta, 139, 2. [in Russ.].

- RF Law. (1995a). *On Agricultural Cooperation*. Adopted 08.12.1995 N 193-FZ (version from 04.23.2018). Rossiyskaya Gazeta, 242, 2. [in Russ.].
- RF Law. (1995b). *On Joint-Stock Companies*. Accepted 26.12.1995 N 208-FZ (version from April 15, 2019). Rossiyskaya Gazeta, 248, 29.12.1995.
- RF Law (1998). *On Limited Liability Companies*. Adopted 08.02.1998 N 14-Φ3 (version from 04.23.2018). Rossiyskaya Gazeta, 30, 02.17.1998.
- RF Law. (2009a). *On Amendments to Certain Legislative Acts of the Russian Federation*. Adopted 19.07.2009 N 205-FZ. Retrieved from <http://www.consultant.ru/>. [in Russ.].
- RF Law. (2009b). *On Credit Cooperation*. Adopted 18.07.2009 N 190-FZ (version from 02.08.2019). Rossiyskaya Gazeta, 136, 24.07.2009. [in Russ.].
- Sergeyev, A. P. (Ed.). (2013). *Civil law: textbook (vols. 1-3)*. Vol. 1. Moscow: RG-Press. [in Russ.].
- Shilova, N. P. (2013). Modern legal models of regulation of the creation and activities of cooperatives in foreign countries. *Actual problems of Russian law*, 2(27), 174-181. [in Russ.].
- Shitkina, I. S. (Ed.) (2017). *Corporate law: training course (vols. 1-2)*. Moscow: Statute. [in Russ.].
- Sukhanov, E. A. (2014a). American Corporations in Russian Law (on the new edition of Chapter 4 of the Civil Code of the Russian Federation). *Civil Law Bulletin*, 5, 3-32. [in Russ.].
- Sukhanov, E. A. (2014b). *Comparative Corporate Law*. Moscow: Statute. [in Russ.].