

If a Cooperative Bank can incorporate a bank existing in the form of a joint stock corporation

1. – By Cooperative Banks, we mean both credit societies, which are subject to the special discipline of article 29-30 of the Consolidated Body of Law no. 385 of 1993 and those regulated by articles 33-37 of the banking law. Both these banks have in common the per capita votes of the members, the clause of approval and the limit of their shareholding possession.

In Italy, credit societies had as their pioneer Luigi Luzzati and in general are larger than cooperative credit societies.

These are common in various countries, such as Germany, France and even Canada and Morocco.

They come under the Confédération du Crédit Populaire, which has its head office in Paris.

The cooperative banks are disciplined by articles 33-37 Consolidated Body of Law indicated and are distinguished from credit societies because, as well as the previous characteristics, they have to allocate a considerable share of their annual net profits to insurance funds.

In general they are smaller than the former and are particularly widespread in German-Austrian countries.

The name «banca popolare» in the company name is not always synonymous with the popular cooperative bank, regulated by articles 29/32 of the 1993 Consolidated Body of Law, because at times this only represents the name and distinguishes its historic origin, because in time it has been transformed from a cooperative into a joint stock corporation.

These banks are, to all intents and purposes, subject to the discipline of articles 23-25. 24-57 of the Civil Code and have nothing to do with the previously mentioned banks and their limitations.

The problem we are dealing with here is whether a real credit society can incorporate on which has, on the other hand, the form and legal structure of a joint stock corporation.

Under law previously in force, the problems was not disciplined by the law which did not contain any limitations or prohibitions in this regard.

At the time of the law 127/1971, of an incorporation of a Bank, incorporated in the form of a joint stock company into a Cooperate credit society, OPPO, *Scritti Giuridici*, II, Padua, 1994; GALGANO, *Le società*, p. 474; MARASÀ in *Banca e borsa*, 1997, I, 2503; SERRA, *La trasformazione e la fusione delle società*, in *Trattato* edited by Rescigno, Turin, 1985, XVII, p. 315; TANTINI, *Trasformazione e fusione delle società*, in *Trattato* edited by Galgano, CAMPOBASSO, *Diritto commerciale, 2, Diritto delle società*, 1955, p. 543, DI SABATO, *Manuale delle società*, Turin 1995, p. 805 pronounced themselves against this. However, on the sense that the incorporation had to be approved unanimously by the members, COTTINO, *Diritto commerciale*. Padua, 1994, p. 866; CABRAS, *Le trasformazioni*, in *Trattato delle società per azioni* by Colombo and Portale, Turin, vol, VII, p. 1477.

Case law on the merits oscillated between the absolute rejection (Court of Naples, 17th July 1989 in Rep. Foro it., 90, *Società* 878) and the need for the consensus of all the members (Court of Verona, 11th June 1985, in *Foro it.*, 1986, no. 2316).

In the absence of a contrary provision in the law, many years ago there were some examples of incorporation of joint stock Banks into cooperative credit societies. These were those of the joint stock company Credito Varesino, previously belonging top the Ambrosiano-Calvi group into the Banca Popolare di Bergamo or the joint stock company Industria Gallaratese into the Banca Popolare di Lodi.

2. – This last incorporation which took place on 8th June 1992 under law 127/1971, was judged admissible, although the orientation to the contrary of legal literature and case law of the Supreme Court of Cassation in its decision of 14th July 1977 no. 6349 in *Foro it.*, 1998, I, 558.

However, the decision in its motivation under point 3.2 on page 561 specified that the decision referred exclusively to the case in point as it had occurred under the old law 127/71 and that it did not therefore apply to the cases which occurred after article 31, Consolidated Body of Law 385/93 came into force.

The motivation of the decision indicated, against the reference by the plaintiffs to legal literature and case law on the merits under the previous law as well as to art. 31 of Consolidated Body of Law 385/93, that wanted to have the meaning of an authentic interpretation of the previous law, rejected the retroactive applicability of art. 31 of the new Banking Law.

The decision then confirmed the full applicability, in all its strictness, of art. 31 subsequent to the coming into force of the new law.

The decision textually stated «the verification of the legitimacy and therefore of the validity of the resolution of incorporation must be made with reference to the laws in force at the time in which it was adopted (8th June 1992) and therefore provisions issued at a later date (such as those of

Law Decree no. 481 of 14th December 1992 and Law Decree no. 305 of 1st September) cannot for that purpose take on any significance».

In short, the decision of the Supreme Court confirmed that its *dictum* was regulated by the criterion of *tempus regit actum* and therefore law 385/93 applied only starting from when it came into force. It stated again that the incorporation of a bank existing as a joint stock corporation into a co-operate credit society cannot be hypothesized.

From the point of view of the reform of company law, the same conclusion must be reached.

Article 9 of the rules of enactment and transition, section B N of the table of the Legislative Decree approved by the Cabinet on 29th-30th September 2002 on the reform of company law states under article 223 *terdecies* «the rules in force on the date the law enacted under delegated powers continue to apply to the credit societies and agricultural consortia».

The problem could perhaps have been raised in a different way if, for credit societies a different discipline had been adopted that had accepted for them the statute of joint stock corporations of special law, with rules other than those existing.