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## ARTICLES / ARTÍCULOS

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# The Legal Nature of the Cooperative's Activity in the Interests of its Members – Remarks Under Polish Law

(La naturaleza jurídica de la actividad de la cooperativa en interés de sus miembros: observaciones en virtud de la legislación polaca)

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**Summary:** I. Introduction. II. The Legal Nature of the Economic Activity of the Cooperative. III. Joint Economic Activity. IV. Conclusions.

**Sumario:** I. Introducción. II. La Naturaleza Jurídica de la Actividad Económica de la Cooperativa. III. Actividad Económica Conjunta. IV. Conclusiones.

**Abstact:** The Author considers the legal nature of the economic, social and cultural activity of the cooperative in Polish law. Considerations are focused on for profit and not for profit forms of economic activity of the cooperative, cooperative's status as an entrepreneur, possibility of conducting activity in the general interest of the society, the formula of joint economic activity of the cooperative and democratic control of members over this activity. Also, the Author analysis the nature of the cooperative transaction in Polish law, including its model of regulation.

**Keywords:** Joint economic activity, cooperative, cooperative transaction, democratic control.

**Resumen:** El autor considera la naturaleza jurídica de la actividad económica, social y cultural de la cooperativa en el derecho polaco. Las consideraciones se centran en las formas lucrativas y no lucrativas de la actividad económica de la cooperativa, la condición de empresaria de la cooperativa, la posibilidad de realizar actividades en el interés general de la sociedad, la fórmula de actividad económica conjunta de la cooperativa y el control democrático de los miembros sobre esta actividad. Además, el autor analiza la natura-

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leza de la transacción cooperativa en el derecho polaco, incluido su modelo de regulación.

**Palabras clave:** Actividad económica conjunta, cooperativa, transacción cooperativa, control democrático.

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## I. Introduction

The legal definition of a cooperative, which in Polish law is contained in the article 1 paragraph 1 of the 16<sup>th</sup> of September 1982 Cooperative Act<sup>2</sup> (CA), expresses the feature of the economic activity of this legal person in the form of conducting this activity jointly. These feature of the cooperative's activity correlate with the purpose of this legal person. However, in distinguishing a cooperative from other corporate legal persons, the statutory specificity of the economic activity of a cooperative constitutes a category other than its purpose. In Polish law the main purpose of the cooperative is to conduct economic activity in the interest of its members (providing social and cultural needs is the secondary and optional objective of the cooperative)<sup>3</sup>. Joint economic activity is a method of achieving the cooperative's purpose. To identify the specificity of such an activity it is necessary to define its nature and the form of its conduct by the cooperative in the interest of its members. Such considerations are important in determining the differences in the model of economic activity conducted by the cooperative from the activity of other corporate legal persons. These considerations shall: 1) determine the conditions of economic activity of the cooperative according to article 1 paragraph 1 of the CA, 2) indicate legal instruments that result in cooperative's joint economic activity, 3) define members role in the joint economic activity of the cooperative.

## II. The Legal Nature of the Economic Activity of the Cooperative

In Polish law there is not a uniform definition of the economic (business) activity which applies to all of the actions performed by the entrepreneurs (cooperatives, commercial companies or physical persons who perform economic activity). Different definitions concern public business law (article 3 of the 6<sup>th</sup> of March 2018 Entrepreneurs' Law Act<sup>4</sup>–ELA) and tax law, regarding legislations on tax on goods and services and income tax, and also law on the social insurance system. Moreover, Polish law also consists different definitions of an entrepreneur, including the definition of a private law (article 43<sup>1</sup> of the 23<sup>rd</sup> of April 1964 Civil Code<sup>5</sup>–CC), and a public law (article 4 of the ELA).

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<sup>2</sup> Official Journal of Laws 2021, item 648 consolidated text with further changes.

<sup>3</sup> Zakrzewski 2018, 542-543 and Zakrzewski 2005, 49.

<sup>4</sup> Official Journal of Laws 2021, item 162 consolidated text with further changes.

<sup>5</sup> Official Journal of Laws 2020, item 1740 consolidated text with further changes.

However, in both of these cases, the entrepreneur is considered as a person (physical or legal) who performs economic (business) activity. It is agreed that because of the systemic values of the legal system, this economic activity should be understood in compliance with the article 3 of the ELA, i.e. as organized for profit activity performed on one's own behalf and in a consistent manner.

Because cooperatives perform economic activity, they should be considered as entrepreneurs under private and public law. Therefore, for the purpose of identifying the economic activity definition applicable to cooperatives, one should consider the regulation of the article 3 of the ELA. However, this definition does not comply with the nature of cooperatives' activity, because it only defines economic activity as a for profit activity in the interests of the entrepreneur. On the other hand, cooperatives' (entrepreneurs) always perform economic activity in the interest of their members and also this activity may be acted on the not for profit bases, i.e. all of the cooperative's profit is saved and intended for further business activities and not divided between members. The not for profit economic activity is performed by credit unions, social cooperatives and housing cooperatives. Accordingly with the provisions of the 5<sup>th</sup> of November 2009 Credit Unions Act<sup>6</sup> (CUA), 27<sup>th</sup> of April 2006 Social Cooperatives Act<sup>7</sup> (SCA) and 15<sup>th</sup> of December 2000 Housing Cooperatives Act<sup>8</sup> (HCA) the regulations of the CA applies to credit unions, social cooperatives and housing cooperatives on the *lex specialis derogate legi generali* bases (article 2 of the CUA, article 2 of the SCA and article 1 paragraph 7 of the HCA)<sup>9</sup>.

<sup>6</sup> Official Journal of Laws 2022, item 924 consolidated text.

<sup>7</sup> Official Journal of Laws 2020, item 2085 consolidated text with further changes.

<sup>8</sup> Official Journal of Laws 2021, item 1208 consolidated text.

<sup>9</sup> In Poland the 1<sup>st</sup> title of 1<sup>st</sup> part of the CA (common provisions) contains regulations of *lex generalis* character for all types of cooperatives. The regulation of *lex specialis* character on specific types of cooperatives is included in 2<sup>nd</sup> title of 1<sup>st</sup> part of the CA which governs workers' cooperatives and agricultural cooperatives. Also, the regulation of *lex specialis* character on specific types of cooperatives is included in a number of separate legal acts from CA. These separate acts are:

1. 7<sup>th</sup> of December 2000 Act on the Functioning of Cooperative Banks, their Associations and Affiliating Banks; Official Journal of Laws 2022, item 456 consolidated text with further changes.
2. 15<sup>th</sup> of December 2000 Housing Cooperatives Act.
3. 27<sup>th</sup> of April 2006 Social Cooperatives Act.
4. 22<sup>nd</sup> of July 2006 European Cooperative Society Act; Official Journal of Laws 2018, item 2043 consolidated text with further changes. This act is the implementation of the Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees (Official Journal of the European Union of 18.08.2003, L 207/25).

Therefore, the concept of the economic activity under article 1 paragraph 1 of the CA should be understood wider than under the article 3 of the ELA because it also consists of the for-profit and the not-for-profit activity in the interest of other persons – cooperative members<sup>10</sup>. Both concepts of economic activity – under article 3 of the ELA and article 1 paragraph 1 of the CA – could be understood as activity of an entrepreneur under regulation of article 43<sup>1</sup> of the CC. Therefore, a cooperative is a party to the transactions incrementing its assets and members' acquire benefits accordingly to the provisions on the division of the balance surplus (profit) of the cooperative. These benefits are not provided by the cooperative to its members in kind, as they were acquired in the cooperative's transaction, but in cash. Therefore, members' benefits from conducting business activity by the cooperative in their interest should be considered in an economical manner<sup>11</sup>. These benefits are secured by the member's claim to participate in the division of the cooperative's balance surplus. One has to also remember that a part of cooperative balance surplus should be maintained within the cooperative. This traditional cooperative principle is reflected by article 76 of the CA. According to the provision of this article at least 5% of the cooperative's balance surplus shall be transferred to the cooperative's reserve fund until this fund equals the value of the obligatory share capital<sup>12</sup>. Also, on the grounds of cooperative's general assembly resolution all of the balance surplus can be transferred to the reserve fund. This does not infringe members' rights as the cooperative's general assembly resolution is binding on all members of the cooperative

5. 5<sup>th</sup> of November 2009 Credit Unions Act (see: BIERECKI 2021, 84-110).

6. 4<sup>th</sup> of October 2018 Farmers' Cooperatives Act; Official Journal of Laws 2018, item 2073.

7. 20<sup>th</sup> of February 2015 Renewable Energy Sources Act; Official Journal of Laws 2021, item 610 consolidated text with further changes. This act contains regulation on energy cooperatives (see: BIERECKI 2021, 7-16).

8. 22<sup>nd</sup> March 1989 Craft Act; Official Journal of Laws 2020, item 2159 consolidated text with further changes. This act contains regulation on crafts cooperatives.

<sup>10</sup> Zakrzewski 2014, 44.

<sup>11</sup> Bierecki 2020, 31.

<sup>12</sup> There are not however legal provisions on the minimum value of the share capital like in the case of the European Cooperative Society (article 3 paragraph 2 of the Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) – hereinafter: SCER), or like in German cooperative law (MÜNKER 2016, 100). The value of the obligatory share capital is a derivative of the number of the cooperative's members who are obligated to declare at least the number of shares required by the articles of association. The value of the single share should also be stipulated in the cooperative's articles of association (article 5 paragraph 1 point 3 of the CA). BIERECKI 2021, 5-23.

in accordance with the principle of democracy and with reference to execution of members right to vote (article 42 paragraph 1 of the CA). In cooperatives which obligatory make transfer of balance surplus to the reserve fund (performing not for profit activity) members benefits from cooperative's economic activity are reflected in cooperative transactions that are provided by the cooperative because of an improvement of its economics. In the case of credit unions this improves member's right to financial services provided by the credit union which are possible due to strengthening cooperative capital by deducting all of the balance surplus to the credit union's statutory funds. In the case of housing cooperatives, members benefit in a title to a flat, dwelling or habitation that only cooperative member can acquire by a cooperative transaction<sup>13</sup>. In social cooperatives, members may benefit by rise in pay in the cooperative employment contract which is a specific type of contract on employment due to its regulation by both cooperative law and labor law.

Moreover, the cooperative can perform social, educational and cultural activities for their members and their communities if the cooperative's articles of association provides the possibility of such a activity (article 1 paragraph 2 of the CA). The provision of article 1 paragraph 2 of the CA complies with the 7<sup>th</sup> Cooperative Principle-Concern for Community<sup>14</sup>. However, nowadays it is considered whether a cooperative can perform its activity —not only social, educational and cultural but also economic— in the interest of the society and still comply with the 7<sup>th</sup> Cooperative Principle<sup>15</sup>. Such a possibility is allowed under

<sup>13</sup> Bierecki 2020, 31.

<sup>14</sup> The International Cooperative Principles are recognized by the International Cooperative Alliance (ICA) as essential features of a cooperative. These principles are: 1) voluntary and open membership, 2) democratic member control, 3) member economic participation, 4) autonomy and independence, 5) education, training and information, 6) cooperation among cooperatives, 7) concern for community. History of the International Cooperative Principles dates back to principles of cooperative founded in Rochdale, England in 1844 (BIRCHALL 1997, 3-11). The International Cooperatives Principles are included in article 7 of the ICA Bylaws (available at: <https://www.ica.coop/en/media/library/governance-materials/ica-bylaws> [access on 8<sup>th</sup> of May 2022]).

<sup>15</sup> See: HIEZ 2018, 93-110 and MÜNKER 2016, 36-75. Accordingly with the 7<sup>th</sup> Cooperative Principle, i.e. concern for community, cooperatives work for sustainable development of their communities through policies approved by their members. Therefore, sustainable development is one of the an elementary goals of the cooperative. One can notice that the 7<sup>th</sup> Cooperative Principle complies with the United Nations Development Program Sustainable Development Goals Impact Standards for Enterprise (see: <https://sdgimpact.undp.org/enterprise.html> [access on 8<sup>th</sup> of May 2022]). In fact, the 7<sup>th</sup> Cooperative Principle was agreed in 1995 in the context of the international debate in the UN about sustainable development goals (see: CRACOGNA 2015, 86).

Portuguese law for social solidarity cooperatives<sup>16</sup>. Likewise, in French law one can find a collective interest cooperative society (*la société coopérative d'intérêt collectif*) which can provide goods and services to people who are not members of the cooperative (art. 19-6 **Loi n.º 47-1775 du 10 septembre 1947 portant statut de la coopération**<sup>17</sup>). The purpose of such a cooperative is to produce or deliver goods and services of common interest that are of a social utility nature. Goods and services can be provided by such cooperatives as part of international solidarity and development aid projects (art. 19-5 *Loi n.º 47-1775*). **Also in European law a cooperative can perform activity for the benefit of non-members as a SCE (*Societas Cooperativa Europaea*) may extend the benefits of its activities to non-members or allow them to participate in its business if its articles of association provides this possibility (article 1 paragraph 4 of the SCER). Likewise in Belgian law in which the definition of a cooperative reflects the SCE definition, a cooperative can satisfy the needs of third parties and develop their economic and social activity**<sup>18</sup>. **This possibility results directly from the article 6:1 paragraph 1 of the *Code des sociétés et des associations***<sup>19</sup> and does not require relevant provisions of cooperative's articles of association. Moreover, one should notice the regulation of the general interest cooperative included in the Principles of European Cooperative Law which were developed as a model of cooperative legislation<sup>20</sup>. Section 1.1. paragraph 4 of these Principles provides for the establishment of the cooperative with the aim of pursuing activities primarily in the general public interest, namely the general interest cooperative.

In Polish law this possibility is limited only to social cooperatives. The social cooperative, under provisions of its articles of association, can perform activities for the benefit of its members, its employees (who may not be members of the social cooperative), and their members and employees communities. Moreover, the social cooperative, also under provisions of its articles of association, can perform socially useful activity in the sphere of public tasks (article 2 paragraph 3 of the SCA). The socially useful activity in the sphere of public tasks is not limited only to members of the social cooperative or its employees or their

<sup>16</sup> Meira 2019, 57-71.

<sup>17</sup> Available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000684004/> [access on 8<sup>th</sup> of May 2022].

<sup>18</sup> Tilquin and Bernaerts 2020, 5-6.

<sup>19</sup> Available at [www.ejustice.just.fgov.be](http://www.ejustice.just.fgov.be) [access on 8<sup>th</sup> of May 2022].

<sup>20</sup> Fici 2017, 19, 27-32.



communities. This activity can be performed by the social cooperative simultaneously to the economic activity. The socially useful activity in the sphere of public tasks can be performed by the social cooperative for fees and not be considered as an economic activity unless fees are not higher than costs of the socially useful activity or employee's yearly salary for working for the social cooperative on socially useful activity is 3 times higher than average salary.

### III. Joint Economic Activity

Article 1 paragraph 1 of the CA states that a cooperative performs joint economic activity. However, this provision does not indicate that the cooperative's economic activity is performed jointly with its members. On the other hand, legal provisions which concern workers' cooperatives states that these cooperatives conduct economic activity based on the personal work of its members (article 181 of the CA). Likewise, legal provisions on social cooperatives states that these cooperatives perform their economic activity on the basis of the personal work of their members and employees (article 2 of the SCA). These legal provisions on workers' cooperatives and social cooperatives are of *lex specialis* character in relation to article 1 paragraph 1 of the CA (*lex generalis*). Interpretation of articles 1 paragraph 1 and 181 of the CA and 2 of the SCA clarifies that the joint nature of an economic activity results from the participation of its members in it (and also employees as in the case of social cooperatives). This thesis should not be limited only to workers' and social cooperatives even though provisions on other types of cooperatives do not *expressis verbis* indicate the form of members' participation in the cooperative economic activity. However, the common ground for joint economic activity by any type of a cooperative is the cooperative transaction (*esp. actos cooperativos, germ. Zweckgeschäft*)<sup>21</sup>. Provisions of this type of an agreement between a cooperative and its member reflect the specificity of joint economic activity of the cooperative and its members and also clarify the consumer, producer or workers' type of the cooperative<sup>22</sup>.

Joint economic activity consists in the consensual way of fulfilling the purpose of the cooperative by this type of a legal person and its members, namely by concluding cooperative transactions<sup>23</sup>. These

<sup>21</sup> Fici 2017, 40-45 and Münker 2016, 6, 17.

<sup>22</sup> Fici 2013, 24

<sup>23</sup> Bierecki 2021, 108-110.

transactions may be concluded by the cooperative only with its members, creating a relationship separate and derived from the membership (article 18 paragraph 7 of the CA). Provisions of cooperative transactions are related to member's benefits from the performance by the cooperative of its statutory activity (article 18 paragraph 2 point 6 of the CA). These can be contracts obliging the cooperative to provide services or the goods to be delivered by the cooperative or by a member (in consumer and producer cooperatives), as well as contracts which constitute the basis for the performance of work by members of the cooperative (cooperative employment contract in workers' cooperative and social cooperative). In housing cooperatives, cooperative transactions are the basis of premises usage of members. A cooperative transaction with a housing cooperative constitutes a member's right to an apartment or a house. In credit unions, cooperative transactions are basis for loans, account management or other financial services. However, it should be noted that in Polish law cooperatives transactions are not basis for conducting joint economic activity in all types of cooperatives. Namely, in agricultural production cooperatives members' work is performed solely on the basis of a membership relationship in the cooperative (article 138 of the CA). However, in other type of a cooperative which concentrates its economic activity in the rural section of the economy, namely farmers' cooperative and agricultural service cooperatives, cooperative transactions are the basis of delivering goods by the members. Agricultural production cooperatives are workers' cooperatives, farmers' cooperatives are producers cooperatives and agricultural service cooperatives are consumer cooperatives.

Therefore, cooperative transactions concerns user members of the cooperative. Investor members who contribute to the cooperative only by cash and enter the cooperative to obtain return on capital<sup>24</sup> do not conduct joint economic activity with the cooperative. Investor members status varies in different cooperative legislations worldwide<sup>25</sup>. In Poland this type of membership has not been introduced yet. Currently this possibility is regarded in credit unions but only for legal persons. However, under article 1 paragraph 1 of the CA, the formula of joint activity in the form of concluding cooperative transactions and working for the cooperative would exclude the possibility of recognizing investor members as participants to the cooperative's economic activity. In my

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<sup>24</sup> Fici 2013, 48.

<sup>25</sup> Kober 2010, 37-49 and Bierecki 2019, 38-40.

opinion, this thesis complies with remarks of the Court of Justice of the European Union (CJEU) made in thesis 56 to 61 of the judgment of 8<sup>th</sup> of September 2011 (joined cases C-78/08 to C-80/08, *Paint Graphos et.*, EU:C:2011:550). In this judgement, the CJEU indicated that the cooperative is set up by members to concentrate their economic potential through contributing members' own funds and through transactions with the cooperative. Such a goal of a cooperative, which applies only to its members, does not correspond with the involvement of external investors interested only in high return on investment. The mutual benefit of members results from the possibility for users, customers or suppliers to derive different benefits from their services, which differ depending on the way they participate in the activities of the cooperative. Therefore, the CJEU underlined the relevance of member's activity through transaction with the cooperative and indicated that the benefits of investors to the cooperative are restricted.

It should be also noted that in European law, cooperative transactions are explicitly defined as leading to the achievement of the cooperative's purpose. Pursuant to the SCER, the achievement of the SCE's purpose—in the form of meeting the needs of its members, supporting their economic or social activities—takes place, in particular, by concluding agreements with members for the supply of goods or services or by performing work for the SCE (article 1 paragraph 3 of the SCER). A similar situation occurs in Belgian law. The *Code des sociétés et des associations* defines a cooperative by reflecting the definition of the purpose of the SCE. Also under Belgian law, the goal of a cooperative to meet the needs of its members and to develop their economic or social activity is achieved by concluding contracts for the supply of goods, provision of services or performance of work as part of the activities of the cooperative (article 6:1 paragraph 1 of the *Code des sociétés et des associations*).

Under article 1 paragraph 1 of the CA, the joint nature concerns only economic activity of the cooperative and members. However, the social and cultural activity of the cooperative should also be considered as joint activity (article 1 paragraph 2 of the CA). In the field of social and cultural activity, members only receive benefits from the cooperative. They do not provide increments to the cooperative as in the case of cooperative transactions. However, in the case of workers' cooperatives and social cooperatives, the social and cultural activity can be performed on the bases of work of members, provided under the cooperative transaction, namely the cooperative employment contract. This situation also occurs when the social cooperative performs socially useful activity in the sphere of public tasks (article 2 paragraph 3 of the

SCA). Although the socially useful activity in the sphere of public tasks is not limited only to members of the social cooperative or its employees or their communities, it can be performed by the social cooperative on the bases of members' work provided under the cooperative employment contracts.

The nature of cooperative transactions and legal relationships which arise from them is also determined in Polish law by the specific method of regulation. These contracts and relationships are regulated by statute law and also by the cooperative's articles of association (article 18 paragraph 7 of the CA). Therefore, provisions of the cooperative transaction concluded for the conduct of joint economic activity of the cooperative cannot be inconsistent with the content of the provisions of the cooperative's articles of association. This situation also gives the cooperative the possibility to unilaterally regulate the contract by changing the provisions of its articles of association. Such a change requires the general assembly resolution adopted by a majority of 2/3 votes (article 12a paragraph 1 of the CA). Also, the other way to unilaterally regulate the contract by the cooperative is to adopt a resolution which would determine rights and obligations of the parties to the cooperative transaction. This is possible when the articles of association provide that matters relating to performance of the contract can be specified by the general assembly resolution. Such resolutions are binding to the members as well as members of the cooperative's board of directors and supervisory board (article 42 paragraph 1 of the CA). This means that a member who is a party to a cooperative transaction may vote on the general assembly resolution and thus on the amendment of the regulation of the transaction. This situation indicates that the cooperative's joint economic activity is democratically controlled by its members<sup>26</sup>. Also, in the case when joint economic activity is conducted on the bases of the membership (agricultural production cooperatives) members can democratically control this activity by general assembly resolutions which can also concern rights and obligations which derive from the membership. Also this type of reso-

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<sup>26</sup> Rule of democratic control of the cooperative exists in Polish law as in primary cooperatives the principle of one member-one vote applies. Exception to this rule exist in farmers' cooperatives. Articles of association of the farmers' cooperative which is a primary cooperative can deviate from the one member-one vote rule for the benefit of other rule of voting on the general assembly (article 5 point 10 of 4th of October 2018 Farmers' Cooperatives Act). This possibility exists in farmers' cooperatives of physical and legal persons and of cooperatives of only legal persons. However, the deviation from the one member-one vote principle is possible only against members who are legal persons. BIERECKI 2021, 83-93 and BIERECKI 2022, 272.

lutions are bidding to all cooperative's members and members of the cooperative's board of directors and supervisory board (article 42 paragraph 1 of the CA).

#### IV. Conclusions

The conditions of economic activity of the cooperative in Polish law should be considered wider than in the case of other types of legal persons. Depending on the type, cooperatives perform for profit or non for profit activity and both of these are considered as economic activity under the legal definition of a cooperative (article 1 paragraph 1 of the CA). Both of these concepts of economic activity could be understood as activity of an entrepreneur under regulation of article 43<sup>1</sup> of the CC. The cooperative's economic activity is performed in the interest of its members who are the ultimate beneficiaries of its results. However, even in the case of for profit economic activity, a part of the profit should not be divided between members but maintain in the cooperative. In the case of not for profit economic activity all of the profit should be kept in the cooperative.

Cooperatives shall perform its economic activity in the sole interest of its members. Under Polish law cooperatives can not act for or in the interest of third parties or the society. Only social cooperatives, under provisions of its articles of association, can perform activities for the benefit of its employees (who may not be members of the social cooperative), their members and employees communities. Moreover, social cooperatives, again under its articles of association, can perform socially useful activity in the sphere of public tasks. This activity is not limited only to members of the social cooperative or its employees or their communities.

In the joint economic activity of the cooperative members has an essential role of concluding cooperative transactions or working on the basis of a membership relationship in the cooperative. The joint economic activity is a consensual way of fulfilling the purpose of the cooperative. It is conducted with the cooperative by user members who conclude cooperative transactions or perform work and not by investing members. Cooperative transactions and membership are regulated by the provisions of the cooperative's articles of association. Therefore, the members can democratically control cooperative' economic activity by resolutions of its general assembly which amend the articles of association or directly indicate matters related to performance of the contract.

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