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Special issue on taxation

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TABLE OF CONTENTS

Foreword /Editorial

Special Section: Cooperatives and Contemporary Issues in Tax Law and Policy

Legislation

Court Cases

-

Book Reviews and Announcement of Publications

-

Events

Practicioners' Corner

-

Interviews

Foreword/Editorial

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- **Introduction**

The article section of this issue of the International Journal of Cooperative Law (IJCL) is entirely dedicated to the taxation of cooperatives.

Currently, 12% of the world's population is a member of a cooperative, and 10% of the world's employed population works in cooperatives. The global turnover of the cooperatives amounts to 2.14 trillion US dollars [2]. These data show the importance of cooperatives in the world economy. Cooperatives are part of what is known as the Social Economy. The concept of Social Economy, as Moulaert and Ailenei (2005) point out, is very broad and encompasses historical, institutional and local contexts, and is presented as a mix between the market, the State and civil society. These authors indicate that the Social Economy is a reaction to market failures and state intervention, which triggered socioeconomic crises. To face these crises, collective organizations were created based on social movements driven by solidarity and reciprocity.

Cooperatives have a legal regime that differs from that of commercial, capital-based companies. This means that they work differently, namely according to the cooperative principles set forth by the International Cooperative Alliance. Fici (2012, p.8) indicates that these principles are greatly relevant for the analysis of the identity of cooperatives, since they are even mentioned in some national cooperative laws, such as the Spanish, Portuguese or Maltese law. Likewise, a number of regional cooperative laws refer to these principles. Indeed, these cooperative principles show the interest that cooperatives have in their environment, since they are principles that put the interests of the person in the center, not the business profit.

Therefore, the question arises whether cooperatives should be taxed differently.

The aim of this Special Issue of the IJCL is to improve the knowledge on how cooperatives are taxed in different countries around the world from a comparative law perspective. It is to help find answers to the following questions, among others: Where there is no specific tax regime for cooperatives, what tax regime applies? What are the limits of specific tax treatment or incentives for cooperatives? Why should cooperatives have a specific tax regime that mirrors their special characteristics?

For many reasons the taxation of cooperatives is a complex and controversial issue. For protagonists of cooperatives, a special tax treatment for cooperatives is simply fair; opponents claim it distorting competition. Already debated in the 19th century, the question is still alive. The recent (2021) “Action plan for the social economy” published by the European

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[2] Data base from https://www.ica.coop/es/cooperativas/datos-y-cifras, Consultation date September 21, 2021.

Commission (Action plan) [3] considers the taxation of cooperatives explicitly as a point of concern. In such a context, it must therefore not come as a surprise that the IJCL dedicates its first thematic issue to this important question. Compared to other issues of cooperative law transcending national borders the literature on the taxation of cooperatives abounds. But no synthetic study has been published so far. This special issue of the IJCL does not pretend to be such a study and it cannot provide an exhaustive overview of the taxation of cooperatives worldwide, but it covers most continents and it gathers analyses from most of the legal traditions.

Some countries apply a specific tax regime to cooperatives, one that is adapted to their legal structure (see Alguacil, 2003), in order not to discriminate cooperatives negatively as compared to other legal entities. However, other countries do not take into account the peculiarities of cooperatives and they apply the general rules on the taxation of legal persons to cooperatives as well.

The European Commission questioned the specific tax regime of cooperatives in countries such as Spain, Italy and France, arguing that this regime could be considered unlawful state aid.

The Italian case is particularly noteworthy. The European Court of Justice (ECJ) ruled on it in 2011. In the procedure leading to the ruling the Attorney General pointed out that the special tax measures for cooperatives would not constitute state aid inasmuch as they applied to cooperatives that follow the cooperative principles, and specifically, the principle of mutuality. According to this ruling, specific tax measures do not constitute unlawful state aid if and when they apply to cooperatives which *"are governed by particular operating principles that clearly differentiate them from other economic operators."*

In the Action plan, which includes cooperatives, the EU Commission foresees to adopt a recommendation to member states dealing with both state aid and taxation (p.7). Interestingly, the approach of this new document seems to dramatically reverse former communications which, while referring to the major conclusions of the ECJ in the case concerning Italy - more by necessity than by conviction - appeared to be restrictive. The Action plan appears much more pro-active, calling on the member states to use all possible margin of appreciation when adopting tax measures or supportive public policies in favour of the social economy.

- **Contributions to this special issue**

The 15 articles in this special issue of the IJCL enrich readers understanding of various aspects of the tax treatment of cooperatives in a great number of countries around the world.

The opening article on comparative law provides a brief review of the current regulations governing the life of cooperatives in various countries around the world, especially those which are not dealt with in the following articles. The article is written by **María Amparo Grau Ruiz** under the title "THE TIMELINESS OF A REVISION OF THE TAX STATUS

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: building an economy that works for people: an action plan for the social economy (COM/2021/778 final).

OF COOPERATIVES BASED ON A COMPARATIVE LAW ANALYSIS IN THE LIGHT OF THE SUSTAINABLE DEVELOPMENT GOALS". It is based on the answers the author received to a questionnaire from experts in a number of countries.

Thereafter **Juan José Hinojosa Torralvo** produces a paper entitled "EUROPEAN TAXATION OF COOPERATIVES: AN EXAMINATION OF THE POSSIBILITIES OFFERED BY THE NEW CONCEPT OF LIMITED PROFITABILITY". The study analyses the contribution of European law to the construction of social cooperativism, emphasizing the taxation of cooperative societies and the role that the concept of "limited profitability" can play in this respect.

The following article, entitled "THE TAXATION OF CO-OPERATIVES' INCOME: ANALYSIS OF ITS RATIONALE", is signed by **Nina Aguiar**. She studies the taxation of the income of cooperatives with the aim of laying some conceptual bases on which the issue should be analyzed, with special emphasis on the definition of what should be considered cooperative income for tax purposes and on the justification of a favorable cooperative tax regime.

Then **Marina Aguilar Rubio** exposes a paper entitled "MODELS FOR DIRECT TAXATION OF COOPERATIVES UNDER COMPARATIVE LAW". She analyzes the special taxation of cooperatives from two points of view. Firstly, from the point of view that cooperatives fulfill a social function and contribute "in kind" to the social group, which must be honored with a special tax treatment that includes tax benefits. Secondly, a special tax regime is justified because of the reasons why cooperatives are established, their traditional principles and their legal structure, which differentiates them from conventional capital companies.

After these papers introducing us to the main features of the tax treatment of cooperatives, there is a string of academic works describing the tax regime of cooperatives in specific countries, starting with the one by **Sofia Arana-Landin**, entitled "US WORKER COOPERATIVES: A DIRE NEED FOR A PROFOUND REVISION OF THEIR TAX REGULATION AT A FEDERAL LEVEL". In it, the author offers an overview of the US tax system, focusing on the income taxation of cooperatives. This system differs from the rest of the countries since different tax provisions are applied depending on the legal and fiscal form chosen. In addition, the paper delves into the regulation of cooperatives, analyzing their low resilience due to the lack of adequate regulations and suggesting a different approach.

The article written by **Daniel Francisco Nagao Menezes** and **Manuel García Jiménez** under the title "THE COOPERATIVE ACT AND ITS TAXATION IN LATIN AMERICAN COUNTRIES" introduces us to several papers on the tax treatment of cooperatives in Latin America, opening a general perspective. The article reviews the legal concept of the “acto cooperativo/cooperative act” and analyzes this specific legal figure, found in almost all Latin American countries, pointing out that this figure is the central element of cooperative societies. The most relevant practical implication of the study is the proposal for change in the articulation of fiscal stimulus and promotion policies.

The article entitled "THE "MONOTRIBUTO" REGIME AND THE WORKER COOPERATIVES IN ARGENTINA : THE DIVERSIFICATION OF A FISCAL POLICY" by **Miguel Agustin Torres** describes, from a legal perspective, the "monotributo", which is

the main tax option that the Argentine tax system offers to the associates of worker cooperatives. Torres describes the main changes it has undergone since its implementation in 1998 with the creation of the "Simplified Regime for Small Taxpayers" by National Law 24977. He demonstrates that it was created with exclusively fiscal and economic objectives and then went through a process that positioned it as a wide-ranging public service policy that constitutes a useful tool for social inclusion.

Continuing with Latin America, **C. Orestes Rodríguez Musa, C. Orisel Hernández Aguilar** and **Liana Simon Otero** sign the article entitled "THE TAXATION OF THE COOPERATIVES. A PROPOSAL FOR ITS UNIFORM REGULATION IN CUBA". The authors analyze the premises that should guide the unification of the tax regime of Cuban cooperatives, in correspondence with the role constitutionally assigned to them and their identity.

This article is followed by a set of papers focusing on the tax treatment of cooperatives in Europe. The first is entitled "GREEK AGRICULTURAL CO-OPERATIVES: LEGAL CONCEPTS AND TAX LEGISLATION AND TREATMENT", signed by **Michael Fefes** and **Marietta Charitonidou**. In this article, the researchers study Greece's agricultural cooperatives, focusing on their tax treatment. Their study provides valuable insights into the general attitude of the Greek State and its legislature towards the organization and functioning of cooperatives, especially those in the agricultural sector.

Under the title "CRITICAL PROFILES OF THE TREATMENT OF SOCIAL COOPERATIVES IN THE ITALIAN TAX SYSTEM" **Maria Grazia Ortoleva** acquaints us with the situation in Italy. She studies whether social cooperatives that are governed by the Italian Law No. 381 on social cooperatives have been affected in their tax regime by the reform of the third sector since these companies are classified as social enterprises and as companies of the third sector and it is not clear whether that classification will have any consequence for the tax regime that is applied to them. The article also seeks to establish whether the tax regime applicable to social cooperatives is consistent with the role they play within the third sector. As the main practical application, the author proposes that the legislator intervene to "put a little order" in the general tax regime of social cooperatives and eliminates the aporias created by the stratification of legislative provisions and the changes in the regulatory framework concerning third sector entities.

The following article is entitled "COOPERATIVES IN BELGIUM IN THE ERA OF THE CODE OF COMPANIES AND ASSOCIATIONS: CURRENT DYNAMICS AND PROSPECTS FOR TAX LAW AND NON-TAX LAW". It is written by **Sabine Garroy**. This paper studies the tax treatment of cooperatives in Belgium by analyzing the connections between tax and non-tax law with the aim of raising a series of issues that need to be addressed in order to reform the tax system, which, in the opinion of the author, is obsolete.

The last paper on a European country is the one entitled "TRANSCENDENCE OF COOPERATIVES IN SUSTAINABLE SOCIO-ECONOMIC DEVELOPMENT IN THE BASQUE COUNTRY", signed by **Waleska Sigüenza**. This article analyzes the characteristics of the Mondragon Cooperative Corporation (CCM) and its impact on the sustainable socio-economic development of the Basque cooperatives from the perspective of the 2030 Agenda for Sustainable Development (UN2030 Agenda). The results affirm that

cooperatives are in a privileged position to collaborate in the achievement of the SDGs and have been able to adapt and internalize the global goals to their immediate environment.

Two articles are on Asia. The first is by **Santosh Kumar**. His article is entitled "CASE NOTES ON RECENT JUDGEMENTS BY INDIAN COURTS IN CLARIFYING THE NATURE OF CERTAIN ASPECTS OF COOPERATION THROUGH THE PERSPECTIVE OF TAXATION". This paper presents thematic summaries of two recent judgments of the Supreme Court of India and of a judgment of the Madras High Court in Chennai, which refer to cooperatives and taxation legislation in India.

The second article on Asia, entitled "THE TAX TREATMENT OF COOPERATIVES IN KOREA: A LACK OF CONSIDERATION OF COOPERATIVES' STRUCTURAL CHARACTERISTICS AND SUGGESTIONS FOR IMPROVEMENT", is signed by **Kim Yong Jin**. Jin examines the problems of the current tax legislation on cooperatives and proposes a legal reform in line with the cooperative identity since the current legislation divides cooperatives into two categories: non-profit societies that are entitled to tax benefits and for-profit societies that are not. Because of this dichotomy, general cooperatives, which represent the largest number of Korean cooperatives, fall into the latter category and are not entitled to any related tax benefits. This problem gives rise to the double taxation of the surpluses of general cooperatives. The article presents a proposal to amend tax legislation and to reform the legal framework of cooperatives, based on the analysis of the interconnection between the two sets of regulations.

Only one article deals with the situation in Africa. It is authored by **Ajibola Anthony Akanji** and is entitled "LEGISLATION AND THE ADMINISTRATION OF TAXATION OF CO-OPERATIVE SOCIETIES: DRAWING AN INTERSECTION FOR SUSTAINABLE DEVELOPMENT". This paper analyzes Nigerian cooperatives regulated by national and subnational legislation. From a practical point of view, he pleads for the abolition of the current tax exemption regime for Nigerian cooperatives and for its replacement with tax incentives for which he provides some recommendations.

- **Conclusions**

Some partial and provisional conclusions may be drawn. The major one is that there is a close link between the tax treatment of cooperatives and their identity. After more than a century of cooperative thinking, research at the end of the 20th century focused less on conceptual issues and more on technical questions. But, the tax question reminds us that the identity of cooperatives must be highlighted, protected, and, maybe, monitored. Indeed, a special tax treatment must never be a privilege. If cooperatives may legitimately claim for a tax treatment distinct from that of other enterprises, it is only because and to the extent that they can show objectively that they are different. In other words, all the thinking and writing about the cooperative identity remains crucial, provided it is not purely reiterative and a superficial repetition of the existing cooperative principles and values, but rather a reinterpretation and an adaptation to changed and changing circumstances.

The second conclusion we would like to draw is that this special issue of the IJCL is a first element of a better knowledge of the tax treatment of cooperatives and hence a call for further research. All along the articles of this issue the reader will observe a high degree of

diversity of tax legislations. This diversity stems as much from national contexts with their cultural, institutional or political differences as they are related to the differences between cooperatives. Broadly speaking, the special tax treatment of cooperatives may relate to their institutional features or to their activities. Therefore, cooperatives are likely to be submitted to diverse tax provisions. In other words, instead of a homogeneous special tax treatment, a deeper study of cooperative taxation might reveal the need for a special, but in itself diverse tax treatment.

At first glance, this assessment could be seen as an argument that weakens the advocacy for cooperatives, since it establishes distinctions among them, whereas their strength relies on their collective promotion. We would like to oppose two arguments to that fear. Firstly, it is dangerous to deny existing differences and the risk is to lose the special tax treatment for all cooperatives. Secondly, and this is far more optimistic: an homogeneous approach may be strategically right in a defensive position, but it is less fruitful in the case of an offensive one. To detail our opinion, we come back to the EU Commission Action plan. It states:

"Social economy has the potential to reshape the economy post-COVID through inclusive and sustainable economic models leading to a fairer ecological, economic and social transformation (EU Commission, 2021, p .3)."

As cooperatives are part of social economy, this claim is true for cooperatives as well. At least for the EU Commission this is new: the social economy, including cooperatives, has become a possible model to build a new society. What an opportunity, and responsibility! But if we take this quotation seriously, then we cannot imagine that the future society will be fully homogeneous. So, the diversity of cooperative enterprises, as well as the diversity of their tax regimes, become a richness.

Taking this diversity for granted, the role of a legal researcher is to provide critical analyses and above all systematic classifications to justify the differences. May the articles published here serve as first bricks! But the building is not achieved yet. We hope that this issue of the IJCL will stimulate future research.

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Special Section: Cooperatives and other fields of law

THE TIMELINESS OF A REVISION OF THE TAX STATUS OF COOPERATIVES BASED ON A COMPARATIVE LAW ANALYSIS IN THE LIGHT OF SUSTAINABLE DEVELOPMENT GOALS

María Amparo Grau Ruiz[1]

A brief review of the current regulations governing the life of cooperatives in various countries around the world clearly highlights their weight in different societies, more or less advanced, and also the influence of the current regulations on their degree of development in any of these contexts.

Indeed, the sampling recently carried out -thanks to the contributions of experts from several continents who have collaborated in this initiative[2]- gives a glimpse of the constitutional basis for the protection of cooperatives *per se*, either explicitly or implicitly. For, ultimately, the support always lies in solidarity, the very basis of the social contract.

All this, without prejudice to the fact that, through migratory phenomena, these schemes have naturally spread through different civilizations, at different times. They have usually been identified as suitable mechanisms to overcome multiple difficulties encountered, through the realization of economic activities in common benefit.

Additionally, often, it happens that the objectives pursued by these entities, given their varied nature, usually coincide with other constitutionally protected purposes, which makes them doubly deserving of special consideration, where appropriate, by the constituent or the legislator (either in the civil, commercial and/or tax field).

Even before some young constitutions, in some countries there were already rules promoting cooperatives. The truth is that there are no homogeneous patterns for the normative configuration: sometimes there are general substantive laws and other concern specific economic sectors (for example, agriculture, housing...), to which are added tax laws (which, in turn, can also be general or specific). Likewise, in the case of sub-central levels of government, complexity can grow on all these fronts. Ultimately, however, it is not so much the form of the regulatory organization that matters, provided that the distribution of powers is respected, as the clarity and flexibility provided by the legal system as a whole.

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[2] Thank you also to Dr. Andrea Rey Martí for her help in coordinating the reception of the comparative materials that they sent in response to the survey designed with Prof. Dr. Pilar Alguacil Marí.

Structurally, in many legal systems, there is undeniable respect for the role that cooperatives can play, in general, in the construction of the social fabric. Now, moreover, given the critical moment we are going through in terms of health, economic and climatic crises on a global scale, it is appropriate to rethink whether the full potential of this legal institute is really being exploited.

At first glance, it is relatively simple to realize the great social usefulness of this legal form for carrying out economic activities, insofar as it has traditionally been responding to repeated demands that currently mark and relaunch some of the Sustainable Development Goals set in the 2030 Agenda of the United Nations Organization.

Certainly, the same needs, repeatedly experienced in the global geography, force to search among the solutions previously offered by the law, when it comes to harmonize private and public interests. People's trust in the institutions that protect their private interests is only maintained as long as they provide them with an adequate service (or, at least, arbitrate the mechanisms for them to receive it). Discredit (feared disaffection) can affect governments if they are unable to articulate sufficient ways for citizens to effectively ensure their own welfare. For this reason, the current circumstances become an incentive for public entities to promote an improved cooperative movement with more effective tools for the urgent pursuit of social, environmental and good governance goals. And this undoubtedly implies the necessary updating of the tax regime applied to cooperatives, taking into account the aforementioned global aspirations.

It may even be necessary to question the exportation of some of the characteristic features of cooperatives to other types of enterprises. For example, in terms of investment in education[3]. This decisive factor has been given special attention in the cooperative world on an ongoing basis, and the experience acquired could well be put to good use, in order to face the risks of lack of technological training of human capital in very diverse areas as a result of the digital revolution.

Thus, when cooperation of a mutual nature without speculative intent leads (as in the case of the Italian constitutional legislator) to protect cooperatives, it is assumed that they will operate in the markets, but without their objective being the achievement of the greatest possible economic benefit for a few at all costs. This is relevant as far as the need to maintain human employment is concerned, particularly when faced with certain technological advances there is a risk of human labor displacement[4]. Clearly, those who take risks when intervening in markets should be rewarded and no productivity gains that limit international competitiveness should be held back; but this must be done with the best possible consideration of the impact on the community and its environment. For example, it is now

[3] On the one hand, failure to comply with the duties of endowment of the Education and Promotion Fund, proper accounting and allocation of its amount to legal purposes constitutes a cause for loss of the tax protection inherent to the special regime of this type of Entities. On the other hand, the allocations made to the Fund generate a deductible expense in the taxable base of the corporate income tax, which implies an exceptional treatment with respect to the general rule of non-deductibility of allocations to Reserves or internal Funds. Alguacil Marí, M.P. (2020). El fondo de educación y promoción y su impacto en la tributación de las cooperativas. *Revista Técnica Tributaria* (131),99-132. https://doi.org/10.48297/rtt.v4i131.591 [last access 28th of April 2021].

[4] D2.1 Preliminary report on interactive robotics´ legal, ethics & socioeconomic aspects; available at INBOTS http://inbots.eu/wp-content/uploads/2019/07/Attachment_0-1.pdf [last access 28th of April 2021].

beginning to be discussed, in general terms, whether it is appropriate to set limits on the maintenance of the workforce in order to enjoy tax benefits for research, development and technological innovation. It is curious to note that similar limits have already existed for many years in the cooperative sector. Perhaps efficiency reasons should lead us to reflect on the right balance between employment and innovation and how to train workers to be able to perform new tasks that bring greater added value, valuing dynamism in the limits on a transitional basis. Even the sharing of the digital dividend could perhaps be encouraged through the advanced use of cooperative instruments.

Nowadays, when looking for viable formulas to reconcile the achievement of economic benefit with the achievement of other social, environmental and good governance benefits, it is particularly interesting to look at the cooperative solution already well known in many legal systems. Of course, the purpose, the nature of the activities, the form of creation, etcetera, must play a relevant role in determining the applicable legal regime. Basically, the question lies in defining what that common benefit is, which, from the outset, cannot be identified with the general one, since a collective group interest is pursued -limited to certain individuals- but which subsequently, in a mediate and "intangible" way, also reverts to the general interest.

If the objective of cooperatives is to give a more advantageous treatment to the members of these social organizations, not only the economic benefit must be taken into account, but also the satisfaction of other types of interests and needs. This does not mean that the activity is not profitable. What is important is how this profitability is measured or quantified, both internally and externally. In short, the basic problem lies in the correct calculation of the social return, since it is sometimes limited only to the cooperative return to the members, without assessing the added value that the existence of this type of institutions really means to society. Therefore, it is necessary to modernize the accounting models so that they value the key aspects of the cooperative model and can find a translation in better targeted tax measures.

All this should be done using both financial and non-financial criteria. In relation to the latter, it is worth considering the amount of information available to cooperatives and the huge value of the available (and conceivable) datasets for the achievement of the Sustainable Development Goals. To this end, it would be desirable in the future to be able to carry out a pilot project to collect sufficient data in several areas, since it may be possible to explore the fiscal room for maneuver (even with digital twins).

Hence the importance of an adequate tax regime, which is only in some cases expressly justified in the constitutional text, while in others it must be reasonably deduced from the configuration of a tax system to be adopted by the legislator inspired by the principle of a fair contribution to the support of public expenditure[5].

Within cooperatives, from the fiscal perspective, different classifications are usually introduced to offer a more or less advantageous (or sometimes apparently "privileged")

[5] Grau Ruiz, M.A.: *Sostenibilidad global y actividad financiera. Los incentivos a la participación privada y su control*, Thomson-Reuters Aranzadi, Cizur Menor, 2019.

treatment. Such classifications are based on different criteria, according to the priorities of the legislator at any given time. Obviously, the tax expenditures that can be assumed will depend on the budgetary capacity and needs of each country, as it cannot be otherwise. This will have to be the case until the day when international aid flows in this field can be better channeled (perhaps through a global fund for the development of sustainable cooperatives).

Today, there are many international texts defending human dignity, decent work, etcetera; and seeking the general prosperity of people, which would justify joint action in the transnational sphere. The problem is how to cover the cost of these rights[6], so the possible alternatives to make them effective at a lower cost, such as cooperatives, should be positively evaluated.

In this sense, it should be noted that there is a notorious legislative evolution that may entail the risk of a certain dilution of the legal regime specifically foreseen in the case of cooperatives in the more recent one established within the framework of the solidarity, sustainable or social economy (according to the denominations used, in a more or less novel way, in different legal systems). This is especially true when the aim is to include under the same umbrella companies that pursue economic profit and simultaneously try to combine their performance in the markets in a socially responsible manner. This type of business initiative, while truly desirable, obviously has different types of consequences, so that the applicable parameters can create confusion in practice or even become redundant. For this reason, it is technically feasible to make the appropriate clarifications in the design of the requirements, the registration and/or accreditation obligations or the scope of the benefits offered.

The debate between genuine or fake cooperatives, or cooperatives that have to be accredited as social enterprises at the same time (as has been shown in Belgium) sometimes leads to contradictions. If enterprises with a social purpose cannot be primarily oriented to the service of their members, then the latter are not encouraged to make the effort to develop any activity.

It is, of course, open to criticism that, in some cases, the situation of cooperatives from a strictly fiscal point of view is worse than that of other entities whose level of commitment to society is lower. In particular, with regard to the benefits available or the requirements demanded to enjoy them. This problem is sometimes caused ("involuntarily") by the mere passage of time and the sequencing of unconnected regulatory reforms, which do not always take into account the cooperative reality, leaving it behind.

Sometimes, the limitations of tax benefits only for actions among members and for the purpose pursued in the bylaws can be inflexible if the social reality in which the rule is to be applied is not known (for example, in rural areas where depopulation can *de facto* force to

[6] Grau Ruiz, M.A.: "Los Derechos Humanos en el siglo XXI: ¿Cómo financiar su coste para salvaguardar su eficacia?", Sánchez de la Torre, Ángel; Pinto Fontanillo, José Antonio (eds.), *Los derechos humanos en el siglo XXI. En la conmemoración del 70 Aniversario de la Declaración Los Derechos Humanos desde la perspectiva política y social* (Tomo III), Edisofer, Madrid, 2020.

expand the type of activities)[7]. Agricultural cooperatives seem to be at the origin of the cooperative movement in most countries and currently require special attention (e.g. land management by indigenous groups in Guatemala).

To begin with, one issue on which there is great divergence, at the international level, is the number of members required to create a cooperative. Another issue that also varies frequently in the jurisdictions analyzed is the percentage of turnover that must be maintained in operations with non-members for a certain period of time. In the end, the legal debate boils down to a question of limits and their interpretation. It is striking that occasionally some cooperative companies may be reluctant to benefit from a special legal tax regime because of the disproportionate obligations it entails. In such a case, this is a clear sign that the legislative action has been ineffective in achieving the objective initially pursued and it is time to reconsider it.

Special mention should be made of the formal requirements, since registration in a cooperative registry is usually required. If this could be digitized, it would allow better control, facilitating in the future the possible adoption of tax measures in real time. On the other hand, the sectoral and territorial integration of cooperatives on a larger scale, in federations and confederations, could also serve to streamline their tax treatment in a homogeneous manner, in addition to improving their capacity to operate in national and international markets.

The resilience already demonstrated by this sector after the past financial crisis should be noted. It is therefore particularly important to strengthen it after the coronavirus pandemic. At this point, it should be emphasized that temporary rules and transition periods in the face of successive regulatory changes are essential to enable recipients to adapt to the difficult circumstances arising from the new crises that hit many sectors.

The moment of pre-liquidation deserves special consideration, since there is a risk that these institutions will disappear, whereas this phenomenon should be avoided and regeneration sought. However, a delicate balance must be struck between the occasional granting of benefits to facilitate survival, without neglecting efforts to maintain solvency and ensure non-dependence on bailouts. Also on an individual basis, one could exceptionally allow individuals to have access (perhaps temporarily) to their investment in case of need, without undermining the cooperative principles and identity.

To provide financial and technical assistance to cooperatives in many countries there are specialized agencies that centralize, coordinate and/or supervise their activity. It would be very useful for all these state or regional agencies to work in a network and with the representatives of the sector concerned, within the framework of the creation of stable public-private partnerships in line with Sustainable Development Goal 17, promoting inclusion. In particular, with regard to tax aspects, it would be appropriate to count on a specific international tax cooperation line focused on the work of cooperatives. This may be, at least

7 See Prof. Alguacil's contribution in Grau Ruiz, M. A. et al. (2019) Financial activity for global sustainability, 2019 United Nations Climate Change Conference - COP25, Madrid, December 2019, p. 22 et seq. Available at https://eprints.ucm.es/id/eprint/59173/ [last access 28th of April 2021].

indirectly, addressed in the not-too-distant future at the United Nations, thanks to the orientation of the Committee of Experts on International Cooperation in Tax Matters towards sustainability aspects (with the inclusion of the environmental issues in its agenda and the creation of the Subcommittee on Environmental Taxation).

Of course, it is necessary to have an engine of change that will drive recovery in the right direction. Many times, there has been an attempt to support those who have the strength to undertake; however, it is not easy to undertake alone. Therefore, it is necessary to ensure that updated legal regulations are in place to enable joint risk-taking within the framework of cooperatives. Efforts must be made to lower administrative costs so that groups of people with sufficient knowledge and spirit can get ahead.

There is a critical mass worldwide to share fiscal experiences of cooperatives that point to successes and allow learning from failures. It would be highly desirable to have a properly updated fiscal barometer that would highlight the bottlenecks experienced by the stakeholders themselves and propose alternatives. It would certainly serve to improve the current regulations. It may be appropriate to move towards a management by objectives or an objective driven budget (of tax expenditures). Some current requirements could be relaxed, at least provisionally, if positive results are demonstrated.

In the current situation, long-term economic forecasts have in many cases not yet included the consequences arising from COVID-19 on the horizon. It is clear that they have affected, in a first wave, the loss of employment suffered by many workers worldwide, and the next wave is expected to seriously affect investments (the capital factor), with the possible rise in interest rates where they are not currently high. It is therefore necessary to look for ingenious responses to anticipate and overcome future problems. Perhaps credit unions will gain weight. Capital tools should be consistent, or at least compatible with the motivations of the actions to be taken. Access to and relations with capital providers should be facilitated in a transparent manner in order to be able to take future risks.

Consequently, the availability of adequate accountability and financial tools are of great importance. By explaining their advantages to citizens, considering performance in all its dimensions (SDG 8 decent work and economic growth, SDG 12 responsible production and consumption, SDG 13 climate action or SDG 16 peace and justice, among others), public opinion could rely on unambiguous political support for cooperatives to improve their financing directly or indirectly through the tax system (the latter playing better its extra-fiscal and redistributive role[8]).

The existing institutional architecture should urgently focus its work on establishing a basic statute, based on a sort of lowest common denominator, which would serve to strictly identify a model of cooperatives recognizable in each and every developed and developing country, in order to guarantee them a uniform basic fiscal treatment in line with the role to be played by this category within the framework of sustainable development.

[8] GRAU RUIZ, M.A.: "Financing for SDGs, Toward a Responsible Public-Private Tax Approach", Leal Filho, W. (ed.), *Encyclopedia of the UN Sustainable Development*, Springer, 2019.

BELGIUM

Sabine Garroy[1]

1. Does your Constitution consider cooperatives?

No. The Belgian Constitution does not mention cooperatives.

2. Do cooperatives have a special legal regime? Are they regulated in a separate act, or through special rules in commercial legislation applied to corporations?

The cooperative is a specific **legal form** under Belgian law. The cooperative society has been established by an Act of 18 May 1873 as a **commercial company** composed of partners whose number and contributions are variable and where shares are non-transferable to third parties.

Despite several legal changes, its framework has remained flexible. In this way, some people adopted this form without sharing the cooperative ideals (democratic governance, indivisible reserves, etc.); a distinction was made between "true" and "false" cooperatives. At the beginning of the 1960s, an **accreditation for true cooperatives** has been created (CNC accreditation[2]).

In the mid-1990s, the **social purpose company** has been created to fill a gap: the lack of a framework to combine large-scale commercial activity with a disinterested purpose. Indeed, the company could not pursue a disinterested purpose and a non-profit association (NPO) could not carry on a principal commercial activity. The social purpose company was not conceived as a legal form, but a variant that could be grafted on most companies with a commercial form, including the cooperative society.

The accreditation of cooperatives and the variant of the social purpose company were not compatible. Indeed, a social purpose company is prohibited from being primarily oriented towards serving its members, which is the very essence of traditional cooperatives. In 2016, an exemption was provided for social purpose cooperatives in order to allow the legal complementarity of the two systems: the main purpose of the cooperative society, if it is a *social purpose cooperative* must not be to provide members with an economic or social benefit, in the satisfaction of their professional or private needs.

[1] Tax Institute – University of Liège.
[2] Act of 20 July 1955 (*Belgian Official Journal*, 10 Augustus 1955) and and Royal decree of 8 Januari 1962 (*Belgian Official Journal*, 19 Januari 1962).

An Act of 23 March 2019 has introduced the **Code of Companies and Associations**[3] (CCA). This Code integrates the rules relating to companies, associations but also foundations. Given the objective underlying the reform (offer a new legislative product that is attractive on the market of legal norms: a simplified, flexible and exportable law), it was initially envisaged to abolish the cooperative society. In doing so, the cooperative principles could have been enshrined, thanks to increased statutory freedom, from another legal form: the limited liability company (LLC)[4] .

The structure of the cooperative society has been finally retained. Before the adoption of an amendment, only a few articles were specific to the legal framework of cooperative societies.

For the rest, except for derogations, the legal regime of the cooperative society was similar to the regime of the LLC to which the Code was referring.

In fine, cooperatives societies have their own book containing all the relevant provisions in the CCA. However, for many provisions, the texts relating to the LLC have been copied **without taking into account the specificity of the cooperative**. Thus, for example, while the principle of economic democracy "one man, one vote" was promoted, in a suppletive way, in the initial model, the default rule is finally that each share is entitled to one vote.

In the CCA, the distinction between civil and commercial companies has disappeared. The cooperative society with unlimited liability (which was rarely used) has also disappeared.

In the CCA, the accreditation of cooperatives (**CNC accreditation**; see above) is **preserved**[5]. There is even a new accreditation: **accreditation as a social enterprise**[6]. This accreditation is intended to compensate for the disappearance of social purpose companies in Belgium (see above). Indeed, the gap that the variant of the social purpose companies was intended to fill has disappeared: a NPO can carry out an economic activity and a company can pursue a disinterested goal. If the social purpose companies are abolished, the CCA sets up a system of accreditation "as a social enterprise" **only available for cooperative societies**.

The **two accreditations can be cumulated** with a specific name for the cooperative society concerned.

3. Do cooperatives enjoy a specific tax regime? Or any special tax treatment?

<u>Tax regimes applicable to resident legal entities: tax on legal entities or corporate tax</u>

As far as income tax is concerned, a legal entity which has its real seat in Belgium is necessarily subject either to the **tax on legal entities** (TLE), or to **corporate tax** (CT).

In order to determine the income tax applicable to a legal entity resident in Belgium, the reasoning to be applied can be divided into at most three steps.

[3] *Belgian Official Journal*, 4 April 2019.
[4] It should be noted that, in 1873, before opting for the consecration of a cooperative legal form, some argued that there was nothing to prevent the insertion of cooperative rules in the articles of association of existing forms of commercial companies.
[5] Art. 8:4 of the CCA.
[6] Art. 8:5 of the CCA.

Step 1: Does the legal person engage in any exploitation or operations of a profit-making nature?

a. if the answer is no, the legal person is subject to the TLE. ;

b. if the answer is yes, the legal person is subject to CT (with some exceptions, see step 2);

Step 2: if this is indeed the case (1.b), if the legal person does not pursue a lucrative purpose, does it act mainly or exclusively in a privileged field (art. 181 of the Income Tax Code – for example, professional unions, teaching, family assistance, fairs or exhibitions, etc.)?

a. if the answer is yes, the legal person is subject to the TLE. ;

b. if the answer is negative, the legal person is subject to CT (with some exceptions, see step 3);

Step 3: if not (2.b), is the legal person does not pursue a lucrative purpose carrying out only authorised transactions (art. 182 of the Income Tax Code – for example, ancillary economic operations or the absence of industrial or commercial methods)?

a. If so, the TLE will apply.

b. If not, the CT will apply.

The reasoning is **at most** divided in **three stages**, because **only the legal person that does not pursue a lucrative purpose have access to all three stages** of reasoning. If the legal person pursues a lucrative purpose, the only question that matters is whether or not it engages in exploitation or operations of a profit-making nature. A legal person is considered as "legal person (that) does not pursue a lucrative purpose" when it does not seek to grant, directly or indirectly, a material gain, whether immediate or deferred, to its shareholders or partners.

According to the administrative commentary, when it appears from an analysis of the articles of association of a company that it has not been incorporated with a view to exercising a lucrative professional activity and when it appears that in reality it does not engage in operations of a lucrative nature, the company should not be subject to corporate tax.

However, when a company distributes dividends, regardless of the amount, or when it foresees the possibility of a distribution of profits, it must be subject to corporate tax as it is considered that it is then deemed to be engaged in operations of a profit-making nature.

In practice, therefore, in order to claim the "legal person (that) does not pursue a lucrative purpose" status, **a term in the articles of association prohibiting the distribution of a dividend is therefore required**. Furthermore, the **liquidation bonus must also be used for a disinterested purpose**.

Application to cooperative societies

According to article 6:40 of the CCA, each share of a cooperative participates in the profit or the liquidation bonus. The cooperative society therefore has, *de lege lata*, necessarily the status of a *legal person pursuing a lucrative purpose* (see above). If the cooperative does not

have a provision in its articles of association prohibiting the distribution of a dividend, it will automatically be subject to corporate tax (see above).

Application to cooperative societies accredited as social enterprise

For cooperative societies accredited as social enterprise, both conditions – statutory prohibition of the distribution of a dividend and disinterested allocation of the liquidation bonus – can be, in our opinion, met. Indeed, the liquidation bonus must be allocated, in a way which corresponds as much as possible to its purpose[7]. Also, dividends are limited to 6%[8]. Consequently, a cooperative society accredited as social enterprise, subject to an *ad hoc* term in its articles of association concerning dividends, could be considered as a "legal person (that) does not pursue a lucrative purpose".

With the exception of the possible "legal person (that) does not pursue a lucrative purpose" status, no specific tax measures are foreseen for the cooperative societies accredited as social enterprise;

Tax on legal entities *versus* corporate tax

Tax on legal entities and corporate tax are **very different**. They are distinguished by a number of factors: the **tax base**, the **tax rate** and the **method of levying**.

Corporate tax is levied on all net profits (active and passive income; including membership fees, donations and subsidies). The TLE is calculated on a certain number of income items listed in articles 221 to 224 of the Income Tax Code. These are mainly certain passive income, mainly from movable and immovable sources.

Multiple tax rates are applied to TLE according to each taxable item[9]. It has always been common to hear that these rates are generally lower than the basic CT tax rate. The 2017 CT reform may lead us to reconsider this observation. Under the pressure of international competition, the Belgian legislator has amended the CT system by reducing its rate (while broadening its basis to guarantee the budgetary neutrality of the whole). Since 1st January 2020, the ordinary rate is 25%. A reduced rate of 20% is conditionally reserved for small and medium-sized enterprises (SMEs) up to a first income threshold of €100.000.

Any withholding tax withheld from corporate tax is deductible and, where applicable, recoverable. In terms of tax on legal persons, each taxable item is subject to a separate tax regime with the result that the imputation or even the possible recovery of withholding taxes paid is excluded. Therefore, the way in which TLE is levied presents a major disadvantage in comparison with CT.

The **TLE can sometimes be more burdensome than the CT**.

Four specific measures can be noted to accredited cooperatives (CNC accreditation; see above): specific regime associated to a first tranche of dividends paid by an accredited

[7] According to art. 8:5, §1, 3° of the CCA.
[8] According to art. 8:5, §1, 2° of the CCA and Royal decree of 8 Januari 1962 *(Belgian Official Journal*, 19 Januari 1962).
[9] See art. 225 and 226 of the Income Tax Code.

cooperative society (1[10]), the absence of requalification of interest as dividends (2), the exemption from withholding tax in case of partial sharing of the social assets or acquisition of own shares by an accredited cooperative society (3) and, finally, the extended application of the 20% reduced rate (4).

4. In particular, when taxing their benefits:

a. Is there any special rule for mandatory funds -if these exist?

No, because the requirement of a minimum capital has disappeared for the cooperative society in the CCA. It is now required that the company has, at the time of its incorporation, sufficient equity capital in the light of the activity envisaged[11]. The CCA provides for the obligation of a double test (net asset test and liquidity test) in order to be able to make distributions (dividends,...) to the shareholders of a cooperative society, but also in case of a request for reimbursement of shares. According to this double test, no reimbursement of shares or dividends can be made if the solvency of the company would be compromised as a result of this reimbursement or distribution[12], or if the cooperative company would no longer be able to meet its due dates for a period of twelve months[13].

4. In particular, when taxing their benefits:

b. Is there a distinction between the results of transactions carried out with partners and non-partners? Does the income or expenditure derived from transactions with partners receive any special treatment?

Refunds are generally subject to the regime applicable to the various types of discounts (commercial discounts, credit notes, year-end rebates, etc.) granted by commercial and industrial companies: professional expenses if they are adequately justified. Where the refund is not determined in proportion to personal purchases or sales, but in proportion to the participation in the capital, it must be taxed as a component of the company's profit.

For *consumer cooperatives* in particular, a nuance must be made between members and non-members for refunds granted *after* the closure of the accounts. All refunds granted to non-members are taxable. On the other hand, refunds to members are only taxable if they do not come from their own purchases[14].

5. Does any tax benefit in indirect taxes or local taxes apply?

No.

[10] Possible exemption for natural persons receiving dividends through the savings activation plan and exemption measure in the case of the accredited cooperative society.
[11] Art. 6:4 of the CCA.
[12] Art. 6:115 of the CCA.
[13] Art. 6:116 of the CCA.
[14] Art. 189 of the Income Tax Code and administrative commentary n°189/6, 189/10 and 189/11.

BRAZIL

Daniel Francisco Nagao Menezes[1]

1. Introduction

Several authors indicate that the cooperative movement is much older than its legal existence or even before the pioneering experience of Rochdale, in England, the first society officially registered as a cooperative, as is the case of Costa (2007) for whom the essence of cooperativism is found in the early civilizations, being a very old social movement.

In Brazil, the form of cooperative organization was structured from the arrival of European immigrants, mainly in the period between 1824 and 1920, because, when they arrived, they faced many difficulties - of all orders - and found in cooperation and solidarity the possibility to develop their activities.

In order to formulate the legal structures of cooperative societies, Law 5.764 of December 16, 1971 was published, which defined the national policy of cooperativism and instituted the legal regime of cooperative societies, being known as the General Law of Cooperatives. Art. 3º of Law 5.764/71 establishes that cooperative societies may enter into cooperative partnership contracts, and that people reciprocally undertake to contribute with goods or services for the exercise of an economic activity, of common benefit, with no profit objective.

Under the terms of the General Cooperative Law 5.764/71 cooperative societies can be classified according to their legal form of incorporation and also due to their corporate purpose or the legal nature of the activities they develop.

Castro (2017) also stresses that Law 5.764/71 brings reciprocity in the definition of the cooperative act, that is, the legal relationship between the cooperative and the member has the purpose of achieving the social objectives of society. Thus, any other acts practiced by the cooperative that do not refer to cooperative acts, must undergo different tax treatment.

The Brazilian Federal Constitution of 1988 offered special attention to cooperatives, having several articles that privilege cooperatives and, especially with regard to taxation, article 146, III, “c” stands out, which provides that the cooperative act of Cooperative societies will receive adequate tax treatment through complementary law.

The referred article refers only to the cooperative act, which, according to the studies by Castro (2017), the cooperative act is a bilateral action between the cooperative and its associate and vice versa, with the purpose of fulfilling the social objectives that are assigned. The author also deals with the classification and objectives of cooperative societies

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2. Cooperative and non-cooperative acts

Cooperative acts represent an important instrument in the activities of a cooperative. The cooperative act is defined as any relationship between the cooperative and the cooperative, in order to obtain services that are indispensable for the materialization and collectivization of the economic activity that constitutes its object.

In the study by Michels (2000), the author differentiates between the character of cooperative and non-cooperative acts, where he points out that cooperative acts are those that the cooperative performs on behalf of its members, while non-cooperative acts are those that cooperative performs in its own name.

However, cooperative societies do not only carry out activities with their members, according to Gozer, Campos and Menezes (2007, p. 148) *"There are two situations in which an agricultural cooperative practices non-cooperative acts. The first situation is that involving the cooperative and non-associated individuals. The second is that involving the cooperative with the market, carried out outside of social objectives".*

3. Direct taxes

As a fundamental part of the tax planning of cooperative societies, direct taxes are important in the tax regime in the face of cooperative acts. Thus, direct taxes are those that definitely fall on the taxpayer who is directly and personally connected to the taxable event. Thus, the same person is the taxpayer in fact and in law.

As described in Salvador's article (2006) direct taxes are levied on income and equity, because, in theory, they are not transferable to third parties. Thus, it is understood that the direct taxes, in addition to levying on a taxpayer´s assets or income, it is also characterized by the obligation of the entity linked to the taxable event.

Law 9.532, of December 10, 1997, establishes in its art. 15 which philanthropic, recreational, cultural and scientific institutions and civil associations that provide the services for which they have been instituted and make them available to the group of people for whom they are intended, without profit, are considered to be exempt.

Considering that art. 3º of Law 5.764/71, previously mentioned, establishes that cooperative societies do not aim at profit, these are considered non-profit entities and, therefore, fall under the exemption provided for in the IRPJ legislation. For purposes of CSLL, the tax exemption is provided for in art. 39 of Law 10.865 of 2004.

Cooperatives are susceptible to income tax on the financial results of their investments in the capital market. The legislation points in article number 65 of Law 9.981/95 the incidence of IRPJ on financial investments, including for legal entities exempt from tax.

It should be noted, however, that the exemptions from Income Tax and Social Contribution on Profit foreseen for cooperatives refer only to the acts practiced with their members and are

related to the corporate purpose provided for in the bylaws. Thus, any other acts performed by the cooperative that do not aim to achieve the social objectives, provided for by Castro (2017), are considered as acts equal to those practiced by other for-profit companies and, therefore, subject to income tax calculation and taxation. and the Contribution on Profit, as provided for by tax legislation.

4. Indirect taxes

For the tax context of cooperative societies, indirect taxes are of fundamental importance for their tax planning, since unlike direct taxes, they are not exempt from them. Thus, the classification of indirect taxation has an economic rather than legal content and is of paramount importance to understand the tax impacts on equity.

In the article by Salvador (2006), taxes referred to as indirect are characterized by levying on the production and consumption of services, the same being liable to transfer the obligation to a third party. Thus, the amount of the tax due by the principal is transferred to the consumer, which is included in the final price of the goods.

4.1 Imposto sobre Circulação de Mercadorias e Serviços (ICMS) - Tax on Circulation of Goods and Services

Tax planning on ICMS is essential for a cooperative society. According to Castro (2017, p.199), *"among the tax powers attributed to the states is the creation of the Tax on the Circulation of Goods"*. The Federal Constitution of 1988 defines in its article number 155 the hypothesis of incidence for the ICMS, which states must impose taxes on "operations related to the circulation of goods and on the provision of interstate and intercity transportation services and communication, even operations and installments to start abroad".

Complementary Law 87/96, in its article 4, defines the ICMS taxpayer (taxable person) as any person, whether physical or legal, who performs goods circulation activities, or performs transportation or communication services, even with origin abroad.

The basis for calculating the ICMS is defined in article 13 of the Law. The legislation requires that the Tax on Circulation of Goods be calculated on the value of sales or services, including interest, insurance, front (when performed by the sender himself), in addition to other obligations paid, such as, for example, discounts granted on condition. Thus, the ICMS legislation applies to operations carried out by the cooperative in the same way as it applies to other companies.

4.2 Contribuição sobre o Fim Social (COFINS) - Contribution on the Social Finality

Complementary Law 70 of 1991, defines in its article 1º the hypothesis of incidence of the Contribution for Financing and Social Security, where the non-cumulative incidence affects the total income earned in the month by the legal entity. The legislation makes it clear that in view of the first article that COFINS is levied on the billing of cooperative societies.

Regarding the revenues earned in the month, Law 10.833 of 2003 defines the base rate for COFINS in its article 2, where it is defined that it will apply, on the calculation basis

determined in accordance with the provisions of art. 1st, the rate of 7.6%. The rate is applied to the companies described in article 10 of the same Law. For the other entities, which must follow the cumulative regime, the rate of 3% on the results is applied.

In the context of agricultural cooperative societies, COFINS underwent changes in their incidence. Complementary Law 70/91, in article 6º, first exempted cooperatives, from all sectors, from COFINS on billing incurred on cooperative acts. This article was revoked by Provisional Measure 2.158-35 of 2001.

4.3 Programa de Integração Social (PIS) - Social Integration Program

The Social Integration Program (PIS) was instituted by Complementary Law 07 of 1970, with the objective of promoting the development of employees with society and the company that is inserted. The PIS is levied on and the billing of legal entities, and in some cases, on the payroll, the first being the same hypothesis of incidence as COFINS.

The basis for calculating the Social Integration Program is based on the article of the 1st item 2 of Law 10,637 of 2002, which is composed of the total income earned by the legal entity. The same legislation also determines, in its article Nº 2, that on the invoicing of companies of any accounting nature, the rate of 1.65% is levied on the PIS calculation base.

4.4 Imposto de Produtos Industrializados (IPI) - Industrialized Products Tax

According to the National Tax Code, in its article 46, the Tax on Industrialized Products is the responsibility of the Union. The legislation complements in its article in the first paragraph where it defines the concept of industrialized product as the product that has been subjected to any operation that changes its nature or purpose, or improves it for consumption.

The IPI is characterized by not having a fixed rate, which may fluctuate according to the product or market condition. It is a selective tax, the rate of which must consider the essentiality of the product. Precisely for this reason, products intended for food are exempt from tax.

4.5 Imposto sobre Serviços de Qualquer Natureza (ISSQN) - Tax on Services of Any Nature

The Federal Constitution of 1988 establishes in its article 156 the taxes that are incumbent on the municipalities, and in the third item I defines the Tax on Services of Any Nature. The tax has its hypothesis of incidence on all services rendered, with the exception of cargo and passenger transport, and telephone services, which are ICMS-generating facts.

Complementary Law 116 of 2003 provides for the incidence of the Tax on Services of Any Nature. In its article 6, item III, it defines that the value of the tax is due to the Municipality declared as the tax domicile of the legal or physical person taking the service, according to the information provided by it. Thus, when providing a service, both to its member and to a third party, the cooperative owes tax to the city that has its domicile.

ISSQN is a tax with a rate determined according to the service that is provided. Thus, the rates vary according to the activities and determinations of the municipalities, which may encourage certain sectors of relevance to the activities of the region. Complementary Law

116 defines in its article 8 the maximum rate for the tax, limiting it to 5% of the value of the service provided.

5. Final Considerations - Taxes applied to cooperatives

The simple fact that cooperative societies do not have the purpose of obtaining profit does not reflect that they are exempt from all taxes. Table 1 summarizes the incidence of taxes on cooperative societies based on the nature of their operations, which can be carried out with members (cooperative acts) or with third parties (non-cooperative acts).

Table 1: The incidence of taxes in cooperative societies

Activities	IRPJ	CSLL	ICMS	PIS	COFINS	IPI	ISSQN
Cooperative acts			X	X	X	X	X
Non-cooperative acts	X	X	X	X	X	X	X

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COLOMBIA

Dr. Julián Fernando Monroy Bayona[1]

1. Does your Constitution consider cooperatives?

The Political Constitution of Colombia (*Constitución Política de Colombia*, CPC) recognizes in different ways the associativity, solidarity and cooperativism as mechanisms of economic and social development, thus in its fundamental principles (art 1 and 2 CPC) it establishes respect for human dignity, work and solidarity of people as one of its pillars, as well as the service to the community and the promotion of general prosperity. Making clear from the beginning the importance of the concept of solidarity in all its interpretations.

The Constitution gives the general parameters for the development of all activities that are to be carried out in the national territory, in its articles it establishes that in case of conflict in the application of laws, the private interest must yield to the public or social interest (art. 58 CPC), it also stipulates that the State will protect and promote the associative and solidarity forms of property, the same as it assigns to the executive branch of public power, headed by the President of the Republic, to exercise the tasks of inspection, surveillance and control over cooperative entities and commercial companies (art. 198, 24 CPC).

Consequently, the legislative development of the solidarity cooperative sector is framed in the fundamental principles of the State, in this sense, it is relevant to state that Law 79 of 1988 precedes the Political Constitution of Colombia of 1991, but except for some updates, its validity still continues, likewise, this Constitution gave the basis for the recognition of all the actors that converge in the field of solidarity economy.

2. Do cooperatives have a special legal regime and are they regulated by a separate law or by special rules in the commercial legislation applied to corporations?

The main laws that support this sector are Law 79 of 1988 and Law 454 of 1998. Law 79 of 1988 establishes the legal context in which cooperatives will develop as part of the national economy. This law establishes the cooperative agreement, the sector and the relationship between the State and the cooperatives. Among the topics covered by this law are the characteristics that cooperatives must comply with, the manner of their incorporation and legal recognition, quality of the members, administration and surveillance, the economic and labor regime, types of cooperatives, merger and liquidation, education and cooperative integration, among others. It also gives financial status to savings and credit cooperatives, allowing the organization of financial cooperatives under different modalities.

Law 454 of 1998 is a complementary law to the cooperative legislation that develops a new solidarity structure in Colombia. It introduces the concept of Solidarity Economy, creates the

[1] PhD Thesis on ”Responsible financing framework for solidarity-based environmental protection” (”Marco de la financiación responsable para la protección solidaria ambiental”), Universidad Complutense de Madrid, 2019-2020). Available at: https://eprints.ucm.es/id/eprint/64099/1/T42090.pdf

Superintendence of Solidarity Economy, the Guarantee Fund for Savings and Credit Financial Cooperatives, establishes rules on the financial activity of cooperative entities and transforms the National Administrative Department of Cooperatives into the National Administrative Department of Solidarity Economy DANSOCIAL.

The regulatory development is extensive and detailed. The following is a brief description of the background and relevant regulations of the cooperative sector in Colombia.

OBJECT	LEGAL ACT
The first Cooperative Law is enacted in Colombia.	Act 134 of 1931
It regulates the models of cooperatives with State intervention.	Act 61 of 1936
It regulates the different types of production, distribution and consumer cooperatives.	Act 19 of 1958
It introduces the concept of specialization and particularly allows savings and credit cooperatives to collect savings through unlimited deposits by members or third parties.	Decree 1598 of 1963
It establishes the regime for the incorporation, recognition and operation of pre-cooperatives.	Decree 1333 of 1989
It regulates the savings and credit activity carried out by cooperatives and it establishes rules for the exercise of the financial activity by them.	Decree 1134 of 1998
It regulates the creation of the guarantee fund for cooperative entities FOGACOOP.	Decree 2206 of 1998
It dictates provisions in relation to the financial system in general and allows converting the financial institutions of a cooperative nature supervised by the Superintendence of Banking into a commercial company, thus modifying Article 43 of Law 454 of 1988.	Act 510 of 1999
It develops the structure and functions of the Superintendence of Solidarity Economy.	Decree 1401 of 1999

It adjusts some norms of the organic statute of the financial system and dictates other provisions related to cooperative institutions with financial activity, modifying some articles of Law 454 of 1988 and 510 of 1999.	Act 759 of 2002
Whereby rules are issued on the management and administration of liquidity risk of savings and credit cooperatives, savings and credit sections of multi-activity and integral cooperatives, savings and credit cooperatives and integral cooperatives, employee funds and mutual associations.	Decree 790 of 2003
It determines the elements of the social security contributions in the cooperatives and creates the special contributions to be paid by the cooperatives and pre-cooperatives of associated work.	Act 1233 of 2008
It regulates cooperative associated work, it specifies its nature and points out the basic rules of its organization and operation.	Decree 4588 of 2006
It amends Decree 1068 of 2015, in relation to the management and administration of liquidity risk of savings and credit cooperatives, multi-active cooperatives and other cooperatives.	Decree 704 of 2019
The National Development Plan 2018 - 2022 frames the government's objectives for the achievement of Agenda 2030. This law gives the basis for legality, entrepreneurship and equity of Colombians. Particularly in art. 164, it emphasizes the business strengthening of solidarity economy organizations.	Act 1955 of 2019

3. Do cooperatives enjoy a specific tax regime or any special tax treatment?

The Tax Statute determines the provisions applicable to non-profit entities and the cooperative sector within their special tax treatment. Title VI of the first book is dedicated to this subject and establishes the single rate applicable on the net profit or surplus and the way to calculate it.

Article 19 establishes which are the taxpayers that belong to the special tax regime and which are the necessary conditions to access these benefits. In numeral 4, cooperatives, associations, unions, central leagues, higher level financial organizations, mutual associations, cooperative auxiliary institutions and cooperative confederations, as provided for in the cooperative legislation, are determined as taxpayers to this regime.

Regulatory Decree 4400 of 2004, makes a deeper development on the application of the special tax regime for cooperatives, corporations, foundations and non-profit associations. This decree was modified by Decree 640 of 2005, subsequently the Sole Regulatory Decree 1625 of 2016 appears as a compilation rule of all the pre-existing regulations, as well as the law 2010 of 2019 that makes some modifications to the Tax Statute, especially regarding the loss of benefits of the special tax regime and levies.

4. When taxing their profits:

A. Is there any special rule for mandatory funds, if any?

Cooperatives could have the net profit or tax surplus exempted. That is to say, they can reduce to zero the taxable base on which the tax of cooperative entities is applied producing a tax rate of 0%, if they meet the requirements for income tax exemption regarding the distribution of their surpluses, i.e. voluntarily disposing of 20% of the surplus to finance quotas and formal education programs in institutions authorized by the Ministry of National Education[2].

Regarding the distribution of surpluses (art. 54, Law 79 of 1988), the application of the accounting surplus will be as follows: 20% to create and maintain the reserve for the protection of social contributions, 20% for the education fund, and 10% for the solidarity fund.

The remaining 50% may be used in accordance with the bylaws of each cooperative, either for the provision of common services and social security, for the revaluation of contributions, returning it to its members or to the members' contribution amortization fund, in any case, if so provided by the general assembly, it may also create statutory reserves and specific funds.

In other words, first, it must comply with the distribution of the accounting surplus according to the cooperative legislation; second, it must allocate 20% of its surplus to formal education, thus complying with the tax provisions; and third, it must allocate it to formal education.

[2] RIVERA MURCIA, Adriana: Régimen Tributario Especial Sector Cooperativo Colombiano - DIAN, Oficina de estudios económicos, 2007.

It is worth noting that in any case, as a first step, financial surpluses must be used to offset losses from previous periods, if any.

B. Is there a distinction between the results of transactions with partners and non-partners, and is there any special treatment for income or expenses derived from transactions with partners?

In principle, from a general perspective, there is no distinction between transactions between members and non-members of cooperatives, except for the exemptions specifically agreed between each cooperative and its banking entity. In any case, the tax on financial transactions will be applied, which consists of a percentage of all financial operations, such as bank transfers, promissory notes and ATM operations, among others.

In Colombia there is a general classification for the value added tax (VAT), on the one hand there is the common regime in which there are legal entities and individuals, and the simplified regime, where there are individuals who meet special requirements, consequently, the person/s holders of the transactions will belong to one or another regime according to their condition and will have exemptions or will pay VAT or other taxes according to the type of operation carried out.

5. Is there any tax benefit in indirect taxes or local taxes?

Cooperatives are taxed at 20% while the rest of the companies are taxed at 30%.

DENMARK

Rasmus Kristian Feldthusen[1]

1. Does your Constitution consider cooperatives?

The Danish constitution does not contain any special consideration to cooperatives.

2. Do cooperatives have a special legal regime? Are they regulated in a separate act, or through special rules in commercial legislation applied to corporations?

Cooperatives do not have a special legal regime in Denmark. It has from time to time been considered whether special legislation should be enacted, but due mainly to resistance from cooperatives themselves, this has so far not borne fruit.

In Denmark any undertaking which has as its object to promote the financial interests of the undertakings' participants through the pursuit of a business activity with limited liability[2] has to register at the Business Authority (Erhvervsstyrelsen).[3] This also applies to a cooperative, which in the Act is defined as:[4]

For the purposes of this Act, a cooperative organized as a company (or as a cooperative association) means a company covered by section 2, subsection 1 or 2, or section 3, the purpose of which is to promote the common interests of the participants through their participation in the company as customers, suppliers or in another similar way, and where the company's return, apart from normal return on the invested capital, is either distributed among the members in relation to their share in the turnover or remain outstanding in the company.

It is debated in Danish legal theory whether an undertaking, which distributes its profits in relation to the participants' share in the turnover – as opposed to a share in the company's

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[2] It is possible – although rare – to instead have the cooperative without limited liability. In this case the cooperative - when it comes to liability – is most reminiscent of a partnership (interessentskab) or a limited partnership (kommanditselskab), cf. Erik Hørlyck, Dansk andelsret, 3. ed., p. 41.
[3] Cf. the Danish Act on Certain Business section 8, subsection 1.
[4] The Danish Act on Certain Business section 4.

profits in proportion to their ownership interest – is subject to the Danish Companies Act which deals with joint stock companies and private limited companies.[5]

3. Do cooperatives enjoy a specific tax regime? Or any special tax treatment?

Cooperatives, the purpose of which is to promote the common business interests of at least 10 members through their participation in the association's activities as purchasers, suppliers or in any other similar way, enjoy a special tax regime pursuant to the Danish Corporation Tax Act section 1, No. 3, cf. section 14-16 A. This only applies to cooperatives which pursue the commercial, as opposed to private (consumption), interests of its members.[6]

In order to enjoy the special tax treatment, it is furthermore a requirement that any turnover with non-members does not significantly[7] or over a longer-term[8] exceed 25 per cent. of the total turnover, and which, apart from the normal return on a paid-up membership capital, uses the turnover that has taken place with the members as a basis for distribution to them. Cooperatives may enjoy the special tax treatment even if they own shares in companies that do not meet the above-mentioned requirements.[9]

The taxable income of the above-mentioned cooperatives constitutes a percentage of the cooperative's assets at the end of the income year.[10]

The income of cooperatives is calculated as either 4 per cent (concerning turnover with members) or 6 per cent (concerning turnover with non-members) of the assets of the

[5] it should be noted that it is the predominant rule in practice that a member in a cooperative only has one vote regardless of the size of the member's capital contribution and turnover with the cooperative, cf. Rasmus K. Feldthusen, Juridisk Analyse af bindinger og muligheder i foreningsejerskab, in Rapport vedr. selskabsledelse i foreningsejede selskaber, 2019, p. 4; https://forenetkredit.dk/wp-content/uploads/2019/10/Selskabsledelse-i-foreningsejede-selskaber-Del-1.pdf

[6] The calculation of the taxable income of Cooperatives which pursue its members private interests (private consumption) is done after the normal rules, cf. the Danish Corporation Tax Act section 8, subsection 1, with a special tax treatment for dividends to its members, cf. the Danish Corporation Tax Act section 1, subsection 3a. Pursuant to the Danish Corporation Tax Act section 9, subsection 2, these cooperatives may in their income deduct dividends, post payments and bonuses paid to its members in the income year. It is however a condition for the cooperative being able to deduct the aforementioned in its income, that the member on his or her part is taxable, cf. section 9, subsection 2.

[7] The threshold is exceeded if the turnover with non-members in a given income year exceeds 35 per cent.

[8] The threshold is exceeded if the turnover with non-members in each of 3 consecutive income years exceed 25 per cent.

[9] Cf. the Danish Corporation Tax Act section 1, No. 1.

[10] Cf. the Danish Corporation Tax Act section 14, subsection 1. The assets constitute the cooperative's assets less the cooperative's liabilities. In the calculation of assets, goodwill and similar intellectual property rights and suspensive conditions as well as rights of use or claims for periodic benefits of a public or private nature, which are assigned to the cooperative and which cannot be transferred, are disregarded. When calculating the assets, the part of the profit of the income year that is distributed as a dividend or arrears for the income year in question is also disregarded, cf. the Danish Corporation Tax Act section 14, subsection 2.

cooperative.[11] The tax rate is 14,3 per cent,[12] which means the tax constitutes DKK 5.720 pr. DKK million of assets, provide the entire turnover is solely with members.

The counterpart to the special tax treatment of cooperatives is that the members are taxed on any distributions from the cooperative as personal income tax with a marginal tax of app. 56 per cent.[13]

Gains and loss on sale of share certificates are taxable and taxed as the difference between the acquisition price and the disposal price.[14]

4. In particular, when taxing their benefits:

a. Is there any special rule for mandatory funds -if these exist?

No, there are not any rules on a mandatory fund.[15] It is characteristic of a cooperative that the size of the capital and number of members is variable, ie. it must be possible to admit new members who can fulfill the cooperative's purpose (and pay a potential capital contribution) and it must be possible for members to resign from the cooperative if the members no longer fulfill the cooperative purpose. Retiring members have the right to get their deposit back.

b. Is there a distinction between the results of transactions carried out with partners and non-partners? Does the income or expenditure derived from transactions with partners receive any special treatment?

Yes, see above section 3.

5. Does any tax benefit in indirect taxes or local taxes apply?

There are no special tax benefits in either indirect taxes or local taxes for cooperatives.

[11] Cf. The Danish Corporation Tax Act section 14-16. Section 16 A deals with cooperatives which both runs a business as a purchasing cooperative, cf. section 15, and a production and sales cooperatives, cf. section 16. I have omitted the special rules on how to calculate the income of the aforementioned here.
[12] Cf. The Danish Corporation Tax Act section 19.
[13] Cf. the Danish Assessment Act section 16 A and the Danish Personal Income Act section 4. Alternatively, a member may use a special sole trader tax regime (virksomhedsskatteordningen) which reduces the tax to 22 per cent. This is a provisional tax and the difference between the 22 per cent and the marginal tax of app. 56 per cents must be paid if the member withdraw money for private use.
[14] Cf. the Danish Act on Taxation of Capital Gains on Sale of Shares section 18, subsection 1, and are taxed as capital income pursuant to the Danish Personal Income Act section 4, subsection 1.
[15] Cf. Erik Hørlyck, Dansk andelsret, 3. ed., p. 58.

GUATEMALA

Dr. Bayron Ines de León de León

1. Does your Constitution consider cooperatives?

Specifically, in Articles 67 and 119 of the Constitution, the constituent legislator literally enshrined: Article 67.- Protection of **indigenous agricultural lands and cooperatives**. The lands of the cooperatives, indigenous communities or any other forms of communal or collective tenure of agrarian property, as well as the family patrimony and popular housing, **shall enjoy special protection from the State**, credit assistance and preferential technical assistance, which guarantee their possession and development, in order to ensure a better quality of life for all inhabitants. The indigenous communities and others that have lands that historically belong to them and that they have traditionally administered in a special way, will maintain this system. (Emphasis added). In this regard, the Constitutional Court -CC-, in the sentence of date: 05/09/2006. Case number 941-2005. It stated that: "[...] the 'sustainable development', which has already been said to be covered by the application of the Law of Protected Areas, which is general for all types of regulations on specific areas, must be understood as included in the natural patrimony of the Nation protected by Article 64 of the Constitution. In the same way as there is a regulation of social interest on cultural heritage, the concern of the constituent has also covered the natural heritage of the inhabitants of the country. In both cases, the principle of eminent domain of the State tends to protect a wealth that belongs to the different Guatemalan generations and, therefore, its legal and administrative regulation with the purpose of its preservation, protection, conservation and reestablishment is viable. [...] **Following the context of the superior legal good, protected by article 64 of the Constitution, Natural Heritage, it is evident that there can be no contradiction with the protection of ethnic groups, the protection of the lands of cooperatives, indigenous communities and other forms of communal or collective tenure of agrarian property, and its administration by them, or the endowment of state lands to these communities (articles 66, 67 and 78 of the Constitution) with the declaration of a certain area as protected to avoid the depletion of natural resources and environmental degradation, to the detriment of flora, fauna, human potential and biodiversity. Rather, this not only complies with the provisions of the aforementioned article 64, but also with the purposes of the State, as set forth in the Preamble and articles 1 and 2 Ibid. and, in addition, with the provisions that must protect the groups**

referred to in the constitutional articles invoked by the plaintiffs [...]" (Emphasis added). Article 119.- Obligations of the State. The following are fundamental obligations of the State: "(...) e) **To promote and protect the creation and operation of cooperatives, providing them with the necessary technical and financial assistance**; (...) g) To promote as a priority the construction of low-income housing, through adequate financing systems so that the greatest number of Guatemalan families may enjoy their property. **In the case of emerging or cooperative housing**, the tenure system may be different; (...)". The -CC- considers the Cooperatives in the sentence dated 12/01/2009. Case 4476-2008. As follows: "According to the nature of the governing body of the central bank, for the appointment of the regular member and alternate member [...] the 'business associations' have standing, a condition that cooperatives, federations and confederations constituted in accordance with the General Law of Cooperatives lack. [...] **The entities regulated by the General Law of Cooperatives do not have the characteristic of business associations but, since they are not for profit and their function is limited only to their own members, they are of a mutual or solidarity nature, which find their protection in the State itself** [...]" (Emphasis added).

2. Do cooperatives have a special legal regime and are they regulated in an act, or by special rules in the commercial legislation applied to corporations?

Due to the constitutional mandate described above, related to the fundamental obligation of the State to promote and protect the creation and operation of cooperatives, by means of Decree number 82-78 issued by the Congress of the Republic of Guatemala, the General Law of Cooperatives was decreed, with norms that ensure in general terms an orderly and harmonious development of the cooperative movement and that guarantees the associations and third parties their participation in the same, through the control and vigilance of the State. In the same Law, it became necessary to create a specialized agency to centralize, guide, supervise and coordinate cooperative associations and to assume responsibility for the authorization and registration of such organizations considered to be of social utility.

3. Do cooperatives enjoy a specific tax regime or any special tax treatment?

In the General Law of Cooperatives (Decree number 82-78 issued by the Congress of the Republic of Guatemala), Title I, Chapter IV, deals with state protection and specifically Articles 23 and 24 literally state the following: "Article 23. Cooperatives enjoy the protection of the State, which will provide the necessary technical and financial assistance and especially the following: a) Total exemption from the tax on stamped paper and fiscal stamps; b) Exemption from the tax on sale, exchange and adjudication of real estate, inheritances, legacies and donations, when they are destined for the purposes of the cooperatives; c) Exemption from taxes, duties, fees and surcharges on imports of machinery, work vehicles, tools, instruments, inputs, equipment and educational material, studs and implements for agricultural, livestock, industrial or artisan work provided that they are not manufactured in the country or in the Central American area. This exoneration shall be applied in each case by the Ministry of Economy, prior favorable opinion of INACOP; communicated to the Ministry of Finance for customs purposes; and d) The offices, companies and officials of the State, of the Municipalities and autonomous or decentralized institutions shall process with the greatest celerity any matter or management pertinent to the cooperatives, providing them with support and aid." "Article 24. Sanctions for misuse of exonerations. The objects referred to in paragraph c) of the preceding article may only be acquired and used by the cooperatives, federations and confederations for their own purposes. In case of contravention of the above, the offenders shall be obliged to pay the taxes and penalties determined in Article 30 of the present law. Movable property acquired in accordance with paragraph c) of the preceding article may not be traded before four years have elapsed since their acquisition, unless the development of the cooperative makes it necessary to trade, this may be done prior qualification and authorization of the governing body".

In addition to the above, in the special laws on Value Added Tax -VAT- as well as in the Tax Update Law Book I, which deals with Income Tax -ISR-, other special tax treatments are established for Cooperatives, as will be detailed below.

4. In particular, when taxing their profits:

A. Are there any special rules for mandatory funds, if any?

Article 4 of the General Law of Cooperatives (Decree number 82-78 issued by the Congress of the Republic of Guatemala) deals with the principles that cooperatives must comply with in order to be considered as such, among which are: "a) To seek the social and economic improvement of its members through common effort; b) Not to pursue profit purposes, but to serve its members; c) To be of indefinite duration and variable capital, formed by nominative contributions of equal value, transferable only among the members; d) To operate according to the principles of free adhesion, voluntary withdrawal, interest limited to the capital, political and religious neutrality and equality of rights and obligations of all its members. e) To grant each member only one vote, regardless of the number of contributions held. The exercise of the vote may be delegated, when so established in the Bylaws; f**) To distribute surpluses and losses, in proportion to the participation of each member in the cooperative's activities; g) To establish an irreparable reserve fund among the members**; and, h) To promote cooperative education and integration and the establishment of social services" (Emphasis added). Apart from the principles listed above, in the case of mandatory funds there are no special rules related to the taxation of their profits; basically, cooperatives must comply with such principles in order not to be subject to special taxes.

B. Is there a distinction between the results of transactions with members and non-members, and is there any special treatment for income or expenses derived from transactions with members?

In addition to the provisions of Article 4 of the General Law of Cooperatives, described above, Articles 2 and 3 deal with the nature of cooperatives in Guatemala, as well as the minimum number of members to be integrated, **which allows a distinction between the results of transactions with members and non-members and therefore a special tax treatment**. Articles 2 and 3 state: "Article 2. Nature of Cooperatives. Duly constituted cooperatives are **associations that own an economic enterprise at the service of their members**, which are governed in their organization and operation by the provisions of this law. They shall have their own legal personality, distinct from that of their members, as they are registered in the Register of Cooperatives." "Article 3. Minimum number of Members. Every cooperative must have at least twenty members." (Emphasis added).

5. Are there any tax benefits in indirect taxes or local taxes?

In addition to the tax benefits described above, according to Article 23 of the General Law of Cooperatives, the following special tax benefits can also be mentioned for Value Added Tax -VAT- and Income Tax -ISR-, as very important taxes in Guatemala.

- Law of the Value Added Tax -VAT-, Decree number 27-92, issued by the Congress of the Republic of Guatemala.
    - **Article 7. General Exemptions**. The following are exempted from the tax established in this law:
    - Numeral 1. Imports of movable goods made by:

(a) **Cooperatives, federations and confederations of cooperatives, legally constituted and registered, when they are machinery, equipment and other capital goods directly and exclusively related to the activity or service of the cooperative, federation or confederation**. (Emphasis added).

- Numeral 2. Exports of goods and exports of services, as defined in Article 2 numeral 4 of this law. If a Cooperative is engaged in the export of goods and services it enjoys the present exemption.
- Numeral 5. **Cooperatives shall not charge Value Added Tax (VAT) when they carry out sales and service rendering operations with their members, cooperatives, federations, service centers and confederations of cooperatives. In their operations with third parties they must charge the corresponding tax. The tax paid by the cooperatives to their suppliers is part of the tax credit. In the case of savings and credit cooperatives, the services they provide, both to their members and to third parties, are exempt** (Emphasis added). The above is the most important exemption for Cooperatives in the Value Added Tax, by means of which the special treatment between operations with members and non-members can be established, as well as the quality of final consumer that it holds before its suppliers of goods and services.

- Tax Update Law -Ley de Actualización Tributaria, LAT-, Book I Income Tax, Decree number 10-2012, issued by the Congress of the Republic of Guatemala.
    - Title II INCOME FROM LUCRATIVE ACTIVITIES.

- Article 11. Exempt Income. "**The following are exempt from the tax: (...) 2. The income of cooperatives legally constituted in the country, from transactions with their members and with other cooperatives, federations and confederations of cooperatives. However, income from transactions with third parties is taxed**" (Emphasis added). The most important exemption in the Income Tax is the one described above, always with the special treatment among the income obtained with members.
- Article 15. **Exclusion of capital income from taxable income**. "Capital income and capital gains are taxed separately in accordance with the provisions of Title IV of this book. **The provisions of the preceding paragraph do not apply to income from movable capital, capital gains of the same nature, nor to profits from the sale of extraordinary assets obtained by banks, financial companies and legally authorized cooperatives**, nor to the salvage of insurance and bonding companies, subject to the supervision and inspection of the Superintendency of Banks, which are taxed in accordance with the provisions contained in this title. Also exempted from the first paragraph, and shall be taxed in accordance with the provisions contained in this title, is the income from real estate and movable capital from leasing, subleasing, as well as from the constitution or assignment of rights or faculties of use or enjoyment of real estate and movable property, obtained by individuals or legal entities resident in Guatemala, whose usual line of business is such activity" (Emphasis and underlining are added). Non-ordinary income obtained by Cooperatives, such as interest earned on time deposits in banks or financial institutions of various kinds, are not exempt from Income Tax and will be subject to withholding by the payer of such income.

Final comment of importance for Guatemala.

The cooperatives duly constituted and registered in the National Institute of Cooperatives are associations that are owners of an economic enterprise at the service of their associates and are governed in their organization and operation by the provisions of Decree Number 82-78 of the Congress of the Republic of Guatemala, General Law of Cooperatives. Article 4 of the General Law of Cooperatives regulates that in order to be considered as such, cooperatives must comply with, among other principles, the social and economic improvement of their members through common effort; and not pursue profit purposes, but rather service to their

members. Section f) of the same article specifically regulates that among the principles to be complied with is the distribution of surpluses and losses in proportion to the participation of each member in the cooperative's activities. Considering the term profit as: Profit, economic gain obtained from a business, investment or other commercial activity; and surplus as: Business profit. Article 5 of the aforementioned law states that cooperatives may carry out any lawful activity within the production, consumption and services sectors, compatible with the cooperative principles and spirit. Federations are second-tier cooperatives, formed by two or more first-tier cooperatives engaged in similar activities. The Confederation is a third degree cooperative formed by two or more federations of the same economic activity. The Federations shall be representative of the sectors to which their members belong. The Federations and the corresponding Confederation will be considered as cooperative associations, therefore, the same incorporation provisions are applicable to them as to the Cooperatives, as well as the rights and obligations contained in the protection regime indicated in the referred Law.

Pursuant to Article 26 of said Law, the Cooperatives, Federations and the corresponding Confederations will be subject to State control, which will be exercised through the General Inspection of Cooperatives attached to the National Institute of Cooperatives. The Cooperatives that contravene the provisions of this law will be sanctioned as provided in Article 30 of the same.

Cooperatives are governed under the rules of their operation, which are called bylaws, which establish the form of administration, internal control, organs, members, legal representation, summons to General Assemblies, term and meetings of such assemblies, rules for liquidation and dissolution and the provisions deemed necessary.

According to Article 3 of Decree Number 27-92 of the Congress of the Republic of Guatemala, Value Added Tax Law, the rendering of services in the national territory constitutes a taxable event, defined service as the action or rendering that a person does for another and for which he/she receives a fee, interest, premium, commission or any other form of remuneration, provided that it is not an independent relationship.

Article 7 numeral 5 of the above mentioned law, regulates that Cooperatives shall not charge Value Added Tax when they carry out sales and services rendering operations with their associates, cooperatives, federations, service centers and confederations of cooperatives. In their operations with third parties they must charge the corresponding tax. In the case of

savings and credit cooperatives, the services they render, both to their members and to third parties, are exempt.

From the related legal precepts, it is determined that the application and interpretation of the law cannot be made in isolation from the integral context of the legal body to which they belong, for which reason the principle of speciality *lex especiali derogat lex generali* must be applied, regulated in Article 13 of Decree Number 2-89 of the Congress of the Republic, Law of the Judicial Organism, which states: the special provisions of the laws shall prevail over the general provisions of the same or of other laws.

In general, Article 11 of the Tax Update Law establishes that the income obtained by the entities that are exclusively destined to the non-profit purposes of their creation and in no case distribute, directly or indirectly, profits to their members, will be considered exempt from taxation: specifically, Article 4 paragraph f) of the General Law of Cooperatives regulates the distribution of surpluses and losses in proportion to the participation of each member in the activities of the cooperative, as one of the principles that cooperatives must comply with.

In the specific case of income obtained by cooperatives, provided that the legal requirements set forth in Article 4 of the General Law of Cooperatives are met, the exemption regulated in Article 11 of the Tax Update Law will be applied, provided that the surpluses originate or are the result of operations, transactions or activities with its members.

Article 2 of the Tax Update Law refers that the regulations corresponding to each category of income are established and the tax is settled separately, according to each of the titles regulated in Book I of the mentioned law. In this sense, the income obtained by the members of the cooperatives that come from the distribution of surpluses, profits and earnings, regardless of the denomination given to them, constitutes a taxable event for Income Tax, in accordance with articles 83 and 84 literal d) of the Tax Update Law, considering the members of the cooperative that obtain the profits or benefits as taxpayers of the referred tax in accordance with article 18 of the Tax Code.

Regarding the determination of the taxable base of capital income, article 88 numeral 1) of the Tax Update Law, regulates that the taxable base of capital income is constituted by the income generated in cash or in kind represented by the total amount paid, minus the exempt capital income. In the case of the distribution of profits or benefits among the members of the

cooperative, the taxable base is constituted by the total amount received as profit or benefit to be distributed, to which the tax rate of 5% established in Article 93 of the Tax Update Law must be applied.

Article 90 of the Tax Update Law stipulates that capital income, when applicable, is subject to definitive withholding from the moment the payment, credit or bank payment in cash or in kind is made to the beneficiary of the income. In this case, the Cooperative, in accordance with article 47 of the aforementioned Law, must act as withholding agent for Income Tax in the category of Capital Income, considering that any person who pays capital income, by any means or form, when applicable, must withhold Capital Income Tax, must withhold the Income Tax referred to in Title IV of the Tax Update Law and pay it by means of a sworn statement to the Tax Administration, within the first ten (10) days of the month immediately following the month in which the payment or bank credit in money was made, as regulated in articles 86 and 94 of the mentioned law. Noncompliance in this case by the Cooperative in not withholding capital income to the member who benefited from the profit or benefit shall be sanctioned in accordance with the Tax Code. Article 29 of the Tax Code states that, once the withholding has been made, the only person responsible before the Tax Administration for the amount withheld or collected is the withholding agent and that the failure to comply with the obligation to deposit in the tax boxes the amounts that should have been withheld does not exempt the obligation to deposit the amounts that should have been withheld or collected, for which it will be jointly and severally liable with the taxpayer, unless it is proved that the latter made the payment. Failure to withhold taxes in accordance with the rules established in the Tax Code and the specific laws of each tax shall constitute a violation of formal duties and shall be punished with a fine equivalent to the tax withheld, as provided in Article 91 of the same Code. The imposition of the fine does not exempt the obligation to pay the tax collected or withheld, unless payment has already been made by the taxpayer. In the event that the withholding is not made, the member of the cooperative must liquidate and pay the tax within the first 10 days of the month immediately following that in which the payment, crediting or payment in money was received, in accordance with the provisions of Article 95 of the Tax Update Law.

The income obtained by the Cooperatives, in accordance with the specific provisions regulated by the General Law of Cooperatives, is exempt in accordance with article 11 of the Tax Update Law, provided that the requirements set forth in the article of the General Law of

Cooperatives are complied with, and that the surpluses originate or are the result of operations, transactions or activities with their associates. In their operations with third parties they must charge the corresponding tax. Likewise, they must pay the corresponding tax for the distribution made. The income obtained by the members of the Cooperatives that come from the distribution of surpluses, profits and earnings, regardless of the denomination given to them, is subject to Income Tax, in this case the Cooperative, according to article 47 of the Tax Update Law, must act as withholding agent of the mentioned tax in the Capital Income Category and must pay the withheld tax through a sworn statement to the Tax Administration. This does not affect the registration status of the Cooperative before the Superintendence of Tax Administration.

ITALY

Maria Grazia Ortoleva[1]

1. Does your Constitution consider cooperatives?

In the Italian legal system, cooperation finds its legitimacy first and foremost in art. 45 of the Constitution, a provision which "recognizes the social function of cooperation of a mutual nature and without the aim of private speculation" and which assigns to ordinary law the task of promoting and favoring it.

This provision represents the outcome of a process aimed at consecrating the suitability of cooperatives to contribute to the realization of public objectives of a socio-economic nature established in articles 1 to 4 of the same Constitutional Charter and which are included among the fundamental principles of the Italian Republic, starting with those of equality and solidarity.

In the constitutional text, the social function of cooperation is related to the essence of the cooperative model, which is understood as a form of business organization based on a collective, democratic, personal and not capital-based management, and solidarity. According to the majority doctrine, the elements of mutuality and the absence of private speculation are the characteristics that cooperation must have "because it is in direct relation with them that its social function is recognized. If these features are missing, cooperation is not protected or facilitated: there is no cooperation".

However, the meaning and extent of these characteristics are still the subject of debate today. According to the thesis of authoritative doctrine, to which we subscribe, mutuality is relevant from both a structural and functional point of view. That is, it implies, first of all, the adoption of an organizational module which assumes, as its main elements, the principles of participation and democracy in the decision-making process and which, therefore, guarantees both the participation of "anyone" in the carrying out of the activity which is the object of the company (the so-called "open door" rule) and the equal participation of the members of the organization (the "one head one vote" rule). From a functional point of view, at the level of relations between the cooperative body and participants, mutuality should not be resolved in the mere "management of service" (i.e. in the obligation to allocate the activities exclusively or prevalently to the participants), but should be understood as the ability of the body to directly satisfy the needs of the participants; and in this the specific interest of the latter in joining the body is realized.

According to this orientation, the connotation of the absence of a speculative purpose should be referred above all to the cooperative enterprise, which, in this sense, is connoted by being a subject which does not operate according to the merely speculative logic of private enterprises. In substance, in the constitutional dictate, the cooperative enterprise, even though

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it bases its conduct on economic criteria (as a subject operating on the market), should not aim, always and in any case, at the achievement of the highest possible profit[2].

On the other hand, it is necessary to point out that the placement of art. 45 in Title III of Part I of the Constitution concerning "economic relations" seems to underline the importance not only of the economic nature of the activity, which is the object of the type of association, but also of the aims pursued by it which, even if different from mere "private speculation", are directly economic.

2. Do cooperatives have a special legal regime? Are they regulated in a separate act, or through special rules in commercial legislation applied to corporations?

The general regulation of cooperative societies, with the exception of the fiscal aspect, is essentially contained in the Civil Code as modified by Legislative Decree No. 6 dated January 17, 2003 (so-called "Vietti reform")[3]. With reference to certain specific sectors of activity -for example, agriculture, production and labor, banking- special legislation is also envisaged that derogates from ordinary regulations, introducing rules that directly and immediately regulate those specific sectors.

As far as the ordinary discipline is concerned, the Civil Code configures the cooperative as a company with variable capital with a mutualistic purpose, thus underlining, on the one hand, the corporate structure and the variability of capital, and on the other, that the mutualistic purpose is an essential characteristic of every cooperative company[4].

In the revised Civil Code, the mutualistic purpose, while still not being expressly defined, seems to acquire sharper contours, taking shape first and foremost as "management of services in favour of members"[5]. Basically, it means that the aim of the cooperative society is to give the members of the social organization more advantageous working conditions, supplies, etc., than those that the aforementioned members would otherwise be able to find on the market, so that their participation in the cooperative is a function, not of the division of profits, but of the realization of the different interests and needs of which the members are bearers.

In addition to service management, defined by authoritative doctrine as the "DNA" of cooperative societies, the revised Civil Code brings to the fore other traits that mark the

[2] In this perspective, the pursuit of the equivalence of proceeds to costs is allowed and, to a certain extent, necessary, but, at the same time, it represents the functional limit of the cooperative organization, which must therefore act by guaranteeing a balance between management efficiency and the interests of the "community". This implies that the cooperative organization, in order to achieve the objective of satisfying socially relevant needs and to remain faithful to its principles, must also offer third parties (non-members) the most favourable conditions compatible with economic management.

[3] In particular, it can be found in Chapter I ("Of Cooperative Companies") of Title VI ("Of Cooperative Companies and Mutual Insurers") of Book V ("Of Labour") of the Civil Code, in articles 2511 and following.

[4] The discipline of the cooperative, in fact, even though in many points it is identical to that of the s.p.a. and to that of the s.r.l. (which the interpreter must draw on in a supplementary way according to the size of the cooperative enterprise when there is no discipline dictated in sede materiae), is adapted in various parts to the specific needs of the mutualistic purpose.

[5] In this sense was expressed prior to the reform: G. Bonfante, *Cooperazione e imprese cooperative*, in Dig. disc. priv., sez. comm., IV, Torino, 1989, p. 147 ff.

cooperative enterprise, namely: mutualistic exchange, refunds, the principle of the "open door".

In particular, as far as refunds are concerned, at art. 2545 *sexies* it is now established first of all that in the memorandum of association the "criteria for the distribution of refunds" must be indicated and, then, that the data concerning the activity carried out with the members must be reported separately in the balance sheet, eventually distinguishing the different mutualistic managements". Lastly, the aforementioned provision dictates two other fundamental rules, namely that the transfers must be shared among the members in proportion to the quantity and quality of the mutual exchanges and can also be attributed to them by allocating them to capital or by issuing financial instruments.

Last but not least, it must be remembered that, again at the time of the 2003 reform, the Civil Code introduced the distinction -relevant exclusively for the purposes of the recognition of tax benefits- between "prevalently mutual cooperatives" (hereinafter, CMP) and "other" non prevalently mutual cooperatives (hereinafter, CMNP). In particular, it is foreseen that, in order to qualify as prevalently mutual, the cooperative must: a) comply with the requirement of "prevalence" of mutual exchanges, carrying out the social activity prevalently towards the members (art. 2512 Civil Code); b) indicate in the articles of association the clauses as per art. 2514 Civil Code, which are, on the whole, aimed at "compressing" the so-called subjective profit. The notion of prevalence is then appropriately declined and specified by means of the provision of precise accounting parameters, which, depending on the object of the cooperative's activity, specify the criteria to verify, in concrete terms, whether the transactions between the company and the members are prevalent with respect to the activity carried out for third parties or to the productive factors (work, services, goods) acquired from third parties (art. 2513 Civil Code)[6]. However, social cooperatives (law 381/1991) are not subject to these indices, as they are considered to be prevalently mutual[7].

As far as the clauses in the articles of association are concerned, these respond to the need to guarantee that, in the (very frequent) hypothesis in which the social activity is also addressed to third parties and, consequently, includes a profitable activity (so-called spurious mutuality), the mutualistic purpose connotes the activity as a whole. Among the aforementioned clauses, it is worth mentioning the prohibition to distribute reserves among cooperative members and the obligation to devolve, in case of dissolution of the company, the entire corporate assets to mutual funds for the promotion and development of cooperation. In addition, there are limits to the distribution of dividends and to the remuneration of financial instruments offered for subscription to cooperative members[8]. According to the majority opinion, the limits to subjective profitability set by art. 2514

[6] For example, in the case of consumer cooperatives, it is established therein that revenues from the sale of goods and the provision of services to members must exceed 50% of the total revenues from sales and services recorded in item A1 of the income statement.

[7] Cfr. art. 111-*septies* of the implementing and transitional rules of the civil code.

[8] In particular, pursuant to the above-mentioned art. 2514 of the Civil Code, the Articles of Association must indicate the prohibition to distribute dividends to an extent higher than the maximum interest on non-interest-bearing postal bonds, increased by two and a half points compared to the capital actually paid up, and the prohibition to remunerate financial instruments subscribed by cooperative members to an extent higher than two points compared to the maximum limit set for dividends.

mentioned refer only to cooperative members, and not also to financing members for whom, therefore, there would be no constraint "to a 'profit-making' and 'capitalistic' use of the cooperative (freedom supported by the possibility of creating unlimited and divisible reserves in their favor)"[9].

If for two consecutive financial years the conditions of prevalence in the mutual exchange are not respected or if the statutory clauses pursuant to art. 2514 cited are modified, the cooperative loses its CMP status. In this case, *ex lege*, the actual assets of the cooperative are bound to be indivisible (in line with the fact that they have been formed by benefiting from tax relief)[10] and in order to determine their actual value, the directors of the cooperative are obliged to draw up a special balance sheet.

Finally, with regard to the un-distributable reserves, it must be noted that, according to the express provision of the law, they "can be used to cover losses", but "only after the reserves which the company had allocated to capital increase operations and those which can be distributed among the members in the event of dissolution of the company have been used up".

3. Do cooperatives enjoy a specific tax regime? Or any special tax treatment?

In the Italian legal system, also on account of the provisions of art. 45 of the Constitution, there are various tax regulations (both of a "facilitating" nature and not) specifically conceived for cooperative societies in view of and in function of their mutualistic purpose.

However, there is no single tax regime for these entities. On the contrary, different treatments are foreseen according to the qualification of the cooperative as prevalently mutual or not and, among prevalently mutual cooperatives, according to the type of activity carried out.

In the analysis of the regulations on the taxation of cooperatives, the starting point can only be art. 223-*duodecies*, para. 6, trans. provisions of the Civil Code, according to which "the tax provisions of a facilitating nature envisaged by special laws apply only to prevalently mutual cooperatives". With this norm the legislator gives relevance for tax purposes to the distinction between CMP and "different" cooperatives and, at the same time, imposes, as a preliminary step, the difficult qualification of the single provisions foreseen for the benefit of cooperatives as "facilitations" (*agevolazioni*) in the technical sense rather than as "exemptions" of a systematic nature. In the tax field, in fact, the term "facilitation" is not univocal and, moreover, its improper use by the legislator is not infrequent[11].

[9] Cfr. F. Pepe, op. cit., p. 164, who, however, adheres to the minority thesis according to which, despite the literal tenor of the law, an extension of the aforesaid limits could also be envisaged for financing partners. In this sense, see also G. Bonfante, Attività mutualistica i ristorni, cit., 77.

[10] From this point of view, we agree with the thesis according to which this is a provision with an anti-avoidance purpose, aimed at preventing the cooperative, having lost the status of CMP, from distributing to the members the reserves that had enjoyed the partial exclusion from taxation precisely because of their indivisibility. In this sense cfr. D. Stevanato, op. cit., p. 12.

[11] Cfr. M. Ingrosso, cit., p. 81. Some tax treatments, formally referred to by tax regulations or practice as "tax benefits", are not in fact benefits in the technical sense, meaning those provisions dictated for reasons of an extra-tax nature, solely for the purpose of promoting and protecting certain interests; on the contrary, they are often provisions based on the principle of ability to pay and/or justified by structural reasons inherent in individual taxes.

Having said this, looking at income taxes, it should be pointed out first of all that cooperative companies are subject to the corporate income tax (IRES)[12] and that, in order to determine their taxable income, the ordinary criteria provided for the identification of the income of companies with share capital apply as a rule -except for express derogations. In view of their social function and in order to encourage their promotion and development, over the years, special rules have been introduced, some of which affect the *an debeatur* through exemptions or tax exclusions, others affect the *quantum debeatur* through reductions and deductions from the taxable base or from the tax.

In particular, on the basis of the distinctions made by the same tax regulations, some regimes are 'general', i.e. they refer to all cooperatives (both those with prevalent mutuality and those 'different') [13], others - the real 'facilitations' - are destined only to CMP; among these, then - as anticipated - some are foreseen for the benefit of certain types of CMP, i.e. agricultural cooperatives, those of small fishing, those of work, those of consumption and social cooperatives.

Compliance with the conditions foreseen by articles 2512-2514 of the Civil Code (in order to qualify as a CMP) is essential. (in order to obtain the qualification of CMP) is a necessary but not sufficient condition for the entitlement to real tax benefits. In fact, further requirements are necessary for this purpose and, in particular: i) registration in the Register of Cooperatives, section of prevalent mutuality cooperatives; ii) payment of the annual contribution to the mutual funds[14] and, according to the prevalent doctrine, iii) observance "in fact" of the requirements of prevalent mutuality and the non-profit clauses for a five-year period.

4. In particular, when taxing their benefits:

a. Is there any special rule for mandatory funds -if these exist?

As far as the treatment of the year's profits is concerned, first of all, it should be pointed out that these are not freely available to the shareholders and that, in particular, all cooperatives are obliged to allocate at least 30% of the year's net profit to the legal reserve[15] and 3% of the annual net profit to the mutual funds for the promotion and development of cooperation[16]. The existence of such obligations is taken into account, at least in part, by the tax legislator when it provides for the taxation at the rate of 10% of the share of profits set aside for the minimum compulsory reserve[17] and the deductibility, for IRES and IRAP purposes, of

[12] Cfr. art. 73 of d.p.r. n. 917/86 (hereinafter referred to as Tuir); moreover, pursuant to art. 3 of Legislative Decree No. 446/97, these companies are subject to the regional tax on productive activities (referred to as IRAP).
[13] In particular, this involves the partial exclusion from taxable income of profits allocated to the legal reserve and indivisible reserves; the detaxation of part of the profits allocated to specific mutualist purposes and the mitigation of the non-deductibility of income taxes.
[14] Pursuant to art. 11, paragraph 10, Law No. 59/92, failure to pay the 3% contribution entails forfeiture of the tax and other benefits provided for by current legislation.
[15] Cfr. art. 2545-quater of cod. civ.
[16] Cfr. art. 11, c. 4, Act 31 January 1992, n. 59.
[17] Cfr. art. 6, c. 1, d.l. 15 April 2002, n. 63, as amended by paragraph 36-ter of article 2 of Law Decree No. 131/2011. In its original wording, the aforementioned article 6 instead envisaged the application of article 12 of Law No. 904 of December 16, 1977, i.e. the detaxation "in any case" of the portion of the annual net profits allocated to the mandatory minimum.

payments to the funds made by cooperative companies[18]. For the latter, in substance, the payment of 3% represents a deductible charge in line with the non-income nature of the relative sums. Lastly, it should be pointed out that both the aforementioned provisions, in line with their "nature", also apply to CMNP. In this regard, it is, in fact, easy to observe that the rules laid down therein cannot be considered concessions in the technical sense. The first is based on and justified by the indivisibility of the legal reserve; the second, as mentioned above, by the non-income nature of the related sums.

As regards the profits that remain after these allocations, their allocation is left to the decision of the Shareholders' Meeting which, however, in the case of CMPs, must take into account the rules under art. 2514 of the Civil Code which, as mentioned, provide for the compression of subjective profit. On the contrary, in the case of CMNP, art. 2545 *quinquies* C.C. provides only that the memorandum of association indicates the modalities and the maximum percentage of distribution of dividends among cooperative members, so that both are entirely left to the statutory autonomy. Having said this, as far as the tax treatment of profits allocated to indivisible reserves is concerned, for a long time they have been totally exempt from taxation pursuant to art. 12 of Law No. 904 dated December 16, 1977. The exclusion from taxation established therein has, however, been progressively reduced over time, presumably in the belief that the detaxation of reserves constituted "favorable treatment such as to alter competition between companies with different legal forms"[19]. The regime currently in force is the result of the amendments made, firstly, by Law No. 311 of December 30, 2004 and, then, by Law Decree No. 138 of August 13, 2011, which limited the scope of the provision set forth in the aforementioned art. 12, providing for its disapplication on a percentage of annual net profits that varies according to the type of cooperative. In particular, with regard to CMPs (the "natural" beneficiaries of the aforesaid regime), the minimum portion of profits to be taxed is: i) 65% for consumer cooperatives; ii) 20% for agricultural and small fishing cooperatives; iii) 40% for other cooperatives and their consortia. Social cooperatives, which are considered CMPs pursuant to law, are not subject to the latter restrictions[20].

Lastly, it should be clarified that, according to the tax authorities, cooperatives may benefit from the tax provisions that provide for tax relief on the sums allocated to indivisible reserves and the deductibility from taxable income of payments to mutual funds only in respect of those portions of net income that exceed those that must in any event be subject to taxation pursuant to art. 1, paragraph 460, Law No. 311/2004[21].

Consistent with the non-favorable nature of the exemption provided for by art. 12 cited above[22], it is now expressly established that it is also valid for the CMNP, but limited to a

[18] V. art. 11, c. 9, Act 31 January 1992, n. 59 pursuant to which such payments are also tax-exempt for the trade associations receiving the contribution.

[19] R. Paladini - A. Santoro, cit., 158. In this sense, the heading of art. 6 del d.l. n. 63/2002, «Progressivo adeguamento ai principi comunitari del regime tributario delle società cooperative».

[20] Art. 1, c. 463, Act n. 311/2004. Therefore, they continue to enjoy full exemption from income taxes as provided for in the above-mentioned art. 12 in relation to the amounts allocated to indivisible reserves and, if the requirements are met, the exemptions provided for in Presidential Decree No. 601/73. The taxation of 10% of the annual net income allocated to the minimum obligatory reserve remains unchanged.

[21] Cfr. "Agenzia delle Entrate" Revenue Agency, circular 15.07.2005, n. 34/E.

[22] Today, the facilitating nature of this provision tends to be denied, since it is believed that tax relief is justified by the reduced ability to pay of profits set aside in indivisible reserves. In particular, according to some, the lack of

quota equal to 30% of the annual net profits and provided that this quota is destined to an indivisible reserve declared as such by the articles of association[23].

With reference to the treatment of indivisible reserves, it should be remembered that pursuant to art. 3, paragraph 1, of Law No. 28/99, the use of such reserves to cover losses does not result in the forfeiture of the "benefit" of tax relief, "provided that no distribution of profits takes place until the reserves have been reconstituted". In this case, in fact, it is not the "indivisibility" of the reserve that is lost, but rather the reserve itself, which resets to zero as a result of covering the loss.

With reference to all cooperatives, it is also established that the income taxes referable to the tax increases to the statutory profit carried out *ex* art. 83 of the Tuir (due, for example, to the fiscal non-deductibility of some costs[24]) do not contribute to forming the taxable income, on condition that the consequent decrease in the taxable income determines a profit or a higher profit to be allocated to the indivisible reserves[25]. The provision, which serves to avoid the so-called "tax effect", does not apply, therefore, if the profit is distributed to shareholders or allocated to free reserves.

4. In particular, when taxing their benefits:

b. Is there a distinction between the results of transactions carried out with partners and non-partners? Does the income or expenditure derived from transactions with partners receive any special treatment?

Consistently with the mutualistic purpose that characterizes all cooperatives, specific fiscal provisions are foreseen with reference to the management surpluses that derive from "transactions" between the company and the cooperators.

This refers first of all to the regime of transfers, that is, the fiscal treatment of the amounts assigned to members for the "final" allocation of the mutualistic advantage and which, therefore, originate from the very purpose of the cooperation.

From the point of view of the cooperative society, transfers represent a cost that is fully deductible for the purposes of determining the taxable income for IRES and IRAP, on condition that these sums are paid within the limit of the surplus of the mutual management[26]. Deductibility does not depend on the manner of allocation, that is, on whether these amounts: a) are "directly" allocated to the members in the form of restitution of part of the price of goods and services purchased by the members (consumer cooperatives), of greater

availability of an income asset entails its inability to contribute to public expenditure; according to others, on the other hand, that wealth which, by definition, is directed towards public purposes, does not have the capacity to contribute.

[23] V. art. 1, c. 464, legge n. 311/2004. In practice, the exemption applies only to the portion of profits that must be set aside as a minimum reserve.

[24] This is the case, for example, of "presumed" costs, i.e., without the character of certainty.

[25] Cfr. art. 21, c. 10, Act 27 December 1997, n. 449. In addition, the downward variation must be proportional to the portion of profit not taxed as a result of the application of the tax reliefs (Circ. Ag. Entr. 16 March 2005, n. 10/E)

[26] It should be borne in mind that in the financial statements the amounts deriving from the mutual exchange with shareholders must be kept separate, pursuant to art. 2545 sexies of the c.c., from those deriving from relations with third parties.

compensation for the contributions made (contribution cooperatives)[27] or of remuneration for the salaries of the members (work cooperatives)[28]; b) are allocated pursuant to art. 2545-*sexies* of the Civil Code to the capital and therefore allocated to each member through the proportional increase of the respective shares or through the issue of new shares or financial instruments.

From the point of view of the member, the tax regime for reversions depends on: a) the manner of allocation (i.e. whether they are paid out or intended to increase the capital); b) the type of mutual exchange implemented by the cooperative; c) the "status" of the member (i.e. whether or not he/she is a businessman or self-employed). The patrimonial increase obtained in a deferred way with respect to the mutualistic exchange through the refund generally has the same fiscal treatment that it would have had if those sums had been attributed immediately and is therefore, as a rule, ascribable to the same income type. It remains firm that such sums are subject to taxation only if they integrate a case of taxable income, that is, if they have an income nature. The refund is not, therefore, subject to taxation in the case of the member (private consumer) of the consumer cooperatives, representing in this case a lower cost of purchases. On the contrary, in the case of cooperative members/workers of work cooperatives, the refund represents an additional remuneration and is qualified as assimilated employment income. In the hypothesis in which the reversions are allocated to increase the share capital ex art. 2545-*sexies* Civil Code, first of all, a "tax suspension regime" is foreseen on the basis of which, in the year in which they accrue, the reversions (of consumer cooperatives and those of production and work cooperatives) do not contribute to forming the taxable income for IRES and IRAP purposes of the members[29], as the taxation only takes place at the moment in which the sums are disbursed to the members (provided that they are taxable sums at the moment of allocation to the share capital). Moreover -and this is the most important aspect from a systematic point of view- the distribution of transfers is, in this case, assimilated to the distribution of profits and, consequently, taxation takes place with a withholding tax of 26%[30].

Finally, a "favorable" tax treatment is foreseen with reference to the so-called "social loans" understood as capital contributions that can be reimbursed, usually in the short-medium term, made by members to cooperative companies and "incentivized" if the conditions foreseen by art. 13 of Presidential Decree No. 601/73 exist. It is sufficient to recall that, as an exception to the general rule on company income laid down in art. 96 of the Consolidated Income Tax Law, interest on sums loaned by resident individual members to cooperative societies and their consortia is non-deductible only for the part that exceeds the amount calculated with reference to the minimum amount of interest due to holders of interest-bearing postal savings

[27] Cfr. art. 12 of D.P.R. 29 September1973, n. 601 (as reformulated by article 6 of Law No. 388 of December 23, 2000), which identifies the regime applicable to all cooperatives, including those that are not prevalently mutual.
[28] Cfr. art. 11, c. 3, of D.P.R. 29 September 1973, n. 601, which, for production and work cooperatives, provides for the partial and flat-rate deductibility of transfers up to the limit of current salaries increased by 20%..
[29] Cfr. art. 6, c. 2, of d.l. 15 April 2002, n. 63. This regime is not applied for VAT purposes, therefore in the event that the recipient partner is a self-employed worker or an entrepreneur and the conditions for the application of taxation are met, the reversals must be subject to VAT in the financial year in which they are charged as an increase in capital.
[30] Cfr. art. 27 of d.p.r. n. 600/73. This treatment applies in the event that the recipient is a natural person who does not carry out business activities.

bonds, increased by 0.90%, on condition, among other things, that the loans are aimed at achieving the corporate purpose[31]. According to the prevailing theory, this treatment is valid for all cooperatives, that is, also for CMNP.

As far as members are concerned, on the other hand, the benefit consists in the taxation of the interest received by means of withholding tax at a rate of 20% (instead of the ordinary 26%)[32].

5. Does any tax benefit in indirect taxes or local taxes apply?

Even in the area of indirect taxes there is favorable legislation, both general and sectoral, although in recent years this has been considerably reduced.

With regard to value added tax, there is a provision according to which the social, health, welfare and educational services[33] rendered by social cooperatives and their consortia to "disadvantaged persons"[34] are subject to VAT at a rate of 5% (see art. 1, para. 960, of Law No. 208/2015). The application of the reduced rate, in place of the exemption provided for in Italian law for such transactions by art. 10 of Presidential Decree No. 633/72, allowing social cooperatives to exercise their right to deduct the tax on the goods and services used to provide such services, could give rise to unjustified differences in treatment both between non-profit taxpayers who provide the same services and, consequently, between end users.

With regard to other "minor" indirect taxes (registration tax, stamp duty, mortgage tax) there are various provisions aimed at favoring application of the "open door" principle and which, according to some, would also be applicable to CMNP as they do not have the nature of concessions in the technical sense.

Among these is the provision according to which, for the purposes of registration tax, there is no obligation to register deeds "involving a change in the share capital of cooperative companies and their consortia and mutual aid societies" (art. 9 of the table attached to Presidential Decree No. 131 of 1986). Basically, in the event that a cooperative company resolves to admit a new member or to dissolve the bond with a member, the relative resolution, even if it implies an increase in share capital, is not subject to registration and therefore to the payment of registration tax. This exemption does not apply, on the other hand, in the event that the changes in share capital do not depend on the entry/exit of

[31] In substance, for the application of this regime, the conditions provided for by art. 13 of Presidential Decree No. 601 of 1973 must be met, which also provides for compliance with both a maximum limit, for each partner, on the amounts lent and a maximum limit on remuneration.

[32] In particular, as from 2012, the amount of the withholding is independent of the size of the financed cooperative (i.e. whether it is a small/micro cooperative on the basis of EU Commission recommendation No. 2003/361/EC of May 6, 2003). With art. 2, paragraph 25, legislative decree No. 138/2011 the provision of art. 20 of legislative decree No. 95/1974, which envisaged a reduced withholding tax of 12.50% for members of small/micro cooperatives, was repealed.

[33] The *de quibus* transactions are listed in Part II-bis of Table A, attached to D.P.R. n. 633/72.

[34] These are the persons indicated in No. 27-ter) of art. 10, para. 1, of D.P.R. n. 633/1972, namely elderly and disabled adults, drug addicts and AIDS patients, the psychophysically disabled, minors, including those involved in situations of maladjustment and deviance, migrants, the homeless, asylum seekers, people in prison, women victims of trafficking for sexual and labor purposes.

shareholders but, for example, on the resolution passed by the Shareholders' Meeting to increase the nominal value of the shareholding or on the issue of new shares to employees.

It should also be remembered that with regard to stamp duty there is absolute exemption for acts, documents and registers relating to the operations of cooperative companies and their consortia (art. 19 of Table B attached to Presidential Decree No. 642/72).

Finally, there are many favorable treatments reserved for specific types of CMP. For example, for the exclusive benefit of social cooperatives, a fixed amount of registration, mortgage and cadastral tax is levied on "deeds of incorporation" and "statutory changes" (including "merger, demerger or transformation operations") (art. 82, para. 3, Code of the third sector), whilst further facilitations in terms of registration tax are granted to housing cooperatives and their consortia (art. 66, paragraph 6 bis, Law Decree No. 33/931) and cooperatives that directly manage land (art. 9, paragraph 2, Presidential Decree No. 601/1973).

JAPAN

Yuri Matsubara[1]

1. Does your Constitution consider cooperatives?

The Japanese Constitution is quite simple and never has been amended since 194). It does not expressly consider cooperatives.

2. Do cooperatives have a special legal regime?

There is a special legal regime for cooperatives. They are regulated in a separate act. As to their legal status, the Japanese legislator prescribed it in the Civil Code (*Ninni Kumiai* -NK-, namely general partnership) and in the Commercial Code (*Tokumei Kumiai* -TK-, i.e. special partnership) which derived from the German Commercial Code.

3. Do cooperatives enjoy a specific tax regime? Or any special tax treatment?

In addition, special rules for those are prescribed in tax statutes (CIT/IIT)[2].

4. In particular, when taxing their benefits:

a. Is there any special rule for mandatory funds -if these exist?

Yes, there is a special rule for mandatory funds.

b. Is there a distinction between the results of transactions carried out with partners and non-partners?

There is a distinction between the results of transactions carried out with partners and non-partners.

Does the income or expenditure derived from transactions with partners receive any special treatment?

The income or expenditure derived from transactions with partners does not usually receive any special treatment (according to the case law).

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[2] Regarding the tax treatment of "NK" versus "TK", *see* MATSUBARA, Yuri:" International Tax Aspects of the *Tokumei Kumiai*", *IBFD Asia-Pacific Tax Bulletin*, (10) 2004, pp.76-84.

POLAND

Marcin Burzec[1]

1. Does your Constitution consider cooperatives?

There are no provisions in the Constitution of the Republic of Poland which would directly refer to cooperatives. However, taking into account the exceptional character of cooperatives, which distinguishes them from entrepreneurs and legal persons, it is often emphasised that cooperative activity helps to implement the postulates of a social market economy expressed in Article 20 of the Constitution of the Republic of Poland.[2] Moreover, thanks to the features of democratic management and fair co-ownership, a cooperative contributes to the implementation of the principle of social justice expressed in Article 2 of the Constitution,[3] as well as the principle of solidarity referred to in Article 20 of the Constitution.

2. Do cooperatives have a special legal regime? Are they regulated in a separate act, or through special rules in commercial legislation applied to corporations?

The basic legal act regulating the manner of establishment and principles of functioning of cooperatives is the Law on Cooperatives of 16 September 1982. According to this Law, a cooperative is a voluntary association of an unlimited number of persons, with variable membership and variable share fund, which conducts joint economic activity in the interest of its members. A cooperative is a legal person, and acquires its personality upon entry in the National Court Register.

In addition, apart from the Cooperative Law, there are also other legal acts in the Polish legal system regulating the establishment, liquidation and operation of specific types of cooperatives. These include:

- the Act on Housing Cooperatives of 15 December 2000
- the Act on Farmers' Cooperatives of 4 October 2018
- the Act on Social Cooperatives of 27 April 2006

With regard to housing cooperatives, farmers' cooperatives or social cooperatives, the Law on Cooperatives applies only in matters not regulated by the provisions of the aforementioned acts.

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[2] Article 20 of the Constitution of the Republic of Poland of 2 April 1997 (hereinafter referred to as the Polish Constitution) states that a social market economy based on the freedom of economic activity, private ownership and solidarity, dialogue and cooperation between social partners constitutes the basis of the economic system of the Republic of Poland.

[3] Article 2 of the Polish Constitution states that the Republic of Poland is a democratic state ruled by law, implementing the principles of social justice.

The Polish legal system also includes the Act of 22 July 2006 on European Cooperatives, which regulates the establishment, organisation and activities of European cooperatives Society and the rules of employee involvement in the European cooperatives.

3. Do cooperatives enjoy a specific tax regime? Or any special tax treatment?

4. In particular, when taxing their benefits:

a. Is there any special rule for mandatory funds -if these exist?

b. Is there a distinction between the results of transactions carried out with partners and non-partners? Does the income or expenditure derived from transactions with partners receive any special treatment?

a) Corporate Income Tax

In principle, cooperatives are taxed under similar rules as other legal persons, although the legislator has provided for minor exceptions in this respect.

As a rule, CIT is levied on income earned by legal persons, which is the difference between revenue and the costs of generating it. The CIT Act does not contain a definition of revenue, but only lists its exemplary types, defines the moment at which they arise, and enumerates exclusions from the revenue catalogue. As a rule, revenue means received money and pecuniary values, including exchange rate differences. Revenue connected with business activity and specialist agricultural activity is also deemed to be revenue due, even if not actually received yet, after exclusion of the value of returned goods, granted discounts and rebates (accrual method). In the case of cooperatives, revenue may also include the value of a non-cash contribution. If its value is not specified in the statute, the revenue is determined on the basis of the market value. Such revenue arises on the day of registering a cooperative or adopting a resolution on acceptance as a member of the cooperative. However, the following does not constitute revenue: the reimbursed contributions to a cooperative; the value of the registration fee allocated to current reserves and the value of a non-cash contribution to a cooperative if its object is an enterprise or an organised part thereof.

It should be emphasised that, exceptionally, the subject of taxation may be the revenue from the so-called capital gains (without taking into account the costs of obtaining it), on which a 19% tax rate is imposed. In the case of cooperatives, taxation will be imposed on the cooperative's balance surplus and on the equivalent of the cooperative's balance surplus allocated to increase the share fund and the equivalent of the amounts transferred to that capital (fund) from other capital (funds). The Act separates revenue into two sources: revenue (income) and revenue obtained from "capital gains", which results from the desire to limit the fiscal effects associated with operations generating artificial losses. In a situation where a cooperative earns in a tax year both income from "capital gains" and income from other activities, the subject of income tax will be the total income from both sources. However, if it obtains income only from one of these sources and incurs a loss in the other source, then the income obtained from one source will be subject to income tax, without reducing it by the

loss incurred in the other source of income. It should be mentioned that the provisions of the Law on Cooperatives stipulate that the balance surplus (income) is subject to distribution pursuant to the resolution of the general meeting, whereas the rules of its distribution among cooperative members are stipulated in the statute. A part of the income, not less than 5% (3% in the case of agricultural production cooperatives), is transferred to the current reserves if they do not reach the amount of the mandatory shares contributed. The statute may also provide for the creation of other funds and for the transfer to them of a part of profits. Only the revenue surplus above the amounts contributed to the funds is distributed for payment.

Tax-deductible costs in a cooperative are determined according to the same rules as for other legal persons. They are expenses incurred to earn revenue from a source of revenue or to preserve or secure a source of revenue. The CIT Act provides for two differences concerning tax-deductible costs with respect to cooperatives. Firstly, expenses incurred in the subscription or acquisition of contributions in a cooperative are not tax-deductible costs on the date they are incurred but only at the time of their potential disposal. Secondly, expenses related to making unilateral benefits to members of a cooperative who are not its employees do not constitute costs. However, when expenses are incurred for the benefit of members of agricultural production cooperatives, they are tax-deductible in the part concerning activities subject to income tax liability.

CIT provides exemptions for certain types of cooperatives. The following types of income are exempted:

1. Income from business and specialised agricultural activities in so far as it is used to pay the remuneration of the members of **cooperatives engaged in agricultural production**, and their household members, if the remuneration are related to these activities;
2. The income of a **farmers' cooperative** operating as a micro-enterprise, from the sale of agricultural products, or groups of such products, or fish, for which the farmers' cooperative was established, produced on the farms of its members;
3. The income of a **social cooperative** spent during the tax year for the purposes of social and professional reintegration of its members and of the employees of the social cooperative, in so far as it has not been included in tax-deductible costs;
4. The part of the income of **housing cooperatives** allocated to the maintenance of housing stock, excluding income obtained from economic activities other than housing stock management; housing stock management should be understood as activities aimed at maintaining residential premises in good condition.

b) Personal Income Tax

Revenue received by members of cooperatives are subject to **Personal Income Tax**. They are classified as revenue from work or revenue from monetary capital. **Revenue from work** includes:

- revenue from a cooperative employment relationship, i.e. a special type of an employment contract which may only be concluded with a member of a cooperative under the Law on Cooperatives

- revenue from membership in an agricultural production cooperative obtained by a member of a cooperative or his/her household member on the ground of his/her share of work and on other grounds provided for in the statute of the cooperative, after the exclusion from such income of shares divisible income of the cooperative from agricultural activity.

In order to determine taxable income, lump-sum tax-deductible costs are deducted from revenue earned. These amount to PLN 250.00 per month if the taxpayer lives and works in the same town or PLN 300.00 if he lives and works in two different towns. The income determined in this manner, after making statutory deductions, is subject to a 17% tax rate, and 32% for the excess over PLN 85,528.

Revenue from monetary capital includes:

- revenue from participation in the profits of cooperatives actually generated by such participation, including interest on members' shares from the balance-sheet surplus (total income).

- revenue from the disposal of shares in a cooperative against payment. It arises when ownership of cooperative shares is transferred to the acquirer.

-in the case of making non-monetary contributions to a cooperative - the value of the contribution as specified in the statute. In this case, revenue arises upon registration of the cooperative or adoption of a resolution to admit cooperative members.

As a rule, tax-deductible costs are costs incurred to earn revenue or to preserve or secure a source of revenue. However, in the event of making a non-monetary contribution to a cooperative, the cost is the current value of the contribution, reduced by the sum of depreciation write-offs made before the contribution. In the case of the paid disposal of shares in a cooperative acquired by a taxpayer as an inheritance, the tax-deductible costs are the expenses incurred by the testator to take up shares in the cooperative.

The PIT Act excludes certain expenses from costs. These are: interest and commissions paid on the loan for which shares in the cooperative were acquired; expenses for taking up or acquisition of shares or contributions in the cooperative. However, such expenses constitute tax-deductible costs for paid disposal of such shares in the cooperative.

A rate of 19% is imposed on income (revenue) from monetary capital. Income (revenue) from monetary capital does not add up to income (incomes) from other sources.

The following are exempt from PIT:

- income received on the repayment of shares or contributions in a cooperative society, up to the amount of the shares or contributions paid;

- remuneration received by members of agricultural cooperatives for the use of the contributed land by the cooperatives

- income from the sale of shares in a cooperative received as a donation - in the part corresponding to the amount of inheritance and donation tax paid

5. Does any tax benefit in indirect taxes or local taxes apply?

In **VAT** there is an objective exemption with regard to activities performed for the benefit of members of cooperatives for which fees are charged under the Act on Housing Cooperatives (e.g. fees for the operation and maintenance of real estate constituting the property of a cooperative).

There are two exemptions in the **property tax**. The first applies to buildings and structures or their parts and the land occupied by them which are used by a farmers' cooperative or association of farmers' cooperatives for business activities for the benefit of its members with respect to, *inter alia*, the concentration of supply and demand and the sale of produced products, as well as the provision of services to farmers or the packaging and processing of agricultural products.

The other exemption applies to land constituting homestead plots of members of agricultural production cooperatives. This preference applies to members of cooperatives who have reached retirement age, are invalids, disabled persons or are totally incapacitated to work on an agricultural farm.

The exemption relating to land constituting homestead plots is also present in the **agricultural tax.**

As regards the **inheritance and donation tax**, the free-of-charge acquisition of rights to contributions in a farmers' cooperative, in an agricultural production cooperative or in an association of agricultural cooperatives is exempt from taxation.

EUROPEAN TAXATION OF COOPERATIVES: AN EXAMINATION OF THE POSSIBILITIES OFFERED BY THE NEW CONCEPT OF LIMITED PROFITABILITY

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Abstract

Cooperatives are today a very important economic sector in the EU, especially in their small and medium-sized version, in whose business fabric they are heavily involved and account for a significant proportion of employment in Europe. However, European cooperative law expressly excludes taxation from its statute, despite the fact that tax policy is a basic pillar of European integration.

On the other hand, the national laws of many Member States have established specific tax regimes for co-operatives in order to compensate for the inferior position in which they find themselves compared to capital companies.

For years, the cooperative sector has also been calling for decisive intervention by the EU in support of these tax regimes, which have been continually challenged under State aid rules, because, in the dichotomous conception of forms of enterprise that prevails in EU law, cooperatives are excluded from the group of non-profit companies and are included among the rest of the capitalist companies.

This work will analyze the state of the art of the contribution of European law to the construction of social cooperativism, emphasizing the taxation of cooperative societies and the role that the concept of "limited profitability”" can play in this contribution.

SUMMARY

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Law on Cooperatives? V.- CONCLUSIONS AND PROPOSALS. – REFERENCES AND BIBLIOGRAPHY

I.- INTRODUCTION: EUROPEAN TAXATION LAW AND COOPERATIVE SOCIETIES

1.- State of the Art of European Taxation Law of Cooperative Societies.

The basic law on the European Cooperative Society expressly excludes taxation (Council Regulation of the European Commission (EC) 1435/2003, 22 July 2003, on the *Statute for a European Cooperative Society* (SCE)[2].

Nor is there a specific tax regime for social economy entities which, for the rest, constitute a diffuse concept for the European law. Indeed, the current art. 54 of the *Treaty on the Functioning of the European Union* (TFEU) - before 48 - has drawn a binary system of types of enterprises: companies or firms - expressly including cooperative societies - and other legal persons that do not pursue profit[3].

Consequently, cooperatives are assimilated to for-profit companies, which means that European tax law does not distinguish cooperatives from capitalist forms of business in the strict sense included in the regulation of the right of establishment. In any case, it is relevant that Art. 45 of TFEU is included in the regulation of the right of establishment.

However, the economic agents that promote social enterprises - particularly cooperatives - and a large part of the national political powers agree in stating that these types of entities cannot be assimilated to traditional capitalist enterprises. In fact, these companies are based exclusively on the principle of profit and of its distribution or distribution to the participants and shareholders, precisely because those companies - cooperatives and other social enterprises - are not based on that principle or, at least, not exclusively or as a priority[4].

Therefore, the individual Member States have had to create the specific regulations of the tax regime of their own cooperative societies, as in the cases of Spain, Italy and Portugal. There are certainly the intrinsic limitations of these tax regimes within each of the States and the internal controversies over them, but they exist.

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[2] W. 16: "This Regulation does not cover other areas of law such as taxation, competition, intellectual property or insolvency. The provisions of the Member States' law and of Community law are therefore applicable in the above areas and in other areas not covered by this Regulation".

[3] "Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.
Companies or firms means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making".

[4] An overview of cooperatives and social economy entities from the fiscal point of view can be found at CALVO ORTEGA, R. (dir) and ALGUACIL MARÍ, P. (coor) (2005): *Fiscalidad de las entidades de economía social: cooperativas, mutuas, sociedades laborales, fundaciones, asociaciones de utilidad pública, centros especiales de empleo, empresas de inserción socia*l, ed. Aranzadi, Cizur Menor (Navarra). For the analysis of SCE: VARGAS VASSEROT, C. (2014): "Situación y perspectivas de la Sociedad Cooperativa Europea", in *Rev. Deusto Estudios Cooperativos*, n. 4.

The mere existence of these regimes was submitted to the judgment of European law before the Commission - EC - (matter of the benefits taxation of hydrocarbons for agricultural cooperatives in Spain, for example[5]). Later, before the Court of Justice of the European Union (CJEU) regarding the tax regime of Italian cooperatives (CJEU Judgment 09-08-2011, cases C-78 to C-80 in relation to the possibility of considering these schemes as aid granted by State aid or not, in the sense of art. 107 TFEU (previously art. 87).

Finally, the CJEU, attending to singularities of cooperative societies, concluded that the tax exemptions in question would only constitute prohibited AGS if they were selective and were not justified by the nature or general economy of the national tax system, not being so in opposite case.[6] The judgment in question was a confirmation of the adaptation to European law of the national tax laws on cooperatives and, in a certain sense, forced the intervention of the EC, which drew up in 2016 a *Communication* on the concept of State aid in accordance with the provisions of the art. 107.1 of the TFEU. This document recognized that non-profit entities can also offer goods and services in the market (par. 7 to 10)[7] and, in particular with regard to cooperative societies, it recognized that they are governed by unique operating

[5] In the *Decision on the measures implemented by Spain in the agricultural sector following the increase in fuel prices* of 11 December 2002 (2003/293/EC), the EC linked the tax benefits granted to Spanish cooperatives to the nature and economy of the system. This position was also consistent with the *Commission Notice on the application of the State aid rules to measures relating to direct business taxation* (OJEC C 384, 10 December 1998), which had established that these advantages constituted an exceptional benefit to the general scheme excluded from Article 107 TFEU (before 87 TEC). This 2002 Decision was appealed before the European jurisdiction, initiating a procedure (T-146/03), which concluded on December 12, 2006, with a judgment of the Court of First Instance (CFI) declaring that the Spanish provisions did not constitute State aid. However, the final decision, dated 15 December 2009, was contrary to Spain. This decision was appealed against by the General Court, which opened the case T-156/10, falsely closed by the Order of January 23, 2014 for formal reasons of standing of the applicants. For more details, see HINOJOSA TORRALVO, J.J. (2017): "La incidencia de la jurisprudencia y la política comunitaria en la fiscalidad de la economía social", in *Reflexiones jurídicas sobre cuestiones actuales*, ed. Thomson Reuters Aranzadi, Cizur Menor (Navarra) and AGUILAR RUBIO, M. (2016): El régimen fiscal de las cooperativas y el Derecho de la Unión Europea, in *Boletín de la asociación Internacional de Derecho Cooperativo – International Association of Cooperative Law Journal*, nº 50.

[6] "Having regard to all the foregoing considerations, the answer to the questions referred, as reformulated at paragraph 38 above, is that tax exemptions, such as those at issue in the main proceedings, granted to producers' and workers' cooperative societies under national legislation such as that set out in Article 11 of DPR No 601/1973, constitute State aid within the meaning of Article 87(1) EC only in so far as all the requirements for the application of that provision are met. As regards a situation such as that which gave rise to the disputes before the referring court, it is for that court to determine in particular whether the tax exemptions in question are selective and whether they may be justified by the nature or general scheme of the national tax system of which they form part, by establishing in particular whether the cooperative societies at issue in the main proceedings are in fact in a comparable situation to that of other operators in the form of profit-making legal entities and, if that is indeed the case, whether the more advantageous tax treatment enjoyed by those cooperative societies, first, forms an inherent part of the essential principles of the tax system applicable in the Member State concerned and, second, complies with the principles of consistency and proportionality" (82).

[7] "(7) The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed. The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities. This general principle has three important consequences. (8) First, the status of the entity under national law is not decisive. For example, an entity that is classified as an association or a sports club under national law may nevertheless have to be regarded as an undertaking within the meaning of Article 107 of the Treaty. The same applies to an entity that is formally part of the public administration. The only relevant criterion is whether it carries out an economic activity. (9) Second, the application of the State aid rules does not depend on whether the entity is set up to generate profits. Non-profit entities can also offer goods and services on a market. Where this is not the case, nonprofit entities remain outside the scope of State aid control. (10) Third, the classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former."

principles that prevent their comparison of fact and law with commercial companies, which could justify preferential tax treatment[8].

This achievement cannot hide the reality of the absence of a general European regulation on the taxation of cooperatives, but it implies an express recognition and great value of the uniqueness of cooperatives and, in a certain sense, paves the way for subsequent work of other institutions and bodies of the European Union (EU).

Indeed, since the middle of the last decade there have been some working documents that point directly or indirectly to the need to decisively address a comprehensive regulation of social enterprises in general and cooperatives in particular.

Some of them recognized the desirability of adopting a tax framework adapted to social enterprises as a means of rewarding the social impact of these companies. This was already the case in 2013 in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled *Entrepreneurship 2020 Action Plan. Reigniting the entrepreneurial spirit in Europe*, COM (2012) 795 final, 9th January 2013.[9] Later, it was the European Parliament that underlined the important role of this kind of companies in the development of social rights in Europe in the resolution of 19 January 2017 *A European Pillar of Social Rights* (2016/2095(*Own-Initiative Procedure* INI)).[10]

However, one of the most relevant documents of recent years (the communication from the Commission to the European Parliament and the Council *An Action Plan for Fair and Simple Taxation supporting the Recovery Strategy* as a result of the Coronavirus Disease 2019 (COVID-19) pandemic - COM (2020) 312 final, of July 15, 2020 -) does not mention either in its text nor in its *Annex of actions and measures* either cooperatives or social enterprises. Thus, a great opportunity to highlight the value of cooperatives has been missed.

[8] *Ibidem*, 157 to 160.

[9] (3.1) "Social economy actors and social enterprises are important drivers of inclusive job creation and social innovation. While they face similar problems as most SMEs, they may encounter additional difficulties, accessing finance which the Commission addressed in the future *Programme for Social Change and Innovation (PSCI*) as well as in the Structural Funds regulations".
(3.2) Among SMEs, some companies, such as social enterprises, often have specific business models requiring dedicated support schemes. Grouping SMEs may lead to an increase in competitiveness. Therefore, Member States could consider whether their tax regimes could be improved to allow for more such SME groups. And therefore, *the Commission will identify and promote Member States best practices with a view to create a more entrepreneur-friendly fiscal environment*."

[10] (Whereas F): "… whereas social economy enterprises, such as cooperatives, provide a good example in terms of creating quality employment, supporting social inclusion and promoting a participatory economy;"
(20) "… highlights the important role of well-equipped and well-staffed public sector providers and of social enterprises and not-for-profit organizations in this context, given that their primary objective is a positive social impact; points also to the important role of social economy enterprises in providing these services and making the labour market more inclusive;".

II.- THE NEED TO ESTABLISH AN "APPROPRIATE" REGULATORY FRAMEWORK FOR COOPERATIVES

2.- The binary (dual) Model of Company Forms in European primary Law: an obsolete and unrealistic Conception of Business Development.

In the previous section, attention was drawn to the binary concept of company forms based on Article 54 TFEU, according to which there are: on the one hand, companies (companies or firms) incorporated under civil or commercial law and other legal persons under public or private law, and, on the other hand, non-profit companies. This dual concept is a "simplistic vision"[11], which leaves no room for other business manifestations. In particular, the so-called Social Economy Enterprises (SEEs) would fall outside this classification, because they are neither profit-making capitalist entities in the strict sense of the term, nor are they economically disinterested entities.

The *Opinion* of the European Economic and Social Council (EESC) entitled *Towards an appropriate European legal framework for social economy enterprises* (2019/C 282/01, of June 19), puts on the table the perverse effects of the severely applied principle of neutrality and proposes a third category of economic agents: those who voluntarily limit the benefits in exchange for other purposes (p. 2.2.15).

In this way, the concept of limited profit (limited profitability) is advanced as an axis on which a different category of company can be built from the two included in art. 54 of the TFEU. This concept should have effects on a wide range of legal aspects, including taxation, whose favorable tax framework should begin to be discussed to better reward the social impact of companies in terms of social, environmental and territorial cohesion (p. 3.2.4). The EESC thus follows up, albeit in a more concrete way, the call made in 2018 by the European Parliament to the Commission in its *Resolution on a statute for social and solidarity-based enterprises* (P8_TA (2018) 0317) of 5 July 2018.

In the case of cooperatives, the situation is very paradoxical because *de facto* are social economy enterprises (this is in accordance with almost all national legislations), but Art. 54 TFEU expressly mentions them among the "companies or firms constituted under civil or commercial law"; note that it is the only type of company mentioned by name. Therefore, cooperatives are part of the group of profit-making companies or, at least, are excluded from the group of non-profit-making enterprises.

The EESC's 2019 *Opinion* regrets that EU law does not take into account the intrinsic characteristics of the social economy; and further regrets that neither the European Commission in its decision-making practice nor the case law of the CJEU have shown sufficient interest in these companies. This is so despite the fact that they are entities with a different ownership and governance structure and a very different relationship to profits than

[11] *Opinion* of the European Economic and Social Council (EESC) entitled *Towards an appropriate European legal framework for social economy enterprises* (2019/C 282/01, of June 19, p. 2.2). The same applies to other official translations: "conception simplificatrice", "concepción simplificadora", "concezione semplicistica", "conceçao simplista".

other capitalist companies (1.4). This aspect has already been discussed in the previous section.

This closed dual conception of company forms does not correspond to today's reality. A revision of this obsolete scheme is necessary. It is often said that Article 54 TFEU only allows for the identification of capitalist companies - including cooperatives - and charitable-social companies, which are not for profit, and that this binary model would close the door to an autonomous recognition of social economy entities (including cooperatives and not capitalist companies, since a reform of the TFEU for this purpose is not foreseeable).

Aware of this, the EESC proposes another route that could be equally effective: that of including a protocol on different types of enterprise as an annex to the TFEU that includes social economy entities as a third category of enterprises (1.5 last paragraph and 2.2.15). But this route is neither easier to implement nor quicker, since the inclusion of annexed protocols in the TFEU requires the same requirements as the amendment of the Treaty.

While it is true that the normative route is the best and most direct, it is also true that the interpretative route should not be abandoned. Let us see how.

Art. 54 TFEU is part of the chapter on freedom of establishment (right of establishment) and aims to put companies (corporations and firms) on an equal footing with natural persons who are nationals of a Member State for the purposes of the right of establishment (Art. 54.1). The second paragraph - which is the controversial one because the dual conception of company types has been based on it - clarifies the concept of corporation or firm (company) that has the right of establishment. Also it states that corporations and firms are to be understood as civil or commercial companies, cooperatives and public or private legal persons, except if these entities (any of them) are non-profit-making.

In other words, from a rule that seeks to identify the right of establishment in the European Union from a subjective point of view, we have moved on to establishing a distinction between forms of enterprise that has been taken for granted over the years.

The whole EU law has been built around this duality which has had - and is still having - some very important effects on European law and on some Community policies, sometimes by inclusion (social economy enterprises and cooperatives as capitalist companies in areas or community policies in which they do not fit) and other times by exclusion (lack of specific regulation in areas in which it would be desirable to have differentiated legislation).

This is the case, for example, in the very important area of competition law, where the dual conception is taken to the limit to consider apodictically that the companies bound by the rules of competition are those that act in the market exercising an economic activity. Therefore, it is irrelevant what their nature or legal status is: if they act in the market, they are subject to the rules of competition without distinction (2.2.7). As will be seen, this statement can also be challenged.

Therefore, the problem generated by Art. 54.2 TFEU consists in not having distinguished between companies on the basis of their nature, their characteristics, their purpose and, above all, their legal status, and in having focused exclusively on whether they are profit-making or not. But in fact, this article has done no more than equate the right of establishment of legal persons with the right of natural persons who are nationals of a Member State (Article 54.1).

Nevertheless, the identification in the second paragraph of the companies that enjoy this right is not conclusive for all purposes. Indeed, although it can be denied that non-profit-making entities have the right of establishment[12], it cannot be concluded that the forms of company permitted by European law in any of its manifestations must be exclusively those two.

In other words, and in conclusion: the expression "companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law" (art. 54.2) allows all possible forms of enterprise to be included, even if they are of different nature, purpose and legal status. It would follow that there would be no legal impediment to admitting other types of company in the EU and attributing different legal regimes to them if deemed appropriate.

3.- The pernicious Confusion between Social Economy Enterprises and Social Enterprises.

The lack of autonomous recognition of social economy enterprises as enterprises distinct from capitalist enterprises has much to do with the lack of a clear distinction between social enterprises and social economy enterprises.

The former - social enterprises - have an exclusively social, solidarity, philanthropic or humanitarian purpose; they are completely non-profit entities, which operate with the exclusive support of public or private aid and generally do not adopt social business forms, but other forms, such as foundations or associations.

The latter - social economy enterprises - are enterprises whose essential purpose is not profit and which are not profit-driven, but which operate in the market and which, in fact, sometimes make profits that are not, however, intended for distribution to their members or participants. They often take other social forms, such as cooperatives, worker-owned companies, mutual societies and the like.

In fact, when art. 54.2 TFEU refers to companies or firms "save for those which are non-profit-making", it seems to be referring to so-called social enterprises, not to social economy enterprises and therefore excludes cooperatives from this type of company or firm and includes them among civil or commercial law companies of a capitalist type, because they are

[12] Entities sometimes have to make significant regulatory detours in order to exercise this freedom ("Freedom of establishment is a real issue for certain types of SEE. Because legal forms vary widely between Member States, exercising this freedom in most cases obliges enterprises, when they set up in a Member State, to adopt a form there that is at odds with the rules of operation laid down in their Member State of origin." *Towards an appropriate…* wh. 3.2.13).

clearly not non-profit-making companies and act in various areas of the market for the production and distribution of goods and services.

This way has been strictly followed by the European legislator - who has issued a *Statute for a European Cooperative Society (SCE)*[13], but has not developed specific legislation on other social economy enterprises - and also by other institutions, such as the European Parliament, the Commission and the Council. The last, when advocating the development of the social economy, seems to refer to social enterprises, not to all social economy enterprises, thus in fact unduly reducing the social economy to social enterprises.[14]

What has just been explained shows that, with regard to other social economy enterprises that are not cooperatives, the silence is almost absolute and they are practically hidden under the umbrella of small and medium-sized enterprises, the figure to which one must turn to find the European policies that can or should be applied to social economy enterprises.[15]

On the other hand, European legal systems do make distinctions between them; it is true that sometimes it is not very easy to identify them, but in most cases it is. Thus, for example, in Spain they speak of social economy "entities" and within this we can find: on the one hand, social economy "enterprises", which operate in the market for the production of goods and services with a clearly non-capitalist purpose; and on the other hand, entities that completely disregard the profit factor and the slightest profit-making purpose; these are normally social utility entities, which are expressly declared as such by means of the appropriate administrative proceedings.[16]

In the Spanish legal system, cooperatives are considered social economy enterprises and there are laws that regulate them, including an old law that regulates their tax regime.[17] In some countries, they also have constitutional recognition. All of them refer to their mutual nature in the contribution of resources and in meeting the needs of their members, to the absence of a profit-making purpose and to the linked use of their profits. Without going any further into characteristics which are well known, it can safely be said that cooperatives are not capitalist companies. It follows that their immediate and main purpose is not to make a profit and, in accordance with the laws governing them and their articles of association, the use of any profits they may make is limited or conditional.

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[13] COUNCIL REGULATION (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE).
[14] "Moreover, while the European Parliament (EP), Council and Commission have announced that they will focus on the development of the social economy as a whole, their various actions are tailored to social enterprises and do not apply to all SEEs; similarly, these actions are liable to propagate a narrow vision of the social economy as being limited to activities with a social purpose" (*Towards an appropriate…* 2.2.3).
[15] Cfr. HINOJOSA TORRALVO, J.J. (2017): "La promoción de las PYMES en el Derecho Financiero de la Unión Europea", in *As pequenas e médias empresas e o Direito*, ed. Instituto Jurídico, Coimbra.
[16] In Spain: Law 49/2002, of 23 December 2002, on the tax *Regime for non-profit entities and tax tax regime for non-profit organizations and tax incentives for patronage* and *Law 5/2011, of 29 March, on Social Economy*. Cfr. ALGUACIL MARÍ, P. (2017): "Impact on tax and grant matters of the Spanish declaration of social enterprises as providers of economic services of general interest", in *Lex social: revista de los derechos sociales*, vol. 7 n. 2.
[17] In Spain: Law 20/1990 of 19 December 1990 on the Tax Regime for Cooperatives.

It is therefore possible and necessary to distinguish between social economy enterprises and social entities or enterprises, but also to distinguish between social economy enterprises and capitalist enterprises. Cooperatives are social economy entities but not capitalist entities.

4.- Basis - also "constitutional" in accordance with EU Law - for Recognition of other Forms of Enterprise.

The binary conception of companies, insofar as it requires them to be distinguished according to whether or not they are profit-making, is insufficient to cover the variety of companies operating in the European Union. In fact, it leads to the recognition that there is only one model of company, the profit-making company, since non-profit-making companies are not in question. On the other hand, a more open conception of corporate categories can find support in European constitutional law.

One of the supports for this claim is to be found in the principle of neutrality of property regimes in the Member States, identified in Art. 345 TFEU ("The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership")[18].

The idea behind this is that, while it is not the competence of EU law to determine the system of corporate ownership, it is also the case that EU rules should not bind the ownership systems of States. Neutrality would act here like a coin whose two sides reflect the integrity of its value, so that not only should the European Union refrain from regulation, but also respect European law for internal regulations. This second side of the coin is obscured, erased, loses its value, if EU law prevents the development of the enormous potential of all forms of enterprise[19].

This understanding of the principle of neutrality of the property regime is of a negative nature: it obliges to refrain from acting and to respect the internal regimes of the members, but not to do, not to act. In the EESC's view "… when neutrality leads to non-recognition of whole swathes of the economy and allows a certain type of enterprise to be imposed as the reference standard or model for law-making, the principle in question is being misapplied"[20].

But perhaps we should go further and recognise a positive aspect of the principle of neutrality in order to affirm that it also requires providing the channels for different forms of enterprise to develop in accordance with European law, and this is only possible if it acts in favour of their recognition[21].

[18] *Towards an appropriate…* 2.2.10.
[19] *Ibidem…* 1.4.
[20] *Ibidem…* 2.2.12.
[21] This positive aspect could perhaps be found in whereas 3.1.5 of the aforementioned *Opinion*: "However, EU law must also provide for the existence of entities that adopt these particular types of enterprise and must allow them to develop within the internal market" and 2.2.14: "The entire legal order of the EU needs to be revised to better incorporate the specific role and operating methods of enterprises that have a general interest purpose and whose use of the revenue generated by their activities is strictly in line with the pursuit of social objectives."

5.- The Category of limited Profitability, a Concept to be defined. Elements that justify its Adoption and some Notes on its Characteristics.

The EESC has launched a proposal to create a separate category of European enterprises, social economy enterprises, based on the concept of limited profitability[22]. This figure should serve as a criterion for identifying social economy enterprises, so that entities with such limited profitability could be included in that category.

For the time being, the concept of limited profitability is not defined, and the EESC therefore calls on the European Commission to carry out a study to define it, which should make it possible to identify the business models of the different Member States that are in line with it.[23]

Nevertheless, the EESC *Opinion* advances the general conceptual framework that should govern limited profitability, "which would apply to all enterprises that can make a profit but do not intend to distribute that profit to their owners, as their purpose is based on solidarity or the general interest".[24]

This last point should be clarified to avoid confusion between social economy enterprises and social enterprises (entities).

Solidarity or general interest are indeed characteristic of the activities of social entities (foundations, associations and other social forms), but the same cannot be said - or at least not in the same way - of social economy enterprises, which carry out economic activities in the interest of their own members, although they do so in economic sectors of general interest or solidarity.

On the contrary, their activities have a certain general interest - even if limited to a social or territorial sector - and, in a broad sense, they aim to achieve solidarity or collective interest goals, and the use of their profits is not free, but is conditioned (limited) by regulations, precisely because of the social function they fulfill.

However, certain points must be made clear when it comes to shaping the concept of limited profitability.

First of all, it should be noted that social economy enterprises carry out economic activities in the strict sense of the term. When, as social economy enterprises, a solidarity bank lends money, an agricultural processing company produces wine or a worker cooperative provides care services for the elderly, they are undoubtedly carrying out activities of a solidarity nature and of general interest, and the profits they can obtain are limited in their application.

[22] The expression is not the same and does not mean the same thing in all languages. In Spanish it has been translated as "beneficios limitados" to refer to the limited availability of profits from business activity; however, the expressions in the official translation into each of these languages are: "lucrativité limitée", "lucro limitato" and "lucro limitado"; they mean the same thing, but emphasize the limitation of profit - in Spanish "lucro" refers to the profit that is obtained from something; business profits are not profit in the strict sense).
[23] *Towards an appropriate...* 1.5 second paragraph.
[24] *Ibidem*, 1.5 first paragraph.

However, at the same time, they are carrying out activities that are also carried out by profit-making commercial enterprises for which the social purpose of their activity is not so relevant and for which there is no limitation on the distribution of their profits. The difference between the two forms of companies is not so much in the type of activity, but rather in the way it is carried out and its purpose, but both circumstances are difficult to regulate; hence the need for the figure of limited profitability.

Moreover, limited profitability should be an easily identifiable criterion, common to all social economy enterprises and sufficient to distinguish social economy enterprises from capitalist enterprises[25]. But it should also distinguish social economy enterprises that operate in the market from social entities that do not, otherwise they would end up being confused again, when the point is to identify them separately.

And, finally of course, the limitation on the application of profits of social economy enterprises must be clearly established in national laws and be of such a degree or level as to allow them to be clearly separated from capitalist enterprises. European law should require clarity in the definition of the conditions limiting the application of profits that will allow companies to be classified as social economy enterprises.

In this sense, statements such as "SEEs do not pursue the objective of maximisation of profits or return on capital, but rather a social objective" or "qualifying an entity as limited-profit makes profitability a means and not the objective of its operation"[26] are part of the argument in favour of the figure of limited profitability, but they are not elements or criteria that add value to its regulatory configuration.

In other words, it is necessary to establish as clearly as possible the material and quantitative criteria for the application or distribution of profits, i.e. the nature and quantification of the destination of the profits: improvement of the company's own activities, the entity's own funds, legal reserves, company returns, distribution of profits to shareholders and others.

6.- The cross-cutting nature of limited profitability: the General Interest of their effects on EU policies

As conceived, the figure of limited profitability should be cross-cutting, because it should affect the right of establishment, the freedom to provide services, and public procurement and free competition, all of which are essential policies for the European Union.

The right of establishment is limited, but only for some social economy entities, not for social economy enterprises in general and not for cooperatives, for example, but the EESC understands that companies within the concept of limited profitability could solve some of

[25] *Ibidem…* 3.1.
[26] Ibidem… 2.26 and 3.1.1.

the problems of some entities, especially social entities. However, some philanthropic foundations, for example, are based in several Member States. [27]

The current difficulties of social economy enterprises in the area of public procurement are mainly factual, i.e. there is no regulatory exclusion, but in reality the possibilities of this type of enterprise, which is usually of medium or small size, places it, in fact, outside the public procurement circuit. This is also the case for a large number of cooperatives due to their size, especially those providing care services. [28]

Apart from the procurement reserves, which are very limited by the Member States[29], the problems of access to public contracts are also due to the difficulties that social economy enterprises have in accessing financing that would allow them to bid on equal terms.

A couple of preliminary notes will serve to introduce the ideas I intend to convey.

On the one hand, the financing difficulties of co-operative societies are well known in comparison with those of a capitalist nature, whether or not they are competitors in the market. In addition, given the structural limitations to which they are subject, these are entities whose representative securities do not usually have access to the secondary market (stock markets), nor is the possibility of obtaining resources on the primary markets (issuing debt capital or venture capital, shares and bonds, for example) very feasible or agile. Parallel markets are not considered a solid alternative, given their informality and the high-risk component they incorporate. And, finally, the actions of so-called ethical banking or

[27] *Towards an appropriate…* 3.2.1.3. From the same institution, EESC: *Opinion of the European Economic and Social Committee on 'European philanthropy: an untapped potential* (exploratory opinion requested by the Romanian Presidency) (2019/C 240/06), 6.3. "Facilitate cross-border philanthropy: the free flow of capital is at the core of the EU's single market. Ensure the legal and practical application of this fundamental freedom coupled with the non-discrimination principle to facilitate cross-border philanthropic activity. Cross-border investments by philanthropic organisations are key. Supranational legal forms to facilitate philanthropic engagement should also be considered."

[28] According to the *Directive 2014/24/EU* of the European Parliament and of the council of 26 February 2014 *on public procurement and repealing Directive 2004/18/EC*, it is true, however, that there is a possibility of reserving participation in the procurement of certain social, cultural and health services in favour of certain organisations, provided that they meet the conditions laid down in Article 77.2 of the Directive, which, it must be said, correspond quite closely to the profile of organisations with limited profitability or non-profit-making, namely: (a) its objective is the pursuit of a public service mission linked to the delivery of the services referred to in paragraph 1; (b) profits are reinvested with a view to achieving the organisation's objective (where profits are distributed or redistributed, this should be based on participatory considerations); (c) the structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and (d) the organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years. Contracts must have a maximum duration of three years. The services concerned may be: health, social and related service; administrative social, educational, healthcare and cultural services; other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services; other administrative services and government services; provision of services to the community. In Spain, the transposition of this directive was carried out by Law 9/2017, of 8 November, on Public Sector Contracts, whose D.A. details the reservation of these contracts and Annex VI lists them.

[29] In Spain, the transposition of this directive was carried out by *Law 9/2017, of 8 November, on Public Sector Contracts*, whose D.A. details the reservation of these contracts and Annex VI lists them. The reservation is made in favour of Special Employment Centres of social initiative and insertion companies regulated, respectively, in the revised text of the *General Law on the rights of persons with disabilities and their social inclusion*, approved by Royal Legislative Decree 1/2013, of 29 November, and in *Law 44/2007, of 13 December, for the regulation of* the *Regime of insertion companies*. Both entities are social economy entities, very close to the field of social enterprises.

solidarity banking present, along with many advantages, the disadvantage of their limited quantitative capacity.[30]

On the other hand, although private funding is necessarily the main source of resources for social economy organizations, public funding is, at present, irreplaceable. In almost all countries there are or have been public financial institutions whose clients are cooperatives. This model is certainly recommendable and, in those countries where they do not exist, have ceased to exist or have played a secondary role, there is a demand for their creation, reinstatement or reconversion.

However, fiscal policy can also be an effective instrument of financing for social economy organizations and, in particular, for cooperatives. This is improper or indirect financing, of course, insofar as it results in tax savings for the entity. The most recent analyses show that this type of policy, if well-articulated, is appropriate and proportionate to the economic impact and social dimension of Small and Medium Enterprises (SMEs), cooperatives and third sector entities. At the same time, it can be an effective mechanism to compensate for the internalization of social costs within them, as well as to encourage their creation and development.[31]

Limited profitability can also play an important role in competition law, although the EESC's starting position is primarily a desideratum ("at the point of applying the rules adjustments could be made so as to take account of certain specific features of SEEs") more than just evidence ("only criterion for falling within the scope of competition rules is that an entity operates a business in a market"). [32]

These last two areas, financing and competition, have a lot to do with the taxation of cooperatives and, to a certain extent, of other forms of social economy enterprises. These are

[30] A mixed model, of public origin - because it was financed from the General Budget of the European Union, but also privately managed - has been the microcredit project for employment and social inclusion called "Progress", aimed at facilitating access to microfinance (Decision 283/2010/EU of the European Parliament and of the Council of 25 March establishing a European Microfinance Facility for Employment and Social Inclusion - Progress). Regulation 1296/2013 of the same institutions of 11 December 2013 on a *European Union Programme for Employment and Social Innovation (EaSI)* amended it and for the period 2014-2020, this initiative has now been included in the EaSI. But its minimal character is induced not only by its very name, which seems reasonable, but also by its maximum amount (€25,000) and its targeting of micro-enterprises (those employing less than 10 workers, including self-employed workers, and with a turnover of no more than €2 million per year). On the other hand, it is not certain that it helps that it does not finance enterprises directly, but allows a few microcredit providers to extend loans by issuing guarantees, thus sharing the risk of losses. More topical in the Commission's thinking is another bank financing mechanism that is inevitably recurring these days: crowdfunding. Indeed, the working document entitled *Crowdfunding in the EU Capital Market Union*, SWD (2016) 0154 final, highlights the crucial role of this financing instrument as a new way to increase and diversify the resources of European companies in order to improve growth and job creation in Europe. For the Commission, this micro-finance provides a small but rapid development and considers that if well regulated, it will potentially be a key source of funding for SMEs (most cooperatives are SMEs).

[31] Despite this, it is only in 2016 (Parliament Resolution of 15 September, cited above) that European regulations or initiatives have shown a firm and forceful decision to favour the application of fiscal policy to promote the development of SMEs. However, some documents (such as the *Report of the European Economic and Social Committee on the different forms of enterprises*, 1454/2009, 1 October 2009, or the *Report for the drafting of a law to promote the social economy*, Ciriec-Spain, December 2009, the *Single Market Act - Towards a Single Market Act. For a highly competitive social market economy*, 27-10-210, later transformed into the Single Market Act. Twelve priorities to stimulate growth and boost confidence: "Together for new growth", 13 April 2011; *EESC Opinion on Cooperatives and agri-food development*, 11-7-2011), have done so.

[32] *Towards an appropriate…* 3.2.2.2.

aspects of cooperativism which I have had occasion to deal with in other studies and it can be said that the situation is no better now than it was a few years ago.

III.- LIMITED PROFITABILITY AND TAX MEASURES FOR COOPERATIVES

7.- The Limited Profitability on the European Cooperatives Law

The importance of the figure of limited profitability lies in identifying a group of companies to which to attribute a specific legal regime, in particular, a regime that takes into account their deficits because these deficits are motivated or caused by circumstances that are considered to be socially useful: their social interest and their non-primarily profit-making purpose, among others. [33]

Limited profitability is a logical consequence of its non-primarily profit-making character and at the same time a distinguishing factor with respect to capitalist companies and completely non-profit entities which, by definition, do not have profits derived from their economic activity that can or should be limited.

As discussed above, cooperatives are social economy enterprises that would potentially benefit from the configuration of a limited profitability concept. In fact, the only type of social economy enterprise to which the EESC *Opinion* refers expressly in several passages is the cooperative. However, a cooperative is a company which serves, for example, to make it clear that the concept of limited profitability does not exclude the existence of profits from the cooperative economic activity or the possibility of distribution ("part of their surplus to their members in the form of dividends or interests, but only a limited portion of the surplus may be distributed, and that amount theoretically depends on member's transactions rather than share of the capital")[34].

This characteristic of limited profitability is perfectly identifiable in European cooperatives, whose *Statute* foresees, in addition to the allocation of legal reserves (art. 65) and the cooperative returns or dividends (art. 66), if there is a surplus balance available, the surplus, in the order and proportions laid down in the statutes may be allocated providing "a return on paid-up capital and quasi-equity, payment being made in cash or shares" (art. 67 *Statute* of SCE).[35]

Whatever the concept of limited profitability, therefore, it is clear that European cooperative societies have these characteristics, in accordance with their legal regime.

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[33] The EESC "urges the Commission to launch a study on the concept of limited profitability and on business models that operate in this way, in order to identify more precisely what is required, in terms of legal, financial and tax frameworks, for cultivating the competitive strengths of these enterprises and ultimately, where appropriate, to prescribe good practice" (*Towards an appropriate…* 1.5 second paragraph). About the social nature of cooperative acts, see VARGAS VASSEROT, C. (2020): "El acto cooperativo en Derecho español", in *CIRIEC-Revista Jurídica Española de Economía Social y Cooperativa*, n. 37.

[34] *Towards an appropriate…* 3.1.3.

[35] For the Spanish case, ALGUACIL MARÍ, P. (2020): "El fondo de educación y promoción y su impacto en la tributación de las cooperativas", in *Revista Técnica tributaria*, n.131.

8.- Requirements arising from the Limited Profitability of Cooperatives from a Tax Law Perspective: State Aids and other Tax Law Measures for the Cooperatives.

One of the legal fields on which the consequences of limited profitability should be projected is Tax Law.[36] From the point of view of the EESC's *Opinion* of 2019, an appropriate delimitation of the concept of State aid that favours its achievement without contravening European law would help considerably, as it would allow, along the lines already initiated, special tax regimes or tax measures in favour of cooperatives to be definitively brought into line with European law. In addition, however, specific measures would have to be taken in the various national taxes to help the position of cooperatives, which is diminished by their limited profitability.

Professor CALVO ORTEGA (2005) has put forward three compelling reasons that would support favourable taxation for cooperatives and other social economy enterprises. Firstly, he highlights the constitutional obligation of the competent European institutions to implement a social policy and to seek economic and social cohesion. Secondly, he points out that the activities of social economy entities fall within those purposes and, therefore, they are in the general interest. Thirdly, he highlights, too, the limitations on the management and disposal of these entities' own assets with respect to commercial companies. [37] As can be seen, these reasons are perfectly linked to limited profitability.

The relationship between cooperatives and State aid within the meaning of Art. 107 TFEU (before Art. 87) is one of love and hate, of back and forth.

Cooperatives have had, and continue to have in many countries, a specific and allegedly beneficial tax regime compared to other enterprises.

The justification for such favourable discrimination has been based on many reasons, all of them related to the role of these entities in productive sectors of special social value and to the limitations that their own business structure and internal functioning have placed on their development and expansion possibilities, as well as on the uniqueness of their capital and social benefits. Although it is true that today some grouped cooperatives have managed to overcome these difficulties and have expanded in an extraordinary way, the cooperative as a primary source or source of employment is still a reality and those fundamentals are still valid. This role of cooperatives and also these limitations have been repeatedly recognised in several texts issued within the European Union. [38]

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[36] "The model of a capitalist-type, for-profit company pervades all of European law. Thus, despite the general interest benefits from such entities' existence in the EU Member States, and with the exception of the identification of services of general economic interest, neither association and company law, nor public procurement law, nor tax law distinguish between SEEs and other types of enterprise." (*Towards an appropriate*… 2.2.8).

[37] CALVO ORTEGA, R. (2005): *Fiscalidad de las entidades de economía social: cooperativas, mutuas, sociedades laborales, fundaciones, asociaciones de utilidad pública, centros especiales de empleo, empresas de inserción socia*l, ed. Aranzadi, Cizur Menor (Navarra).

[38] Thus, in the document *Cooperatives in Enterprise Europe* of 7 December 2001, the Commission already understood that there were significant differences between cooperatives and typically capitalist companies, differences which were justified

As is well known, State aid is aid granted to certain companies, entities or persons by means of State funds, either directly (subsidies) or indirectly (tax benefits). Such aid may be compatible or incompatible with the Treaty; it is incompatible if it in any way distorts or threatens competition by favouring certain undertakings or the production of certain goods.

The Commission has for a long time maintained a maximalist position and a very broad conception of the selective nature of the measures, which has ultimately seriously undermined the expectations initially raised about the compatibility of certain special tax regimes and European law.

The case of the actions taken in the first decade of this century against some specific tax regimes for cooperatives is possibly the example that can most paradigmatically illustrate the situation that a favourable tax regime for cooperatives has to face, because it also shows the change in the Commission's approach. This was because the legislation of some EU Member States (notably Belgium, Italy, Portugal and Spain) contains taxation for all or some cooperatives that is generally more favourable than that of capital companies.

The Commission argued in its preliminary analysis that the specific tax system of Spanish cooperatives should be considered, by definition, as State aid.[39] However, it must also be said that the Commission decision was sympathetic to a differentiated treatment of mutual operations (between the member and the cooperative), which could be compatible with the Treaty provided that the cooperatives could be characterised as small or medium-sized enterprises (SME).

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in Council Regulation (EC) 1435/2003 of 18 August 2003 on *the Statute for a European Cooperative Society*, to the extent that in the *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the promotion of cooperatives in Europe* of 23 February 2004, the Commission itself understood that such differences could justify specific tax treatment, provided that in all aspects of cooperative legislation, the principle was respected that any protection or protection of cooperatives could justify specific tax treatment, as long as the principle was respected in all aspects of cooperative legislation, of 23 February 2004, the Commission itself took the view that such differences could justify specific tax treatment, provided that, in all aspects of cooperative legislation, the principle that any protection or benefit granted to a specific type of entity must be proportionate to the legal constraints, social value added or limitations inherent in that corporate form must be respected and must in no case be a source of unfair competition. On 1 December 2009, the European Economic and Social Council (EESC) adopted the above-mentioned *Opinion on various types of enterprise*, in which it called most strongly for the introduction of sectoral tax measures to compensate such enterprises on the basis of their proven public utility or their proven contribution to regional development. On 7 July 2012, the EESC adopted a document entitled *Cooperatives and agri-food development*, which contains proposals on taxation. Paragraph 44 of *Parliament's resolution of 15 September 2016*, cited above, is also very clear and direct. It would appear that Parliament has taken an initiative here which, if recognised and followed up, should lead to a major rethink of Member States' tax policies on the taxation of SMEs, including cooperatives.

[39] The questioning of the tax regime for cooperatives in Spain before the European Union began in 2000, as a result of the complaint filed by two associations of service station businessmen (from Madrid and Catalonia) against certain measures introduced by Royal Decree-Law 10/2000 of 6 October; in particular, this RDL eliminated the prohibition hitherto in place on the distribution of B diesel to non-member third parties by agricultural cooperatives. The controversy centred on the possibility for any cooperative to supply or distribute petroleum products - a possibility that had been forbidden since Law 34/1998 of 7 October 1998 - unless the cooperative concerned formalised this distribution through a company outside the cooperative itself; this requirement would not have been significant were it not for the fact that this automatically meant that this branch of its activity would be subject to the general rate of corporation tax. On the other hand, now that the requirement to set up a special purpose vehicle has been removed, it is possible to maintain the privileged tax regime for cooperatives despite the fact that they carry out this activity. Vid. ALGUACIL MARÍ, P. (2010): "Condicionantes del régimen de ayudas de estado en la fiscalidad de cooperativas", *CIRIEC-España. Revista de economía pública, social y cooperativa*, n. 69.

Finally, in a 2009 decision, it opted for the criterion of "pure mutuality" to justify favourable measures, i.e. only such favourable measures are acceptable in respect of the activities of cooperatives with their own members, without establishing percentages in respect of transactions with third parties and eliminating any reference to the cooperative's status as a small or medium-sized enterprise as an indicator justifying the measure's compliance with European law. In transactions which are not purely mutual from this mutualist point of view, the cooperative - the Decision says - acts like other companies and should therefore not be treated favourably in terms of company taxation. The proceedings continued with an appeal to the General Court, which did not resolve the central issue, because the challenge was rejected for lack of standing of the claimants. [40]

Three joined cases (C-78/08 to C-80/08) were brought before the CJEU against the Italian tax benefits for cooperatives, in force from 1973 to 2004 at the request of the Italian *Corte di Cassazione,* which questioned before the European Court whether the Italian scheme for cooperatives constitutes unlawful state aid requiring repayment and whether the use of the cooperative legal form constitutes an abuse of law, bearing in mind also that Italian cooperatives are considered capital companies under Italian law. The judgment of the CJEU of 8 September 2011, handed down in these cases, departed from the Advocate General's approach (the latter had first suggested that the questions should be rejected as inadmissible), although not exactly from his conclusions, since it ends by implying that although they may not be State aid, it leaves that decision to the Italian national court.[41]

Beyond these hesitations, the fact is that the Commission reacted and, in a hitherto unusual gesture, issued the *Regulation (UE) 651/2014 COM, of 17 June, declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty,* in which it recognised the uniqueness of SMEs and their specific handicaps, which led it to establish that different basic forms of aid and tax relief could be applied.[42]

But the Commission has not stopped there and on 17 July 2016 it published its *Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01).*

In this extensive *Notice*, the Commission takes up its own doctrine adopted in successive decisions, but above all it echoes the case law of the ECJU. This is not the time to gloss over its dense content, but to make a few notes that are of interest for the purpose of this study.

Indeed, in the 2019 *Opinion*, which advocates the introduction of the figure of limited profitability, the EESC, aware of the importance that the concept of State aid has in the area of taxation, "urges the Commission to continue the efforts it indicated in its communication

[40] Case T-156/10, O. 23 January 2014. For a more detailed analysis, consult HINOJOSA TORRALVO, J.J. (2017): "La promoción de las PYMES en el Derecho Financiero de la Unión Europea", in *As pequeñas e médias empresas e o Direito*, ed. Instituto Jurídico, Coimbra.

[41] For an in-depth analysis of these cases, consult the CJEU judgement of 8 september 2011 in INGROSSO, M. (2012): "La pronuncia pregiudiziale della Corte di Giustizia sulle agevolazioni fiscali alle cooperative italiane", in *Rassegna Tributaria* 2/2012, p. 529-550.

[42] *Regulation (UE) 651/2014 COM*, arts. 17 a 23.

on the classification of State aid with regard to cooperative societies, by extending the relevant provisions to all SEEs" (p. 1.5, fourth paragraph).

These relevant provisions translate into the following: "In the light of these particular features,[43] cooperatives can be regarded as not being in a comparable factual and legal situation to that of commercial companies, so that preferential tax treatment for cooperatives may fall outside the scope of the State aid rules provided that: they act in the economic interest of their members; their relations with members are not purely commercial, but personal and individual; the members are actively involved in the running of the business; they are entitled to equitable distribution of the results of economic performance". [44]

These characteristics, especially the last one, are very close to the idea behind the concept of limited profitability, although the latter should go further and establish clearly and specifically under what conditions a company (including a cooperative) is in a situation of limited profitability. They should also establish gradations of the limitation and determine in which cases and to what extent the limitation could be modified without this entailing the loss of the status of a limited profitability company.[45]

There are, of course, other demands from the cooperatives, other measures that could be implemented and that would only encourage the cooperative model. The category of limited profitability can help to encourage its acceptance. In this regard, the 2019 EESC's *Opinion* concludes with a heading entitled "Taxation", in which it argues that there should be a discussion about a preferential tax framework that offers a more generous reward for the social impact of all enterprises with regard to social, environmental and territorial cohesion.[46]

In particular, measures such as the recovery of non-deductible input VAT (Value Added Tax), incentives for innovative investment or compensation of social costs are being considered. One of the most worrying issues is the impossibility of recovering input VAT for a large number of entities carrying out tax-exempt activities. This is particularly true for activities of a health or welfare nature, which are increasingly common in the cooperative

[43] *Commission Notice on the notion of State aid…* p. 157: "In principle, genuine cooperative societies conform to operating principles which distinguish them from other economic operators. (232) In particular, they are subject to specific membership requirements and their activities are conducted for the mutual benefit of their members, (233) not in the interest of outside investors. In addition, reserves and assets are non-distributable and must be dedicated to the common interest of the members. Finally, cooperatives generally have limited access to equity markets and generate low profit margins."

[44] *Commission Notice on the notion of State aid…* p. 158. "If, however, the cooperative society under examination is found to be comparable to commercial companies, it should be included in the same reference framework as commercial companies and undergo the three-step analysis as set out in paragraphs 128 to 141. The third step of that analysis requires an analysis of whether the tax regime in question is justified by the logic of the tax system" (p. 159).

[45] *Commission Notice on the notion of State aid…* The above-mentioned article contains an assumption that is striking and could be relevant to the definition of the concept of limited profitability: "For this purpose, it should be noted that the measure needs to be in line with the basic or guiding principles of the Member State's tax system (by reference to the mechanisms inherent to that system). A derogation for cooperative societies in the sense that they are not taxed themselves as cooperatives can, for example, be justified by the fact that they distribute all their profits to their members and that tax is then levied on those individual members. In any event, the reduced taxation must be proportionate and not go beyond what is necessary. Moreover, appropriate control and monitoring procedures must be applied by the Member State concerned" (p. 160). This hypothesis is of interest because it shows that limited profitability is a legal situation that goes beyond the limitation of profit distribution, and extends to the obligation to set aside funds or reserves, to their application to specific needs of the company or to remunerate the services of the shareholders, for example.

[46] *Towards an appropriate…* 3.2.4

sector. The situation is all the more distressing if we bear in mind that these activities, insofar as they are promoted and encouraged by the public sector, are normally contracted with the competent public administrations on a flat-rate basis.

The impossibility of recovering VAT is a very significant cost for these cooperatives. It is true that there are many aspects to this issue that cannot be dealt with at this stage, but it is not less true that their consideration as companies with the right to deduct would alleviate this cost to a large extent. Therefore, this seems to be more a question of a political than a technical issue, since European VAT legislation provides for cases of the right to deduct for certain exempt transactions, since it seems that waiving the exemption would significantly harm the beneficiaries of the exemption, i.e. the service providers.[47]

The issue of investment and development incentives must also be considered from the perspective of cooperatives and other similar enterprises.

Nevertheless, current reality is that public support measures for private R&D&I investment activities (Research plus Development plus Innovation), as they are now structured, mainly favors large companies, because they have the greatest capacity and possibilities to carry them out. This creates competitive disadvantages for small companies. For this reason, the EESC *Opinion on Different forms of enterprise* calls for the introduction of special tax breaks for multiple R&D&I investments, refunds in the event of non-existent profits or losses.[48]

On the other hand, compensation for the social costs of their activity is an area where decision-making is as difficult as it is necessary.

The above-mentioned EESC *Opinion* is aware of this and approaches it by excluding questions of distortion of competition. Indeed, competition law also has to be fair, which means that there is no single model to ensure free competition. In fact, some competition policies are not exactly neutral and this calls for differentiating measures of a fiscal nature, among others.[49]

In this context, it is also important not to forget the cost for some of these companies, in particular cooperatives, of mandatory funds which are neither distributable nor recoverable in

[47] In Spain, the issue was discussed in administrative proceedings and the Central Economic Administrative Court (TEAC) denied the possibility of waiving the exemption provided for in Article 20.1.12 of the Spanish VAT Law 3771992, according to the interpretation of Article 13.1.A.1 of the then applicable Sixth Directive (TEAC Resolution of 29 March 2006).

[48] However, by far the most important impact of these programs is the way in which they can support the development of small and medium-sized enterprises specializing in R&D during the early years of their existence (EESC opinion on *Different forms of enterprise*, 1 December 2009, para. 4.5.2 in fine). Recently, see this comparative analysis of the taxation of profits in AGUILAR RUBIO, M. (2021): "Models for direct taxation of cooperatives under comparative law", in this *IJCL* number. The Spanish version can be found in "Los modelos de imposición directa de las sociedades cooperativas en Derecho comparado", en *Responsabilidad, economía e innovación social corporativa*, Marcial Pons, Madrid, 2021.

[49] On the basis of the consideration that some companies are subject to situations of competitive inequality for reasons unrelated to the production processes themselves and arising from market allocation failures, i.e. situations in which the market itself is inefficient, allocating resources in a sub-optimal way, the EESC "requests the Commission to encourage Member States to study the possibility of granting compensatory measures to enterprises on the basis of their confirmed public value or their proven contribution to regional development(p. 4.5.1).

the event of transformation, an obligation which is not incumbent on any other legal form of company.[50]

IV.- NEW WORKS AND PROJECTS ON COOPERATIVE LAW IN THE EUROPEAN UNION

9.- Can Something be expected for the European Tax Law on Cooperatives?

In recent months, the EESC has continued its activity with opinions and communications that tangentially affect cooperatives. The Commission, on the other hand, in its most important document in times of pandemic (the Communication *An Action Plan for Fair and Simple Taxation supporting the Recovery Strategy* of 15 July 2020), makes not the slightest mention of cooperatives. The scope of this work remains to be seen and will depend on the Commission's attitude in the coming months.

The EESC's *Opinion* on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *Sustainable Europe Investment Plan - European Green Deal Investment Plan* (COM(2020) 21 final) - makes only two mentions: a very brief one regarding the social economy in general, advocating coordination between the action plan foreseen in 2021 for these enterprises and the *Sustainable Europe Investment Plan* to involve social economy investment in the implementation of the *Just Transition Mechanism;*[51] the other one on the desirability of providing appropriate tax treatment for collective micro-finance to complement the stimulus policy.[52]

The next relevant document is the opinion *Strengthening non-profit social enterprises as an essential pillar of a socially equitable Europe*, INT/906,[53] in which the EESC calls for the specific strengthening and support of social enterprises and other social economy organizations, in particular those that reinvest their profits entirely in public interest or non-profit tasks, as set out in their statutes, and for their visibility across Europe to be enhanced.

On the other hand, the *Opinion* insists that a Protocol on the diversity of types of enterprises should be annexed to the TFEU, along the same lines as Protocol 26 on Services of General Interest (SGI), including a separate definition of non-profit social enterprises, and then the EESC also calls on Member States to include this review in the forthcoming reform agenda;

[50] In addition, from scientific sectors close to the social economy, other measures of no little importance are being suggested. Thus, for example, the *Report for the drafting of a law to promote the social economy,* produced by Ciriec-Spain, proposed, among other measures, the following: a) a tax policy to promote the incorporation of social economy entities (exemption or relief from tax on corporate transactions); and b) tax policies during the life of these entities (freedom of amortization, reduction of tax rates on company profits, among others). It also rejects that such tax policies have a negative impact on competition.

[51] *Opinion* on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *Investment Plan for a Sustainable Europe - A European Investment Plan for a Green Deal* (COM(2020) 21 final), p. 4.7.4.

[52] Ibidem, p. 1.14.

[53] Exploratory opinion, rapporteur Krzysztof Balon, plenary 18 September 2020.

finally, the document recommends raising the current threshold of the de minimis Regulation for state aid to EUR 800,000 per three-year period.[54]

At the end of 2020, in the Opinion *Industrial transition towards a green and digital European economy: regulatory requirements and the role of social partners and civil society*,[55] the EESC expresses the resilience of the social economy in the COVID-19 pandemic and claims its role in the way out of the crisis; recommends that the EU takes up its initiative on the large digital business tax, the financial transaction tax and the common consolidated corporate tax base; and calls for tax incentives for companies that invest in green initiatives with a social impact.[56]

The tax measures have been proposed by the December 2020 European Council. Some impact has also been made by suggestions regarding the social economy, which has already been the subject of a Commission roadmap under the name European action plan for social economy.

Recently the EC has published the document Business taxation for the XXI Century, which does not make any mention of cooperatives or the social economy. Although it is true that it is rather aimed at large companies, it cannot be forgotten that it is really a planning document for future European taxation.[57]

So, nothing new can be expected at this stage. Perhaps the most important thing now is to clarify the concept of limited profitability and to relate it to State aid. Other VAT and corporate taxation objectives are still to be achieved.

V.- CONCLUSIONS AND PROPOSALS

1st. For European law, cooperatives are included among capital companies, as opposed to non-profit entities. This dichotomy of forms of enterprise - established in the TFEU for the purposes of the right of establishment - does not correspond to the reality of the forms of enterprise known in Europe, nor does it guarantee the principle of neutrality of forms of ownership also recognised in the Treaty. Cooperatives should also be distinguished from purely social entities or enterprises, which are completely non-profitmaking.

2nd. Cooperatives are subject to statutory limitations which place them in a situation of inferiority compared to capitalist companies. This inferiority should be corrected through measures which, while recognising the value of this type of enterprise and the role it plays in society, allow them to reasonably balance their position.

[54] EESC Opinion *Strengthening non-profit social enterprises as an essential pillar of a socially equitable Europe, INT/906*, p. 1.1, 1.3 and 1.6.
[55] EESC Exploratory Opinion, rapporteur Lucie STUDNIČNÁ, adopted at plenary on 2 December 2020.
[56] *Ibidem*, p. 1.3, 2.8, 4.3, 9.3 y 9.5
[57] Communication from the Commission to the European Parliament and the Council: *Business Taxation for the 21st Century*, COM (2021) 251 final, 18.5.21

3rd. Any special tax regime applied to a sector or a group of companies will always be subject to review and will be continually called into question. European law, under Article 107 TFEU, is an unavoidable reference framework in this regard. The Commission's efforts to characterize the concept of state aid are commendable, as is the desirability of further developing it.

4th. In general, cooperatives are conditioned by a legal regime which places them at a disadvantage compared to capitalist companies. If cooperatives manage to achieve high levels of competitiveness with other economic operators, the current state of development of the European Union will only allow them to comply with the requirements of neutral competition. In a scenario of neutral competition, the limitations inherent in the very essence of the legal and economic regimes specific to these entities would have to be reconsidered, as it would be difficult for those that currently regulate them to provide them with the agility required to compete on a level playing field.

5th. The limited profitability category is a reasonable alternative to provide social economy enterprises and cooperatives once and for all with a legal and fiscal regime that distinguishes them and that is sufficiently clear and precise to be accepted peacefully and not continually called into question. Therefore, its general interest is evident and it should be defined and developed normatively without delay.

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THE TAXATION OF CO-OPERATIVES' INCOME: ANALYSIS OF ITS RATIONALE

Nina Aguiar[1]

Abstract

In this paper we address the issue of taxation of cooperatives' income. Cooperatives traditionally receive a specific tax treatment distinct from that given to companies. In general terms, that specific cooperative tax regime is apparently more favorable when compared to the one applied to companies. A tradition of granting cooperatives a favorable tax relief-based tax regime is widely extended, being noticeable in all Western European Countries and in the Northern American countries (USA and Canada). This paper seeks to lay down some conceptual basis on which the issue ought to be analyzed, with a special emphasis on the definition of what is to be treated as cooperative income for tax purposes and the rationale for a favorable cooperative tax regime.

I. Purpose and scope of the study

We must warn from the very beginning that the subject that we propose to discuss in this paper is not new or original and most probably we will not be able to bring any new insight about it.

In fact, since the very emergence of cooperative societies, modern tax systems have created and developed special rules for the taxation of these entities. These special tax regimes have persisted to this day, regardless of the ideological and social fluctuations occurred in the different countries and in the large regional legal and political families. And since the very beginning, the issue of taxation of cooperatives has been debated, in the perspective of equal tax treatment with other forms of business. The debate has always been ideological more than technical and it remains so.

From the perspective of a tax lawyer or of a tax legislator, the principle of equality in taxation is cardinal in the topic of taxation of cooperatives. It's not sustainable, in our humble opinion, that cooperatives should be granted any favorable tax regime on the simple and unelaborated statement of their especially relevant social function. Not because cooperatives do not have an especially relevant social function, but because companies have a very relevant function as well, particularly in developed economies. It may be true that gigantic companies' power must be brought under control; but it is also true that the company model of enterprise

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organization has become popularized and that an enormous part of GDP in developed countries is generated by small and medium for-profit enterprises, most of them companies, largely based on the work of their owners (is the assumption that companies are capital centered still valid?). If we fail to guarantee equality in taxation we risk creating malfunctions in our societies, which would result in a decrease in our general well-being.

But guaranteeing equality in taxation entails treating differently what is different and equally what is equal.[2] And there is no doubt that there are differences between cooperatives and companies. The most important basis to guarantee an equal treatment between cooperatives and companies as well as other forms of business is to carefully distinguish differences between them.

Differences that matter for the taxation issue begin with the nature or status of net proceeds (income) of transactions carried on by cooperatives. There is a possibility that not all net proceeds accruing to cooperatives have a tax substance, with the consequence that not taxing those proceeds should not even be seen as favorable tax treatment (a tax incentive) at all.[3]

So, in this study we propose to explore the concepts mentioned above – income, differences and similarities with companies and tax incentives – in their relationship with the special structure of cooperatives, a structure that is related to the very nature of cooperatives and to the cooperative principles.

We intend to address the subject from a strict legal perspective, which means that we will purposely refrain from referring to any issue related to the development of the cooperative sector. Also, we will try to treat the topic in terms of its general theory, which means that we'll be searching for concepts that are applicable to any cooperatives in any given legal system, although occasionally some examples can be taken from particular jurisdictions to help clarifying the analysis.

But, going back to our first declaration at the beginning of this introduction, it's unlikely that we will be able to bring any truly innovative insight into this subject, since it was already been brilliantly treated by Arthur Pigou in his 1920 study "Co-operative societies and income tax".[4] We can only, and that's our true purpose, modestly review the contribution of that honored Author and bring it to the current discussion.

[2] MUSGRAVE, Richard (1990). *Horizontal equity, once more.* National Tax Journal, Vol. 43, 2 (June, 1990), p. 113.
[3] In this regard, PEPE, Francesco (2009). *La fiscalità delle cooperative, Riparto dei carichi pubblici e scopo mutualistico*, Mian: Giuffrè Editore, p. 74.
[4] PIGOU, Arthur C. (1920). *Co-operative societies and income tax*. The Economic Journal, Vol. 30, 118 (Jun 1920), pp. 156-162.

II. Types of cooperative earnings

In order to classify the different types of earnings accruing to cooperatives, it will be helpful to review some specific structural features of the cooperative enterprise. The cooperative is an associative organization, like companies, but in which, unlike in companies, the members join the cooperative with the purpose of carrying out an economic activity with it, whether as producers of goods and services or workers, or as consumers of goods and services.[5]

It's important to note, for those who may not be so acquainted with the cooperatives' topic, and for the purpose of the analysis of the taxation issue, that economic transactions carried on between members and the cooperative are not something that occurs incidentally in a cooperative, or just as a side effect of the normal functioning of the cooperative, but stands rather as the very specific and core objective of the cooperative institution itself.[6] This means that members join the cooperative with the aim of conducting economic operations with it, rather than doing so with any other organization, and do it in order to maximize their economic advantage.[7]

The clearest example might be given by agri-food cooperatives. In agri-food cooperatives, members are agricultural producers who, in most cases, sell their crops to the cooperative for marketing or processing.[8] Producers may also use services provided by the cooperative and that they need to incorporate into their individual production process, such as technical advice, supply of inputs or equipment, etc. When a farmer joins an agricultural cooperative, they seek to sell their crops at the highest price possible, and buy inputs from the cooperative at the lowest price possible.

The same reasoning applies to any other type of cooperative. In housing cooperatives, cooperative members enter into transactions with the cooperative with the purpose of acquiring a house in more favorable conditions than those they would be able to be granted if they simply bought the house or acquired the construction service from any other type of commercial organization. And so on.

The economic transactions that cooperative members perform with the cooperative ("cooperative transactions") vary in their nature. In some cases, cooperative members join the cooperative to carry out a professional activity (labor cooperatives, teaching cooperatives) or a productive activity (agricultural cooperatives); In other cases, members join the cooperative to be able to purchase goods (consumer cooperatives) or services (housing cooperatives,

[5] FICI, Antonio (2013). "An Introduction to cooperative law", *in* D. CRACOGNA, A. FICI & H. HENRY (eds.). International Handbook of Cooperative Law, Berlin: Springer, p. 22-23; HENRY, Hagen (2012). Guidelines for cooperation legislation. 3. ed. Geneva: ILO – International Labour Organization, p. 38.
[6] FICI, Antonio (2013), cit., p. 23; MEIRA, Deolinda (2012a). *Revisitando o problema da distinção entre excedente cooperativo e lucro societário*. Proceedings of the 2nd Congress of Corporate Law. Coimbra: Almedina, p. 355.
[7] FICI, Antonio (2015). *La Función social de las cooperativas: Notas de derecho comparado*. REVESCO 117, p. 84.
[8] Some Authors sustain that members to not sell "to the cooperative" but to third parties through the cooperative. In our view, the answer to this question depends on whether the cooperative assumes the risk associated with property of the goods that it acquires from members. In Portugal, cooperatives fully assume the risk associated to goods bought from members.

financial cooperatives) that they use in their personal life domain. Even in the case of solidarity cooperatives, members acquire a service that is provided by the cooperative (*e.g.* special education for handicapped people), which can still be seen as an economic need of members.[9]

It should not be objected to our basic assumption – "cooperative members join cooperatives with the purpose of conducting economic transactions with them, rather than doing so with any other organization, in order to maximize their economic advantage" – that this is an economical approach incompatible with cooperative values, not reflecting the essence of cooperatives. In fact, some cooperative scholars might oppose to our premise that cooperatives are mainly focused on non-economic values, like cooperation in itself, etc. We think we can reply, for the purpose of our analysis, that "economic transactions" and "economic advantages" should be interpreted in a very broad sense, covering any type of human necessities. It is worth noting that the cooperative movement was born to solve the problem of hunger and the lack of work – two essentially economic problems – of large sections of the population in European industrialized countries.[10]

Besides, as several Authors point out,[11] the above characteristic – the main focus on transactions with members - is what differentiates cooperatives from other forms of enterprise organization from a legal point of view. It can be found in the ICA's Statement on the Co-operative Identity, specifically in reference to the definition of a cooperative: "A cooperative is an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise."

The above-mentioned distinctive trait of cooperatives becomes critical for the definition of what cooperative's income is. For it is of the essence of cooperative organizations that while trading with members the cooperative must seek to maximize the member's economic advantage instead of its own advantage or earnings.[12]

This economic process, which is exclusive to cooperative organizations, is what defines their very nature. When an investor acquires a share in a joint stock company, that investor just trusts their capital to the company's administrators, hoping that their money will be invested by the company's administrators in the most efficient way possible (from the point of view of obtaining profit) in order to receive dividends in the future. The investor no longer has a role in the life of the company, apart from the control role that, in a very limited way, is given to him to be exerted through the company's general assembly. The company's shareholders have a legitimate expectation that their money will be used in the most profitable way possible, which is the aspect that defines the nature of companies and frame all their activity.

[9]FICI, Antonio (2013) … *cit.*, p. 23.
[10] COLE, George (1944). *A century of co-operation*. Manchester, George Allen And Unwin Ltd, p. 1.
[11] FICI, Antonio (2013) ..., *cit.* p. 23.
[12] FICI, Antonio (2013) ..., *cit.* p. 39.

This structural characteristic of companies implies that the company buys all its inputs at the lowest possible price and sells all its products or services at the highest possible price.

It is not so with cooperatives, because cooperatives must seek "not making profit", since in the case of a cooperative, profit is made at the expense of the members, thus being averse to its very purpose and essence. Let's consider, for instance, a lawyers' cooperative that provides services to its members. The cooperative is supposed to pay the lowest possible price for inputs (leasing, electricity, communications, etc.), that it uses to provide services to its members, but it is also supposed to provide its services to members at the lowest possible price, in order to maximize the members' economic benefit. If the cooperative should sell its services to its members at the lowest possible price, it should desirably not obtain any income from the transaction with the member.[13] The price at which the cooperative sells the service to its member must tend to equal the value of the inputs incorporated into that service. The concept of "cost", of course, must include not just the specific costs incorporated in the service provided to any single member, but also general costs and, moreover, the estimated costs of replacing and renewing the productive capacity. Of course, "estimated costs of replacing and renewing the productive capacity" is a very comprehensive concept, that may offer a broad basis to justify retaining surpluses. From the point of view of taxation, that would not hamper its treatment in the same way as any other cooperative surplus, as long as full and transparent accountability is granted concerning the application of those reserves.

The concept of cooperative surplus must be understood in the light of the explained context of transactions between the cooperative and its members.[14] If the cooperative sells the service to the member at a price that exceeds the costs incorporated in the service, a cooperative surplus is generated.[15] Such surplus is not something that the cooperative should pursue in order to fulfil its constitutional object but rather an "error", arising from an imperfect estimation of the value of the costs embodied in the service provided[16] or rather from the prudent inclusion in the price charged of a margin intended to cover a market-related risk that does not prove materialized at the end of the year.[17]

[13] HENRY, Hagen (2012) …, *cit.,* p. 105.

[14] Legal statutes do not always embody a definition of cooperative surpluses as distinctive and clear as the one given here. For instance, in the Portuguese Cooperative Code, article 100 says that "[T]he annual net surpluses, with the exception of those arising from operations carried out with third parties, which remain after the payment of interest on the capital securities and the building of the various reserves, may be returned to the cooperators." And "[T]he distribution of surpluses among the cooperators may not be carried out, nor the creation of free reserves, before the losses of previous years have been offset or, having used the legal reserve to offset these losses, before having rebuilt the reserve to the level prior to its use." The first error in this provision is that cooperative surpluses cannot arise from operations carried out with third parties. A second error is that there are not any surpluses before the "payment of interest on the capital securities", because interest is a cost that must be offset to receipts when computing surpluses, not after surpluses are already computed. And finally, losses of previous years are the result of errors in setting the price in cooperative transactions, so of course losses must also be offset to receipts when computing surpluses, not after surpluses are already computed.

[15] MEIRA, Deolinda (2012a), … *cit.*, p. 105.

[16] CABALEIRO, Maria (2000). *El excedente de la sociedad cooperativa, especial referencia a la Ley 5/1998 de Cooperativas de Galicia*. REVESCO- Revista de estudios cooperativos, 72, p. 37.

[17] HENRY, Hagen (2012) … *cit.* p. 94.

But not all financial surplus obtained by cooperatives come from "cooperative transactions", i.e. transactions with members. Although these should form the nuclear part of the cooperative's activity, cooperatives can carry out transactions with third parties,[18] albeit limitedly.[19] These transactions with third parties may be of the same type or nature of "cooperative transactions"[20], except that are carried on with non-members. The case of an agricultural cooperative that purchases products from non-member farmers, or of a housebuilding cooperative that sales a house to a non-member party, or the sale of goods to non-members in the case of consumer cooperatives are examples of transactions of the same nature of cooperative transactions carried on with third parties.[21] Along with Munkner, we designate these transactions as "purpose transactions with third parties".[22] Earnings arising from this type of transactions form the so called "extra-cooperative income".[23]

On the other hand, cooperatives can carry out non-purpose activities, i.e. operations not comprised in its regular activity, such as the acquisition of financial assets, the sale of fixed assets, the leasing of facilities or equipment that are not being used by the cooperative, etc. These transactions are instrumental in relation to the cooperative's purpose activity.[24] Earnings arising from this type of operations form "non-operational income".[25]

Both "extra-cooperative income" and "non-operational income" have a radically different nature from "cooperative surplus". Any discussion on cooperative income taxation must consider these three different sources of income, as will be better explained in the following sections.

III. Taxation of "cooperative surpluses"

As Pigou says in his above-mentioned famous writing,[26] "much the most important part of this question concerns the status of the net proceeds of transactions of sale between co-operative societies and their own members. Representatives of private traders maintain that the whole of these net proceeds constitute a (money) profit: the majority of the Royal Commission on the Income Tax maintain that part of them which is retained by the societies

[18] VARGAS, Carlos. (2006) *La actividad cooperarativizada y las relaciones de la cooperativa com sus sócios y com terceros* Navarra: Editorial Aranzadi; MEIRA, Deolinda & RAMOS, Elisabete (2014). *Governação e regime económico das cooperativas -Estado da arte e linhas de reforma.* Porto: Vida Económica.
[19] HENRY, Hagen (2012) … *cit.* p 93; TORRES, Carlos (2013). "Peru", in D. CRACOGNA, A. FICI & H. HENRY (eds.). International Handbook of Cooperative Law, Berlin: Springer, p. 594.
[20] MUNKNER, Hans-H. (2018). Legal Framework analysis. National Report: Germany. ICA-EU Partnership, Cooperatives Europe, p. 5, referring to German cooperative law, distinguishes between "purpose transactions", i.e. transactions to serve the purpose for which the cooperative society was formed, with non-members, and "counter-transactions, transactions to make purpose transactions possible. Purpose transactions with non-members match our concept of "operations with third parties".
[21] FICI, Antonio (2013) ..., *cit.* p. 31.
[22] MUNKNER, Hans-H. (2018), op. cit., p. 5.
[23] BANDEIRA, Ana, MEIRA, Deolinda & ALVES, Vera (2017). *Los diferentes tipos de resultados en las cooperativas portuguesas*. Un estudio de caso múltiple. REVESCO- Revista de estudios cooperativos, 123, p. 40.
[24] FICI, Antonio (2013) ..., *cit.* p. 31.
[25] FAJARDO, Isabel-Gemma (1992). *La gestión económica de la cooperativa: Responsabilidad de los socios*. Valencia: Universidad de Valencia, p. 229.
[26] PIGOU, Arthur C., *op. cit.,* p. 156.

and not distributed in the form of dividends on purchases constitutes a profit; and the representative of the co-operative societies maintain that no part of them constitutes profit".

It became clear in the end of the previous section that "cooperative surplus" is not to be seen as any positive difference between receipts and costs at the end of any fiscal year, but is only the surplus generated in "cooperative transactions" which are the "purpose transactions" carried on with members, ie transaction with members that fulfil directly the object of the cooperative ("purpose operations with members").

Since "cooperative surpluses" as previously explained are originated by an "error" in estimating the price to be paid or charged to the member, or by incorporating in the price payed or charged a margin aiming to cover a market-related risk that did not materialize at the end of the year, "cooperative surpluses" should, in principle, be returned to members, through a "patronage refund"[27], so the cooperative fully fulfils its constitutional purpose of maximizing the member's economic advantage.[28] Therefore, refunding cooperative surpluses is not to be seen as an extra benefit that members can receive as a result of a good performance of the cooperative, but rather as a mere adjustment in financial flows that is required in order to fulfil the purpose of the cooperative.

Therefore, in principle, if cooperative surplus is to be seen as an amount accruing to the cooperative due to an imperfect estimation of the price to be paid or charged to the member and which must be returned to them, then cooperative surplus should not, in idealistic terms, be considered income of the cooperative.[29] Consequently, it should not, in principle, denote a cooperative's ability to pay tax and therefore should not trigger any taxation. Also, since surplus is not to be seen as income, the non-taxation of cooperative surplus is not technically a tax exemption, i.e. a tax incentive. It must rather be seen as the exclusion from taxation of an accrual that has no taxable substance.

However, the issue is not as linear as described above. Since cooperative bylaws and cooperative legislation allow cooperative bodies a wide margin of discretion regarding the decision as to whether or not refunding surpluses to members, cooperative surpluses are not always necessarily paid to members in the form of patronage refunds.[30]

Regarding this topic, it is worth recalling the Third Cooperative Principle, as stated by the International Cooperative Alliance, that states on the application of cooperative surpluses:

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[27] FREDERICK, Donald (2005). *Income tax treatment of cooperatives: Patronage Refunds and other Income Issues*, Cooperative Information Report 44, Part 2, Washigton: USDA Rural Development.

[28] LLOBREGAT, Maria (1989). *El principio de mutualidade y su incidência sobre el regímen jurídico-economico de las sociedades cooperativas*. Alicante, Universidad de Alicante, p. 470; MEIRA, Deolinda (2015). "O regime da distribuição de resultados nas cooperativas de crédito em Portugal. Uma análise crítica". Boletín de la Asociación Internacional de Derecho Cooperativo, p. 100.

[29] HENRY, Hagen (2012) … *cit.* p. 94.

[30] Referring again to Portuguese law, article 100 previously cited (footnote 13) says only that "surpluses may be returned to members". With the aggravation of the fact that the term "surplus" used there is too broad and inaccurate, this leaves the cooperative assembly a very wide margin to decide on the distribution of surpluses, such that, in most cases, the cooperator will not be able to perceive any connection between returns and the transactions carried out by them.

"Members allocate surpluses for any or all of the following purposes: developing their cooperative, possibly by setting up reserves, part of which at least would be indivisible; benefiting members in proportion to their transactions with the cooperative; and supporting other activities approved by the membership." This principle provides cooperatives with a legal basis for holding surpluses, being thus crucial to assess the legal nature of retained surpluses.

The first important notion arising from the Principle is that there is no legal obligation for cooperatives to return cooperative surpluses to members, and therefore there is no general basis for cooperatives to consider cooperative surplus as a liability instead of income in their accounts. Thus, the above assumption, that cooperative surpluses should not, in idealistic terms, be considered income of the cooperative need, in practical terms, to be evaluated in light of the actual rules governing the cooperative in question.

It is true that the Third Principle, among various possibilities concerning the application of cooperative surpluses, refers to one consisting in "benefiting members in proportion to their transactions with the cooperative," which means the refunding of surpluses to the members who originated them through the transactions they entered in with the cooperative.

In view of the economic nature of the surplus – a net margin generated by an operation with the member – taking into account the fact that the occurrence of a surplus means that the cooperative failed in its essential purpose of maximizing the member's economic gain, considering also that the holding of surpluses means an accumulation of financial assets in the cooperative at the expense of the member, and finally taking into account the possibility provided for in the Third Principle of refunding surpluses to cooperators, it can be sustained that there is no impediment for the cooperative internal bylaws or even national law to lay down a legal obligation for the cooperative to refund surpluses on a periodical basis. Whenever such an obligation is laid down in law or in the cooperative internal bylaws there is no doubt that the surpluses which the cooperative refunds to members must be classified and disclosed in accounts as liabilities and not as income and are therefore not to be treated as taxable income. We find this approach put into practice in some legal systems of the Anglo-Saxon legal systems family, like the USA.[31] Even in the cases where the members, following a deliberation of the general assembly will decide to renounce receiving refunds for specific reasons, this could very clearly be seen as a capital contribution, which would not change its nature for tax purposes.

But even when patronage refunds are not based on any legal or regulatory obligation but on a deliberation of the membership, the fact cannot be ignored that the surplus always represents an imperfect accomplishment of the main obligation of the cooperative towards its members, of maximizing their economic gain in any transaction, and therefore was unduly obtained at their expense. Thus, by refunding surpluses, the cooperative is only returning to members a sum that already belonged to them. To that extent, surpluses returned to cooperators should

[31] BAARDA, James (2007). Cooperatives and Income Tax Principles. Little Rock: University of Arkansas, p. 2.

not be considered as income of the cooperative for tax purposes. Or as Pigou says, refunded surpluses "are, in essence, not a profit in any sense, but a refund made from an overcharge".[32]

Obviously, surpluses refunded to members can be subject to tax as income of those who receive them, depending on the nature of the transaction that gave rise to the surplus. In this regard, the key point is whether the transaction between the cooperative and the member was intended to generate income for the latter in the first place, or just a personal saving. Taking the example of an agricultural cooperative, who bought the production of the member A at a price X, and later paid them an additional sum Y for patronage refund, the refund Y is an income accruing to A, as well as the price Y initially paid to them, both coming from their agricultural activity. Considering now a consumer cooperative, if the member A initially was first charged the price X and subsequently received an amount Y as a patronage refund, the sum Y is not income, but only a deduction of a price paid by them for personal consumption,[33] so that there will be nothing to tax.

But again, there is more to this question than just that. Traditionally, cooperative surplus is returned to members in proportion to the volume of transactions of each member, which equals distributing surpluses to the members who originated it in the amount generated by each member. This is the practice, in our view, that is more in line with the Third Principle, mentioned above.

However, some legislations allow refunding of surpluses not in proportion to the volume of transactions carried on by each member, but rather in proportion to the capital subscribed by each member.[34] When this possibility is available, and when it applies to "cooperative surpluses", this necessarily means the enrichment of some members on the basis of capital invested, just like any company shareholder, at the expense of other members who will not be able to maximize their economic advantage from their transactions with the cooperative. Aside from the difficulty of making this mechanism compatible with the essence of cooperatives and with the Third Principle in particular, the fact is that these gains have nothing to distinguish them from the profit of a company, since the cooperative is remunerating a capital contribution that is not mutualistic in its essence. We can say that the capital contribution is not mutualistic in its essence because the investor is seeking a capital gain, as in any for profit organization; besides they are not, concerning the capital contribution, in the same position as the other cooperative members. The capital investor is in the position of providing a capital sum for the cooperative activity, while the other members are in a position where they need that capital.

[32] PIGOU, Arthur, *op. cit.*, p. 56.
[33] HANDSCHIN, Hans (1950). *Die Besteuerung der Genossenschaften.* Wohnen, 25, p. 236.
[34] MUNKNER, H-H., *op. cit.*, p. 10, describes the possibility of distributing surpluses in proportion to the capital subscribed in the German cooperative law. Apparently, the same possibility also exists in Portuguese cooperative law, since the 2015 cooperative code provides for the existence of investing members, while, on the other hand, it regulates the possibility of distributing surpluses in a generic way among the "members", without fix any criteria for that distribution.

In fact, by establishing the possibility of paying dividends out of cooperative surpluses, the cooperative and its members recognize that non-investor members are not entitled a right to receive the correspondent surpluses on the basis of transactions, which somehow means that such surpluses no longer have the nature of "cooperative surpluses" but the nature of a cost to non-investor members,[35] a sum that all members have agreed to pay to investors as a remuneration for the contributed capital. Thus, not taxing the investor-member for those dividends payed out of surpluses cannot be justified by any essential characteristic of cooperatives.

Aside from distributing it to members, the Third Principle provides for two other possibilities for the application of surpluses: using it for "developing the cooperative", usually through the prior formation of reserves, and using it to support "other activities" approved by the membership.

The principle means in practical terms that the cooperative bodies may decide to withhold surpluses to build reserves that will be used either in activities that will help developing the cooperative in view of supporting its core activity in the future (e.g. the acquisition of new facilities, equipment, etc.) or in activities that are not fundamental to the core business of the cooperative, although seen as beneficial to members.

It's important to stress in this regard, once again, that the concept of surplus must be very carefully delimited, in order to exclude from any costs that the cooperative bears in the development of its activity. For this purpose, the concept of "cost" must also be strictly defined, including all costs of future replacement of productive capacity. Such a delimitation of the concepts of surpluses and costs would probably lead to "thinning" the amount of surplus.

Examining the problem on the basis of a strict concept of surplus, when looking at retained surpluses for purposes of taxation, there's a clear similarity between retained surpluses in cooperatives and retained profit in companies, which are, as a general rule, taxed at the company's level.

Let's look again at what Pigou said about this:[36] "[cooperatives] are not, as companies and corporations, liable to tax; they are merely channels through which, with as much accuracy as practical conditions allow, the taxation due from their members is collected. Hence, if the money put to reserve by co-operative societies is taxable profit at all, it must be taxable profit of the members. But to decide that the proceeds of mutual trade are not profits from the income tax point of view when they are distributed, is to make the nature of these proceeds

[35] The question raised in this point has nothing to do with another question, debated in literature, about the compatibility of "investor members" with the Cooperative Principles. All we bring to discussion here is the possibility of paying dividens to "investor members" out of cooperative surpluses without eliminating, at the same time, the its nature of "profit surpluses".
[36] PIGOU, Arthur, *op. cit.,* p. 57.

depend, not on their origin – which is clearly the proper test – but on their destination, which is no test at all."

It is a fact that retained "cooperative surpluses" are still accruals (from the cooperative's perspective) generated in transactions with members, due to a "mistake" in estimating the price to be paid or to be charged to the members, and thus realized at the expense of members. Unlike capital contributions to companies, which are an investment of available assets, surpluses that the members decide to waive are either extra costs they supported in purchasing goods or services or gains that members were never able to dispose of. As extra costs supported, that income has been taxed before the expenditure; as waived gains, as with dividends, surplus has never been real income to members. Thus, considering the way in which surpluses are generated, the conclusion must be that they should not be taxed even when retained in the form of reserves.

However, considering the great flexibility that the cooperative principles allow with regard to the treatment of surpluses, the nature of the surplus as something that belongs to the member should be perfectly clear in the applicable rules, either through cooperative law or through the cooperative by laws, as a condition to not consider withheld surpluses as income. Otherwise, in our opinion, withheld surpluses must be seen as taxable cooperative income. Whether that income is to be taxed or exempt from tax on the basis of its application by the cooperative is a question to be considered in terms of tax incentives.

IV. "Extra-cooperative" and "non-operational" income

Recalling the previously mentioned notion, "extra-cooperative" earnings are earnings realized in operational transactions ("purpose transactions") carried on with third parties. Operational transactions with third parties are transactions with non-members that directly fulfil the specific purpose of the cooperative, like e.g. an agriculture cooperative that buys a crop from a non-member farmer. In the terminology we use in this paper, if the selling farmer is a member the operation is a "cooperative transaction" and the surplus generated will be a "cooperative surplus"; If, on the contrary, the selling farmer is a non-member, the operation will be termed a "transaction with a third party" and the surplus generated in that transaction will be designated as "extra-cooperative surplus". In these transactions, capital originally owned by members and invested in the cooperative – either through initial capital contribution or through waiving of surpluses – is used to produce economic utilities (goods, services) that are provided to non-members who pay a remuneration for them. In terms of the economic nature of the whole operation, from the capital contribution to the final transaction, there is nothing that can distinguish it from operations carried on by companies. It is a commercial transaction that is not a mutualist transaction and have nothing to do with the mutualist scope.

On the other hand, "non-operational earnings" are those earnings obtained in transactions that are not related with the core objective of the cooperative: rental of equipment or facilities not

used by the cooperative, earnings from financial investments, sale of fixed assets, etc. The income generated in these transactions is of the same nature as income from purpose transactions with non-members ("extra-cooperative transactions"). When, e.g., a cooperative sells land, the land sold is capital that members invested in the cooperative and is used in commercial transactions that are not mutualist transactions and have nothing to do with the mutualist scope.

In any of these cases, we are faced with effective accruals generated in the cooperative's sphere and by means of the application of the capital invested by members for non-mutualistic purposes.

None of the considerations that we have made regarding cooperative surpluses, which led us to consider that these belong to the members and not to the cooperative, apply to these two types of earnings, which are definitely income of the cooperative.

In terms of taxation, it is important to set the idea that the arguments on which we concluded that "cooperative surpluses" should not be seen as showing any ability to pay do not apply to "extra-cooperative" and "non-operational" income. Citing Pigou again:[37] "There is no dispute that the net proceeds of a co-operative society's trade with non-members is a money profit and properly taxable. The income they receive from securities held by them is no less clearly a money profit".

By saying this, we are not suggesting that this income must always necessarily be taxed. But as we consider the taxation of "extra-cooperative" and "non-operational" income of cooperatives, we must inevitably address the problem in the perspective of justifying a "favorable" tax treatment of cooperatives. A "favorable tax regime" means a tax regime that incorporates tax reliefs that are not granted, under the same conditions, to companies.

In some tax systems - such as the Portuguese, the Spanish, the Italian and the German - tax reliefs for cooperatives have deep historical roots.[38] The situation may not be very different in the United States and Canada (MAGILL 1960). In the Portuguese legal system, the "principle of favorable tax treatment for cooperatives" is even laid down in the Constitution, since 1976. This principle is designated by cooperative law scholars as the principle of "positive discrimination of cooperatives."[39]

[37] PIGOU, Arthur, *op. cit.*, p. 58.
[38] For the Portuguese case, AGUIAR, N. (2016). *O Problema da Tributação do Rendimento das Cooperativas – reflexão a partir do direito português.* Revista Cooperativismo e Economía Social, 38; regarding the case of USA, PACKEL, Israel (1941). *Cooperatives and the Income Tax.* University of Pennsylvania Law Review, 137, pp. 137-155.
[39] HENRY, Hagen (2005). *Guidelines for cooperatives legislation,* 2. ed., Geneva, ILO - International Labour Organization, p. 4.

The rationale for these tax reliefs granted to cooperatives is found by cooperative law academics in the particularly relevant social function of the cooperatives[40] or in the legal limitations that cooperatives face regarding the distribution of dividends and the formation of capital.[41]

Again, when considering tax issues we need to rely on neutral and very objective assumptions, and we certainly lack objective analysis concerning the limitations that cooperatives effectively face. Just by looking at the structure of cooperatives, one can safely conclude that cooperatives face structural constraints, that can put them at a competitive disadvantage position towards non-cooperative enterprises, regarding capital formation.[42] These constraints result from the fact that, in general, cooperatives will not be targeted to remunerate capital investments. To the extent that in cooperatives, as a rule, there is no remuneration for capital investment or this remuneration is strictly limited, some cooperatives may face a problem as to the formation of capital. In order to form capital, cooperatives must retain cooperative surpluses most of the time. The withholding of surpluses, on the other hand, may work as a disincentive for joining the cooperative. Thus, naturally, "extra-cooperative" transactions and non-operational transactions can be an important instrument for cooperatives to form capital. But by not taxing income arising from these types of operations the legislator will be granting cooperatives a tax incentive.

As for the aforementioned particularly relevant social role of cooperatives, and as to whether it represents a sound rationale for a favorable tax regime for cooperatives, as we started saying at the beginning of this paper, it is not its purpose to discuss the social role of cooperatives. Which, however, does not seem to be an impediment to point out one or two ideas.

The first one is that in less developed countries, with incipient private business sectors, cooperatives seem to be an important legal instrument that allows the formation of small enterprises with little capital in situations where other types of enterprises are not viable, thus allowing the emergence of business activities where a large number of people can participate directly[43]. The second is that in developed market economies, like in all OECD countries, cooperatives appear to be a solution for the specific needs of particular sectors, where they are better suited than non-cooperative enterprises. Agriculture is the most resilient traditional cooperative sector in developed market economies, proving that the cooperative form is particularly well fitting for the agricultural sector. But there might be some emerging cooperative sectors, such as labour intensive services and work cooperatives.

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[40] ALGUACIL, Maria (2010). *Condicionantes del régimen de ayudas de estado en la fiscalidad de las cooperativas*. Revista de Economía Pública, Social y Cooperativa, 69, p. 31. About the social function of the cooperative enterprise, the important study, unique as far as we know, from FICI, Antonio (2015), *cit.*

[41] HINOJOSA, Juan (2010). *Fiscalidad y financiación de las cooperativas: ¿A qué* juega *la Unión Europea?,* Revista de Economía Pública, Social y Cooperativa, 69,p. 77.

[42]HENRY, Hagen (2012) … *cit.* p. 92.

[43] BELLO, Dogarawa (2005). *The Role of Cooperative Societies in Economic Development*. MPRA - Munich Personal RePEc Archive, Paper nr. 23161.

In any case, both the particularly relevant social role of cooperatives and the legal constraints they face in their economic regime are closely linked to the "cooperative identity" which is based on the Cooperative Principles as defined by the International Cooperative Alliance. if cooperatives are not effectively forced to strictly follow the Cooperative Principles, if they do not have a totally transparent and democratic governance, if they do not observe strict rules on the use of reserves, etc., both their social function and their structural constraints will cease to exist, and cannot serve as a rationale for any favorable tax regime. For this reason, the tax laws that establish tax reliefs for cooperatives should impose as a condition for them to enjoy such tax reliefs, to operate in strict compliance with the Cooperative Principles.[44]

However, even if the requirements referred to in the two previous paragraphs are safeguarded, it is still important to bear in mind that the tax reliefs granted by law to cooperatives can collide with both the principle of equal taxation and the principle of free competition.[45] And since these two principles are also fundamental values of the legal order of democratic countries, a tension between these apparently contradictory values will arise. In other words, any tax scheme favoring cooperatives must ensure that, because of them, cooperatives are not placed in a situation of competitive advantage in relation to non-cooperative enterprises. To this end, tight control is required to ensure that cooperatives act strictly in accordance with Cooperative Principles.

V. Conclusion

Three types of earnings must be distinguished in cooperatives: “cooperative surpluses”, “extra-cooperative earnings” and “non-operating earnings”.

“Cooperative surpluses” are exclusive to cooperatives. They are generated by “cooperative transactions”, which are those transactions carried on with members and that fulfil the specific purpose of the cooperative (buying farmers’ crops in agricultural cooperatives; selling houses to members in housebuilding cooperatives; selling goods to the members in the case of consumer cooperatives; etc.). Since the normal objective of “cooperative transactions” is to maximize the economic advantage of the member, the surplus arising from it ought to be seen as belonging to the member. Therefore, the surplus only becomes an accrual for the cooperative at the moment the member waives its reimbursement.

Withheld surpluses, on the other hand, even when they must be seen as accruals for the cooperative, should only be taxed at the cooperative level if they were to be seen as profit for the members in the first place. Since surpluses are never profit for the members, retained surpluses should not be seen as taxable income. However, it must be safeguarded that retained surpluses are placed in non-distributable reserves, according to the Third Cooperative Principle.

[44] AGUIAR, Nina (2015), *op. cit.*, p. 438.
[45] GIORGI, Maurizio, & VACIAGO, Giuzeppe (2011). *Le società cooperative. Tipi di cooperative. Strumenti di tutela. Aspetti civili, concorsuali, tributari e penali*. Padua: CEDAM, p. 28.

Extra-cooperative earnings are originated in operational transactions exceptionally carried on with third parties.

Non-operational earnings are originated in non-operational transactions that are instrumental to the realization of the cooperative's main objective.

Extra-cooperative earnings and non-operational earnings both are earnings that accrue to the cooperative in a way totally similar to what happens with profits in companies. They represent therefore income of the cooperative, as opposed to surpluses which means that its non-taxation qualifies as a tax relief.

The granting of tax reliefs to extra-cooperative and non-operational income is a matter of political positioning of the community in relation to the cooperative sector. A "favorable", tax relief-based tax regime for cooperatives can be justified by the need to put cooperatives on a level playing field with non-cooperative enterprises, given their structural difficulties in terms of capital formation.

However, a tax benefit scheme for cooperatives should always be balanced against the principles of fiscal equality and free competition which are also constitutional principles of market economies and democratic countries. The tax system of cooperatives cannot be so advantageous that, because of it, cooperatives grow to a position of competitive advantage with non-cooperative enterprises, where the freedom of economic agents would be jeopardized.

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MODELS FOR DIRECT TAXATION OF COOPERATIVES UNDER COMPARATIVE LAW[1]

Marina Aguilar Rubio[2]

1. INTRODUCTION

The cooperative society is shown to be a corporate formula inspired by different operating principles from those governing the conventional corporation. Based on this special nature that the cooperative has, the paper goes on to analyse its tax treatment, trying to find the answer to two questions.

First, what are the reasons or arguments on which the legal provision of special tax treatment (in some cases, also beneficial) for cooperatives could be based or justified[3]. This question takes on special relevance in view of the model of cooperative society designed by current regulations. In some way, they are progressively abandoning the traditional cooperative principles, in order to strengthen its competitive component as a company operating in the market (Vargas-Vasserot *et al*, 2017: 24, Vargas-Vasserot, 2020: 44), in which the cooperatives competes with other companies with different operations, for which such tax treatment is not recognised.

Secondly, on the basis of these reasons for the special taxation of cooperatives, the aim is to analyse what this taxation is like today. To this end, we will deal with the tax treatment of the three elements which we consider fundamental in the development of the economic activity of cooperatives: cooperative surpluses; cooperative returns[4]; and allocations from the mandatory reserve and the apprenticeship and training reserves. Therefore, it focuses on income taxes by giving examples of legal systems that put into practice different taxation techniques. This focus is very broad for two reasons: the regime may be different depending on the type of cooperative and in many countries fiscal sovereignty is decentralised, resulting in differences in taxation within the country

[1] Study carried out in the framework of the RDI project for the generation of "frontier" knowledge of the Andalusian Plan for Research, Development and Innovation (PAIDI 2020): "The reformulation of cooperative principles and their statutory adaptation to meet current social, economic and environmental demands" (PY20_01278, IUSCOOP).
[2] University of Almería (Spain)
[3] In relation to the tax regime, it has been pointed out that the problems of justification of tax incentives lie in their compatibility with the principle of equality and fiscal neutrality, especially if it is taken into consideration that the current permissiveness of cooperative legislation with regard to operations with non-member third parties places these entities in a situation of clear competition with non-cooperative entities in the same economic sector (Alguacil-Marí, 2001: 917).
[4] The profits made by a cooperative are distributed among its members on the basis of the cooperative business each carries out during the financial year, not according to the capital each contributed. This is known as cooperative return and is completely different from the dividends paid out by companies with share capital (Ballestero, 1990: 102, Prieto-Juárez, 2002: 165; Vargas-Vasserot and Aguilar-Rubio, 2006: 228).

itself. So, for purposes of illustration, the preferred approach was to generalise and make such distinctions only where necessary.

2. RECOGNITION OF A SPECIFIC TAX REGIME FOR COOPERATIVES

Clearly, we are among those in favour of recognising special taxation for cooperatives, but if it is to be useful, it must be based on grounds that have two characteristics. On the one hand, its foundations or motivations must be verifiable in reality, i.e., in facts, since this is what gives them force. And, on the other hand, they must be arguments of sufficient significance for the rest of the companies with which they compete in the market to consent to the existence of specific subjects who either do not pay as much taxes as the others or pay them in a different way. If the differentiated tax treatment is not justified with sufficiently solid arguments, it will always be suspected of favouring a position of unfair competition for these entities *versus* the rest of the companies operating in the market[5].

From the different legislations on cooperatives and the doctrine that has analysed them, we have summarised six justifications for the existence of a specific tax treatment for cooperatives.

2. 1. Absence of profit motive

Throughout the history of the cooperative movement, it has often been argued that the cooperative is a non-profit-making entity[6]. This idea has become one of the main arguments in defence of the non-taxation of cooperatives because it is a way of justifying favourable tax treatment and because it is required in order to qualify for certain tax benefits. Based on cooperative mutualism, the concept of cooperative act arose to identify the activity of the cooperative with its members, a concept defined by Salinas Puente (1954: 150) as "a collective, patrimonial and not onerous act". From this first use of the concept, it was widely taken up by the doctrine and introduced in Latin American cooperative regulations (Brazil, Argentina, Uruguay, Honduras, Colombia, Mexico,

[5] Thus, the preamble to the Spanish Law 20/1990 on the tax regime for cooperatives puts forward various arguments to justify the special tax regime it provides for and does so in the following terms: “cooperative societies have always received special attention from the legislator who, aware of their special characteristics as associative entities and their social function, has long recognised certain tax benefits for them [...] in view of their social function, activities and characteristics [...]”. And also “insofar as they facilitate workers' access to the means of production and promote the adaptation and training of the members' persons through the allocations made for this purpose [...], because of their activities in these sectors, the economic capacity of their members and the greater proximity to the mutualist principle, they enjoy additional benefits”.

[6] Cracogna (2006: 2) explains this by contrasting capitalist companies and cooperatives. He considers that there is a clearly different starting point in each case: the commercial organisation is set up to make a profit as compensation for the risk involved in investing the capital that the members commit to this activity. This is the logic of commercial profit-making activity; that is what it is organised for, and that is its *raison d'être*. The co-operative, on the other hand, is organised to solve a common need of its members. Whatever activity it undertakes, in all cases its purpose is always to solve a common problem that affects all the members of the co-operative, and not to make a profit by organising a business.

Paraguay, among others) [7]. Thus, it is understood that "market transactions carried out by the cooperative in pursuit of its corporate purpose, linked to the activity of the members and on their behalf, do not involve income, turnover or any financial advantage for the cooperative"[8].

However, it seems that nowadays the question of whether or not the cooperative is profit-making is considered to have been fairly well overcome, as it is generally understood that profit is normal in the existence and survival of any company operating in the market, so that the justification for the differentiated tax regime must be sought in other arguments[9]. Moreover, the decision to tax cooperative surpluses should not be based on whether or not the cooperative intends to make an income, but on whether or not it actually does make an income. In other words, for tax purposes, whether or not the cooperative is profit-making seems a futile debate, since what matters is whether or not a cooperative actually makes an income as a result of its operations, whether or not it intends to do so, and, if such an income actually exists, how it should be treated for tax purposes.

2.2. The activity they carry out

There is a high percentage of cooperatives working in activities that are in great need and not always sufficiently defended, such as all those related to the primary sector (agriculture, mining, livestock farming, forestry, beekeeping, aquaculture, hunting and fishing, etc.).

This argument seems to be easily refuted by a very simple reasoning: if the need for tax support is justified by the activity carried out, protection should be granted to all entities operating in that sector of activity, regardless of the legal form they adopt, i.e., cooperative society, public limited company, limited liability company or other (Alonso Rodrigo, 2001: 43).

2.3. The mutual operation that characterises them

The requirement for the cooperative to act on a mutual basis and the legal limitation of its operations with third parties constitutes a specialty of cooperative operation insofar as it is a limitation that may not exist for other companies and, consequently, can be taken into account when designing a tax regime that accommodates its specialties.

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[7] Its characteristic features can be summarised as follows: (1) the subjects of the cooperative act are necessarily a cooperative and its members; (2) it must form part of the compliance with the object of the cooperative; (3) it is celebrated within the cooperative, it is not a market operation; (4) its economic function is mutual aid, and it is not contractual; finally, (5) it is celebrated in fulfilment of an associative agreement, it is not an isolated operation (Cracogna, 1986: 13).

[8] Justification of Article 7. Cooperative Act of the Framework Law for the Cooperatives in Latin America.

[9] Furthermore, cooperative legislation, at least in Spain, has progressively introduced measures that favour the generation of profit for the cooperative and its members. These include the possibility of distributing among members the results obtained from operations with third parties; the raising of the interest limit on capital contributions; and joint accounting of cooperative and extra-cooperative results together with an increase in the allocation to reserve funds (among others, Cooperative Laws 11/2010 of Castilla La Mancha, 14/2011 of Andalusia, 12/2015 of Catalonia and 11/2019 of Basque Country, as can be seen from their respective explanatory memorandums).

However, we should be cautious about using this argument for favourable tax treatment, because the current trend in the cooperative world, both in terms of its actions in the market and its regulation, is precisely towards an ever-greater permissibility in the volume of operations with third parties which, have moved from being totally prohibited in the early cooperative orthodoxy towards broad levels of openness. One does not have to look any further than Spain to find examples[10]. The question is, therefore, if the law ceases to limit the possibilities of the cooperative to operate with third parties, what will be the fate of the special taxation justified in this way?[11]

2.4. Their lower economic capacity

It is based on the assumption that people who form cooperatives are by definition people with scarce economic resources, so that cooperatives would also have a reduced economic capacity[12]. This justifies a more advantageous tax regime in application of a basic principle of tax justice, which obliges taxpayers to contribute to the support of public expenditure in accordance with their economic capacity. But this is not always the case; it is a purely theoretical approach. In developed countries, the cooperative model, based on the principles of the ICA, has long since ceased to be an instrument for marginal and subsistence economies or a mere formula for self-employment and the development of depressed areas and activities, and has become a model of competitive enterprise, with projection and expansion in the market. (Rosembuj, 1985: 11-13, Vargas-Vasserot *et al*, 2015: 47).

2.5. The special rules of operation to which they are subject

[10] Article 5 of Catalan Law 12/2015 on Cooperatives places no limits on operations with third parties for all types of cooperatives. 50% of the result of these operations must be allocated to the mandatory reserve fund, but the other 50% could be freely disposable, if so regulated in the bylaws. Article 10 of Law 14/2006 on Cooperatives of Navarra says cooperatives may operate with non-members if so stated in their bylaws, but 50% of the result of these operations must be allocated to the mandatory reserve fund and the remaining 50% to the voluntary reserve fund. This is not necessary for workers' cooperatives. Also Law 27/1999 of Cooperatives (national) and most of regional liberalise operations with third parties for consumer and user cooperatives (except Laws of Cooperatives 5/1998 Galicia and 4/2001 La Rioja).

[11] The limitation on third party operations for these companies was a requirement introduced by the legislator at the request of non-cooperative companies to ensure that the tax benefits granted to cooperatives would not serve to place them in a position of advantageous competition in the market (Paniagua Zurera, 1997: 204-205). This requirement, which limited the operability of cooperatives, makes no sense in today's globalised market, where the aspiration of companies, whatever their legal form, is to expand markets, sometimes not only to grow, but simply to maintain their position.

[12] In Latin America this consideration has been widespread. The Discussion paper for the Specialized Meeting of MERCOSUR Cooperatives, I Cumbre ACI-Americas, Uruguay, 2009, states: "It has sometimes been considered as a marginal business formula -'an economy of the poor for the poor'" *(Las cooperativas como parte de la economía social, ¿una alternativa para salir de la crisis?* https://www.aciamericas.coop/IMG/pdf/Claudia_Delisio-Cumbre_Mxico_eje3.pdf)

In Spain, the former Decree of 9 April 1954 approving the Tax Statute for Cooperatives emphasised the low taxation capacity of cooperatives as well as their submission to the mutualist principle. Expressions such as "production cooperatives formed by workers or small artisans", "consumer cooperatives formed by civil servants, employees or workers", "workers who act with their own labour" take us back to a time when cooperativism was mainly identified with this model of a union of people with scarce resources to satisfy their most basic needs, with the limitation of the exclusive limitation of operating exclusively with its members.

Cooperatives have special operating characteristics that fully justify their special taxation, such as the configuration of their capital, the dual status of members as partners and workers, their specific mandatory reserves, etc. As they are different taxable entities, there can be no question of positive discrimination compared to other entities[13].

2.6. The social function they perform

Together with the previous one, this is the fundamental argument to justify the special taxation of cooperative societies. The social function that cooperatives perform not only for the benefit of their members, but also for the benefit of the social group in general (Fici, 2015: 77-98), is one of the clearest reasons in favour of advantageous taxation for cooperatives. In fact, many tax rules cite precisely this social function as a justification for the differentiated treatment of cooperatives[14].

In addition, the social function manifests itself in the fact that cooperatives are basic instruments for job creation, both in the form of refloating companies in crisis and in the creation of new companies. This is something that the figures show, and which has been recognised in various international reports and documents[15]. The contribution of cooperatives to development is also

[13] A large part of the tax doctrine defends a specific taxation that mitigates the parafiscal burdens of its substantive legal regime. Among many others, Alguacil-Marí, 2003: 131-181; Calvo-Ortega, 2005: 33-64; Tejerizo-López, 2010: 51-72 and Aguilar-Rubio, 2015: 373-400.

[14] In Spain, the special taxation will be justified by the obligation imposed by Article 129.2 EC: "The public authorities shall effectively promote the various forms of participation in business and shall encourage, by means of appropriate legislation, cooperative societies". The Constitutions of Italy, 1947 (Article 45), Greece, 1978 (Article 12.5 and 6) and Portugal, 1976 (Article 61, 80.f) and 85) also include a mandate to promote cooperativism, without determining, a priori, the means to do so. Article 19.4 of the 1991 Bulgarian Constitution states that "the law shall establish the conditions conducive to the establishment of cooperatives and other forms of association of citizens and corporate bodies for the benefit of economic and social prosperity". Apart from these cases, only the Serbian Constitution of 2006 guarantees cooperative ownership in Article 86.

In the Americas, the 1988 Federal Constitution of Brazil, article 146.III.c) establishes that it is up to the law to complement "the appropriate treatment of the cooperative act". The 1992 Constitution of Paraguay, in article 113, under the heading "Promotion of cooperatives", establishes that "the State shall promote cooperative enterprises and other associative forms of production of goods and services, based on solidarity and social profitability, and shall guarantee their free organisation and autonomy. The cooperative principles, as an instrument of national economic development, shall be defended through the educational system". The Political Constitution of the Republic of Guatemala, in its Article 119. e), establishes among other obligations of the State "to promote and protect the creation and operation of cooperatives by providing them with the necessary technical and financial assistance". The 1993 Political Constitution of Peru contains only one reference to cooperatives in its Article 17, relating to the field of education, whereas the previous one, of 1979, was a paradigmatic case due to the reference to cooperatives in numerous provisions (Articles 18, 30, 112, 116, 157, 159, 162 and 15th General and Transitory Provision). The Bolivarian Constitution of the Republic of Venezuela of 1999 has a set of Articles 70, 118, 184 and 308, which encourage the strengthening and development of associative expressions and the consolidation of a participatory economy. Article 64 of the Constitution of the Republic of Costa Rica provides that "the State shall encourage the creation of cooperatives as a means of facilitating better living conditions for workers". The Constitution of the Republic of Nicaragua, in the seventh paragraph of its Articles 5, 99 and 103 (amended by Law No. 854) guarantees and promotes the cooperative form of ownership without discrimination with respect to others. The Constitution of Honduras of 1982 establishes that the law "shall encourage the organization of cooperatives of any kind" in Article 338. The Constitution of El Salvador of 1983 also recognizes the promotion of cooperatives in Article 114, as does the Constitution of Bolivia of 2009 in Article 55 and that of Ecuador in 277.6.

[15] From the International Labour Organization statement on "*The cooperative key to sustainable development*" (https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_303222/lang--en/index.htm) to the European Commission's Consultation Paper on Cooperatives in Enterprise Europe of 7 December 2001; the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on *The Promotion of co-operative societies in Europe* of 23 February 2004 (COM/2004/0018 final); the Opinion

fundamental. This is more than just a theoretical statement since the United Nations recognised early the important role played by the cooperative movement in various social and economic sectors[16].

Therefore, from the point of view of justifying a favourable tax regime for these entities, the most interesting argument is that of the identity of purpose that exists between the State and this type of societies, with the tax benefit being presented as compensation for the development of work aimed at achieving the general interest[17]. In my opinion, the interest of this last argument lies in the fact that it not only justifies the full existence of tax benefits for these companies, but also demands their existence in compliance with the most basic principle of commutative and distributive justice, since the contribution in kind that, in particular, cooperatives make must be taken into account to reduce their economic contribution via taxes, otherwise they will be taxed more than they should be (Alguacil-Marí, 2003: 180-181; Calvo-Ortega, 2005: 33-64; Tejerizo-López, 2010: 69-70 and Aguilar-Rubio, 2015: 400).

On the basis of the social function performed by cooperatives, these entities should be granted a tax regime that serves at least two purposes: first, to include technical adjustment measures, consistent with the special features of the economic regime of cooperatives, and secondly, to provide incentives for the model in the sense of containing a system of tax benefits that would serve both to compensate for the social work they carry out and to defend these organisations and encourage their development (Alguacil-Marí, 2001: 916-917)[18].

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on *Different types of enterprise* of 1 December 2009 (2009/C 318/05) and the Opinion on *Cooperatives and restructuring* of 25 April 2012 (CCMI/093-CESE 1049/2012), Opinion on *Social economy enterprises'contribution to a more cohesive and democratic Europe* (2019/C 240/05), all of them from the European Economic and Social Council. Also, from the EESC; the Report on *The contribution of cooperatives to overcoming the crisis* of the European Parliament of 12 June 2013 (2012/2321/(INI)); the study on Recent evolutions of the Social Economy in the European Union of 2016 (CES/CSS/12/2016/23406); up to the 2018 Report on *The future of EU policies for the Social Economy: Towards a European Action Plan* by Social Economy Europe.

[16] Since United Nations General Assembly Resolution of December 1968, *The role of the cooperative movement in economic and social development*, it is recognised "the important role of the cooperative movement in the development of various fields of production and distribution, including agriculture, livestock and fisheries, manufacturing, housing, credit, education and health".

[17] In fact, it follows from the documents cited in the notes above that the differences in the cooperative model could justify specific tax treatment, provided that all aspects of cooperative legislation respect the principle that any protection or benefit granted to a specific type of entity must be proportionate to the legal constraints, added social value or limitations inherent in that corporate form and must in no case be a source of unfair competition.

[18] Although in favour of the existence of tax benefits for cooperatives, for Montero-Simó the promotion of cooperatives does not necessarily translate into them, the tax regulations must inevitably recognise the peculiarities of cooperatives compared to other social forms and adapt the general corporate tax regulations to these entities (2016: 42).

3. TAX TREATMENT OF COOPERATIVE SURPLUS

3.1. The concept of cooperative surplus

Three forms of profit will arise from the normal functioning of the cooperative[19].

Firstly, the economic and social advantages in favour of the members depending on the type of cooperative (education, housing, jobs, provision of services, purchases or sales at better prices, etc.) which constitute its main purpose. Although they represent a benefit for the member, they do not constitute taxable income.

Secondly, some cooperatives obtain monetary surpluses in addition to producing these non-monetary benefits for their members. If these surpluses have been generated exclusively by the action of the provision margins and over-perception, then neither the cooperative nor the member can be said to have made a profit[20]. Thus, the traditional approach to the taxation of cooperative surpluses is that all cooperative surpluses are made up of overpayments and profit margins which do not constitute income of either the cooperative or the member and should therefore not be subject to taxation.

However, not all cooperative surpluses will always be made up in this way. It is normal for the operation of the cooperative to generate a real profit, a profit over and above these adjustments. That is, thirdly, the co-operative will obtain profits in excess of costs, which is known as surplus.

Knowing the characteristics of the cooperative surplus and how it differs from the profit made by other companies operating in the market, we can analyse how it should be taxed by a corporate income tax.

a) It is considered to be an accidental element

They are neither necessary nor the main objective of the cooperative because the essential aim pursued by the members when they set up the cooperative is to satisfy their needs: to buy at better prices, to access a job, to sell their production, etc. But this is without prejudice to the fact that there may be secondary motivations such as obtaining a benefit or profit[21]. We must not lose sight of the

[19] Vargas-Vasserot *et al*, 2017: 143-148 deeply explained the evolution of these concepts.

[20] In this case, what the member overpaid or underpaid at an earlier time comes back to him through the returns at the end of the year. We consider that this is neither a profit nor an income, neither for the cooperative (which gets rid of that amount) nor for the members (who only gets back what they previously paid in) (Alonso-Rodrigo, 2001: 111).

[21] This is clear from the International Cooperative Alliance Statement on the Co-operative Identity, which defines a cooperative as an "autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations". If their main purpose were essentially profit-making, it seems clear that they would not form a cooperative, but would opt for a different corporate model, as there are several mechanisms that limit profit for the members within the cooperative model (International Cooperative Alliance, 1995: https://www.ica.coop/en/cooperatives/cooperative-identity).

fact that, in order to satisfy their needs, cooperative members do not constitute a foundation or an association or any other type of non-profit entity, but a company operating in the market. They are, therefore, organisations which do not necessarily exclude the idea of profit, but which, on the contrary, will need to be profitable in order to maintain themselves in a market in which they will be competing with companies inspired by principles of maximum profit[22].

b) It is subordinated to the general interest

Before any surplus can be distributed, it is a requirement to cover the apprenticeship and training reserves in the terms established by the applicable law, a fund that does not exist in capitalist companies and which is used for social purposes. Moreover, before obtaining these surpluses, the needs of the members have to be met and these must correspond, to a certain extent, to the general interest. In order to justify the non-taxation of cooperative surpluses, the argument has usually been put forward that the way in which these surpluses are distributed is different in cooperative and capital companies[23]. For others, the fact that the distribution is carried out in one way or another will have a significant influence on the characterisation of the company, but not on the characterisation of the profit, which will be equal profit regardless of the way in which it is distributed[24].

c) It is linked to the cooperative activity

The surplus is distributed in proportion to the transactions carried out by the members with the cooperative during the financial year. This is the substantial difference between cooperatives and capital companies: in the latter, the profit is distributed in proportion to the capital contributed by each member. In the cooperative, however, the capital is subordinated to the work of the members (Vargas-Vasserot *et al*, 2017: 162).

3. 2. Methods for the tax treatment of cooperative surplus

If we look at the European context, the tax treatment granted in the different member states is not homogeneous. With regard to the corporate tax adjustment rules affecting cooperative profit, the

[22] According to Alguacil-Marí (2001: 958) the tax protection of cooperatives cannot ignore the search for economic efficiency that every enterprise pursues when operating in a competitive market and, therefore, the need to establish contracts not only with its members, but also with third parties within certain limits. In this way, cooperatives can be more competitive, allowing members to obtain better prices for their consumer products or for the factors of production they contribute to society than they would on the free market. This result is, of course, compatible with the promotion of cooperativism through appropriate legislation.

[23] They are distributed on the basis of the cooperative activity carried out by each member and after endowment of compulsory funds and voluntary funds, if any (Ballestero, 1990: 237-240, Vargas-Vasserot and Aguilar-Rubio, 2006: 227-229, Arana-Landín, 2019: 33).

[24] For further discussion of these arguments, traditionally defended by economists, see Rovira-Ferrer (1969: 50) or Ballestero (1983: 21).

solutions adopted by the different European tax systems can be grouped into four main blocks (Alguacil Mari, 2001: 938-950):

1) systems that apply the general tax regime to cooperatives without taking into account their peculiarities, as is the case in Ireland and Austria;

2) systems that apply the method of exempting the results obtained with members for the cooperative. The exemption is combined either with a system of fiscal transparency or imputation of incomes to members. Also, with taxation of the profit received as a dividend by the member. This tends to be the case only for certain cooperatives, in countries such as Greece, Germany and Portugal, among others.

3) those that deduct the return from the cooperative's tax base, as in Italy and the United Kingdom, in some cases;

4) those that treat the distributed profits as a dividend and apply a lower tax rate to the cooperative, including Spain and Portugal.

In Latin America, the formulas have traditionally leaned, in some cases, towards non-taxation, or, more frequently, towards exemption from paying taxes on the results of cooperative activity, in accordance with the doctrine of the cooperative act and the absence of profit. It has been argued that the recognition provided by law through the specific legal framework must also be present in tax matters. On the basis of the principle according to which "in the cooperative, capital is not capable of producing income because the law itself does not allow it to appropriate the income produced by the social activity", taxing the cooperative with income or wealth taxes "means applying a tax that deteriorates, that diminishes the manifestation of wealth expressed in the cooperative. It is not like in commercial companies where the potential ability to produce profits is taxed because, as there is no profit, what is being done is to reduce the capital" (Cracogna, 2006: 1). However, since the 1990s, laws have evolved, in different countries of the continent, towards taxation of the benefit, as soon as it is accepted that there may be a profit (Sánchez-Boza, 2015:129, Cracogna, 2019: 17).

Let us now look at the formulas that have been put forward for taxing the income made by cooperatives[25].

[25] What cooperatives get is not profits, but income or margins and thus, we can speak of net income, net margins or a net surplus. The general principle of cooperative income taxation is that money flows through the cooperative and reaches the members, leaving no margins for the cooperative to retain as profit. (Arana-Landin, 2019: 33).

3.2.1. Application of the general corporate tax regime

At least in Europe, there is no shortage of those who, without taking into account the peculiarities of cooperatives and their social function, have been in favour of applying the same tax regime as that for capital companies without any specialties whatsoever to cooperatives[26]. The main argument underpinning this position is that today's cooperatives are not charities or mutual societies, which simply carry out transactions with their members and, emphasises that they are companies which operate in the market (Cracogna, 2013: 210). It is assumed that they act on an equal footing with other companies so that caution should be exercised when establishing special rules for co-operatives which could place them in a position of unfair competition, protected by the legislation itself, compared to other companies operating in the same market.

This concern will become even more evident when the special tax regulations for cooperatives include tax benefits, as is currently the case in some European legal systems. In fact, following a complaint by Spanish service station owners' associations against a regulation that allowed diesel to be distributed to non-member third parties, a debate arose within the European Union about the legality of the existence of a subsidised tax regime for cooperatives. The European Commission was very belligerent on this issue and has gone from a favourable position to considering that tax systems such as the Spanish or the Italian ones represented state aids that were incompatible with the single market, to the point of demanding that the cooperatives refund the taxes they had not paid because of these exemptions. The resolution of the Italian case by the European Court of Justice restored some reassurance to the sector. The ruling of the European court understood that the system as a whole is not incompatible with the single market and that each exemption established will have to be studied in the light of the State aid regulations in order to determine its legality or illegality[27].

[26] This tendency links tax benefits to pure mutuality and does not justify them outside of it. A good example of this is the Commission Decision 2010/473/UE, of 15 December 2009 on support measures implemented by Spain in the agricultural sector following the increase in fuel prices. In connection with the extension of cooperatives' operations with non-member third parties without losing the tax benefits provided for in Spanish law, the Commission stated that this was a fiscal State aid affecting competition within the EU.
On the one hand, the favourable measures were considered to be justified or not on the basis of the 'pure mutuality' criterion. That is, they could be considered compatible with the common market only to the extent that cooperatives fulfil the Common Agricultural Policy objectives of Art. 33 of the Treaty and thus contribute to the general interest, but for this they need to be proportionate. Therefore, in the Commission's view, only those measures which fell under the mutual character were justified, while those affecting operations with non-members would only be compatible with the Treaty if they had a negligible impact on competition and this would occur, according to the Commission itself, when the co-operatives fulfilled the necessary conditions to be considered as small or medium-sized enterprises.
On the other hand, the regime is State aid since it necessarily entailed a loss of tax revenue for the State correlated with a lower taxation of the beneficiaries, who would thus obtain a tax advantage for the cooperatives to the exclusion of the other companies.

[27] In the case described in footnote 25 the European Commission justified the tax benefits granted to Spanish cooperatives with the higher tax burden on cooperative returns compared to dividends from commercial companies as a result, on the one hand, of the compulsory contributions to the mandatory reserves and, on the other hand, of the deficient model for correcting double taxation between cooperatives and members. However, after that, the Decision 2010/473/UE marked a turnaround.

3.2.2. Absence of taxation

In a properly structured State, one of the fundamental principles that should inspire the tax system is that of the generality of taxation, in the sense that all those who manifest economic capacity have the duty to contribute to the support of public expenditure. However, this principle admits exceptions, and these have been used to defend the total non-payment of taxes by cooperative societies[28]. There are two techniques that would allow this result to be achieved: non-taxation and exemption.

a) Non-taxation

As a consequence of the particular operational characteristics of the cooperative, the activities it carries out and the economic relations it develops do not constitute taxable events of the rule and are therefore not subject to taxation[29]. This situation arises as a result of the fact that tax regulations often define the taxable events with the conventional company's operating system in mind, without taking into account the peculiarities of cooperative operation[30].

Thus, it has been argued that the cooperative act is that carried out by the co-operative with its members for the fulfilment of its institutional purposes, i.e., animated by a service purpose. If the cooperative act has a specific legal nature in accordance with its economic reality, it cannot be treated from a tax point of view in the same way as a commercial act, which is a different legal nature, with a different economic background. If it were to make a profit, it would accrue to the members by way of return, which means that the cooperative could never, even if it intended to, make a profit from the transactions it carries out with its members. Likewise, in the limited services or operations offered to non-members, the final destination of the surpluses generated are not distributable, and they are not returned to the members (Cracogna, 1986: 13 *et seq*.).

This is explained at length in Alguacil-Marí, 2003: 131-181; Merino-Jara, 2009: 109-128; Hinojosa-Torralvo, 2010: 73-89; and Aguilar-Rubio, 2016: 49-71.

[28] See section 2.1., where reference has been made to the concept of cooperative act, which underpins the thesis of non-taxation of cooperatives.

[29] Article 3.d) of Costa Rican Income Tax Law No. 7092 of 1988 (introduced by Law No. 7293 of 1992 on current exemptions, derogations and exceptions) implies that cooperatives incorporated under Law No. 6756 of 1982 on Cooperative Associations are not subject to tax. But following the Comprehensive Reform of this law, it seems that this non-taxation has been transformed into a case of exemption (Article 78), since certain formal obligations are established, in particular, the withholding obligation to safeguard the tax liability of the members for 5% of the surpluses from which they benefit.

[30] In Spain. Rosembuj (1985: 119) has expressed this opinion. But it is above all a position defended in Latin America. In Argentina, Professor Cracogna (2019: 16) defends the non-taxation of cooperatives in corporation tax because, "strictly speaking, they do not constitute the taxable event". He criticises the confusion of the Argentinian law, stating that "the profits of cooperative societies are exempt" because "there are no such profits, but rather a price adjustment which is returned to the members by way of a return".

In my opinion, there is no justification for defending the cooperative's non-liability to all the taxes that may affect it, but rather that whether or not it is liable must be determined for each specific tax. Only by verifying that the cooperative has not carried out the taxable events can we say that it is a case of non-taxation. Furthermore, if the absence of taxation is linked to the absence of profit, the measures adopted by many current cooperative laws, which favour the generation of profit for the cooperative and its members, would make this unjustifiable[31].

b) Exemption of corporate tax

The thesis of tax exemption for cooperatives is based fundamentally on the social function they fulfil. On the grounds that taxes are levied to meet social needs such as education or health care, taxes should not be levied on those user groups who, through the cooperative, either satisfy these needs themselves without requiring public activity, or collaborate with the public sector in meeting these needs[32].

The argument is particularly valid for *developing countries*, where a significant sector of cooperatives is dedicated to this type of function, providing its members with essential services (such as housing, health, education and others), making up as far as possible for the incapacity or inactivity of the State (Vargas-Vasserot *et al*, 2015: 21-22). In countries considered *developed*, these basic services are sufficiently provided by the State, but precisely for this reason they represent a cost for the public coffers which is avoided through cooperative action (Alonso-Rodrigo, 2001: 122-123). Moreover, the provision of these services by the cooperative and their subsequent exemption from taxation is much cheaper for the State than it would be if it were to raise the sums necessary to pay for them itself, then organise the expenditure, and finally devote part of its funds to these purposes[33].

[31] I have already refuted the no-profit argument in section 2.1. of this paper.

[32] For Rosembuj (1991: 15-16) cooperatives integrate, complement or substitute state action in the provision of public services, so that the fiscal benefit is compensated by the greater social effort entrusted to them and they share the responsibility for the provision of public services.

[33] Thus, for example, in Europe, we find that in Italy the results obtained by production, agricultural, maritime and other cooperatives are fully or partially exempted from corporation tax (DPR 29 September 1973, n. 601, Articles. 10, 11 and 12 updated by Decree Law n. 63 of 2002). In Germany, the Corporation Tax Act of 31 August 1976 (recast version of 15.10.2002) exempts housing cooperatives from corporation tax under certain conditions (§ 5.10 a) and b). In Portugal, Decree-Law no. 215/89, which approves the Tax Benefits Statute, establishes in Article 66.º-A the exemptions for cooperatives, which depend on whether their activity can be considered mutual. To this end, it begins by classifying cooperatives into two main groups. For the first group, which includes agricultural, cultural, consumer, housing and construction and social solidarity cooperatives, the distinction is similar to ours between cooperative and non-cooperative results. With regard to the second group, which includes marketing, credit, worker production, craft, fishing, educational and service cooperatives, the distinction lies in certain characteristics of the cooperative itself which may function as indicators of its mutualist purity. The exemption regimes for these two groups not only depend on the fulfilment of different requirements but produce very different effects. And in Greece agricultural cooperatives are exempt from profit tax according to Paragraph 5 Law 52-1980 on capital gains.
In Latin America, the income tax exemption was introduced in Colombia by Article 2 Law 128, of 28 September 1936. Curiously, it required that the income had been obtained in the exercise of the ordinary activity of the cooperative and that it was invested entirely within the country. This favourable treatment was gradually lost as a result of the different national and

There is no shortage of opponents to this thesis, who argue that excessive state protectionism of the cooperative phenomenon through favourable tax rules would lead to excessive dependence of the sector on the state[34]. This would inevitably result in chronic stagnation in its development and permanent entrepreneurial inefficiency in its management and operation[35].

3.2.3. Application of a special regime

The particularities of cooperative functioning, which are condensed in the ICA Cooperative Principles, amply justify the existence of a tax regime for them that is different from that generally

local tax laws, and the exemptions were greatly reduced. In Argentina, article 26.d Income Tax Law (Ordered text by Decree 824/2019) recognises that "the following are exempt from taxation: d) The profits of cooperative societies of any nature and those that under any denomination (return, share interest, etc.) are distributed by consumer cooperatives among their members". In El Salvador, Articles 71 and 72 General Law of Cooperative Associations No. 559- 1969, provide for exemption from taxes of different nature. In Brazil (Article 182 Decree No. 3000- 1999) and in Guatemala (Income Tax Decree No. 26-92), the exemption for cooperatives applies to income obtained from transactions with their members and with other cooperatives, federations and confederations of cooperatives; income, interest and capital gains made with third parties are not exempt. In Honduras, Article 56.a) Decree No. 65-87, which regulates the Honduran Cooperatives Law, exempts cooperatives from income taxes. And the Tax Equity Law (Decree No. 51-2003) exempts cooperatives engaged in agricultural activities from the general payment of taxes. In Panama, cooperatives are subject to, but exempt from, Property Tax, Income Tax and Transaction Tax (Article 116 Law No. 17- 1997, which, being relatively recent, has incorporated many of the proposals of the Framework Law for Cooperatives in the Americas). Law No. 127-64 on Cooperatives in the Dominican Republic recognises the exemption and exoneration of taxes, fees and contributions to legally constituted and properly functioning cooperatives for their surpluses from transactions with their members. In Peru, according to the General Law on Cooperatives (Decree No. 85), they are subject to income tax only on their net income from transactions with non-member third parties. Although, according to the Most Favoured Enterprise Principle, cooperatives should enjoy all the benefits or privileges granted to other forms of business organisation, as long as they are more beneficial than those granted to cooperatives. Both the 2001 Special Law on Cooperative Associations and the Venezuelan Income Tax Law provide for the exemption of cooperatives from direct national taxes when they operate under the general conditions set by the National Executive. In Chile, according to Article 49 General Law on Cooperatives, cooperatives are exempt from the following taxes: a) 50% of all contributions, taxes, fees and other fiscal charges in favour of the Treasury, except VAT; b) all taxes levied on legal acts, conventions, acts related to their constitution, registration, internal functioning and judicial proceedings, and c) 50% of all contributions, duties, taxes and municipal patents, except those related to the production or sale of alcoholic beverages and tobacco. Finally, in Mexico, there is no exemption for the society in the Decree regulating income tax (DOF 11-12-2013). It has been criticised that the 2014 tax reform has eliminated the tax benefits achieved not so long ago, in the 2006 reform, thus ignoring the true social function and nature of cooperatives (Izquierdo, 2016: 105). However, the 2015 Decree granting housing support measures and other fiscal measures established the tax incentive for production cooperatives that determine taxable profit for the fiscal year and do not distribute it, to be able to defer the total tax for the year determined for three fiscal years in addition to the two already provided for in the Law, so that they can then defer the payment of the income tax, if they do not distribute the profits to the members, for a maximum of five years.

[34] An appropriate balance must be sought between, on the one hand, the promotion of the most needy inherent to the state which is described as social, and, on the other hand, economic competition in the markets, which is part of the essential content of the freedom of enterprise (Paniagua-Zurera and Jiménez-Escobar, 2014: 66).

[35] In order to avoid this negative dependence on the state, positions have been defended in favour of recognising temporary tax benefits. An example of this technique can be found in Bolivia, where Article 39 of the General Law on Cooperative Societies DL Nº 5035-1958 established that "they shall be exempt from paying taxes and fees on the operations they carry out to develop their economic activity and guarantee the fulfilment of their social purposes, for a period of two years". This rule was repealed by Law No. 356-2013, which does not contain a similar provision. Costa Rica's Law on Cooperative Associations No. 6756 maintains the "exemption from payment of land tax for a period of ten years from the date of its legal registration" (Article 6.a). El Salvador's General Law of Cooperative Associations No. 559-1969 provides in Article 72: "for a period of five years, from the date of its application and extendable at the request of the Cooperative for equal periods: a) Exemption from income tax [...] whatever its nature, the capital with which it is formed, interest generated from the fiscal year during which the application is submitted".

However, the recognition of tax benefits for cooperatives is not exclusively aimed at helping the business consolidation of a cooperative, but rather at a more general and lasting promotion insofar as it fulfils certain purposes of social interest throughout its life, or whose operation implies difficulties of competitiveness in the market which they try to compensate through the recognition of certain tax advantages.

provided for companies[36]. The existence of sufficient compelling arguments justifying a special tax regime for cooperatives precludes any accusation of discrimination[37].

Once it is accepted that the cooperative can make a profit, in the form of income, which would be taxable for corporate tax purposes, some possibilities for special taxation arise.

a) The system of fiscal transparency or taxation of partners

Fiscal transparency is designed to tax members on the results obtained by the cooperative. Thus, the company's fiscal personality is denied, and the members a "re taxed on the results obtained by the company, whether they have been distributed or not. This system considers the members to be the owners of the company's profits by means of the mechanism of presuming that the company's profits are attributed to the members in proportion to the cooperative activity carried out by each of them[38].

The main arguments in favour of the application to cooperatives of the fiscal transparency regime or, in general, of the imputation of results to members, are summarised below (Cracogna,1992: 174)[39]. The first argument stems from the personal nature with which the cooperative society has traditionally been conceived. The leading role of the members in the cooperative model makes it appropriate to have a taxation mechanism that refers precisely to them. Secondly, the special relationship that exists between the cooperative and the member, different to that found in any other company, sometimes defined as a kind of agency relationship in which the cooperative acts as a simple agent for the member. According to this conception, the cooperative is seen as the sum of the members and not as a reality independent of the member or the group of members. The company takes a back seat to the tax administration, which addresses itself to the member. Thirdly, this peculiar relationship between member and company means that it is the member, not the cooperative, who benefits from and also bears the risks involved in the development

[36] All those who defend the existence of these specific characteristics are aligned with this position. We have left a good sample of this doctrine above in footnote 12.
[37] These arguments are developed at length in Aguilar-Rubio, 2015: 373-400.
[38] This regime was in force in Spain, albeit for a short time and with little success, in Laws 61/1978, on Corporate Tax and 44/1978, on Income Tax (see Busquets 1995: 1-3).
Many countries do not treat the cooperative's surplus on its transactions with members as part of the co-operative's taxable income. But any distribution of that surplus to the members may be treated as part of their taxable income.
In France, only SICA and SCOPs benefit from a total exemption from Corporate Tax on transactions with their members (Article 204 CGI). This income is shifted to the tax base of the members. SICA are agricultural collective interest companies. SCOPs are production cooperatives. They are considered 'closed' according to Article 3 Law 47-1775 of the Statute of Cooperation, because they are not allowed to let non-members benefit from their services, unless the specific laws regulating them allow them to do so. In that case they have to admit them as members, if these non-members make use of this option or if they carry out work for the cooperative and fulfill the conditions set by their statutes.
[39] In Spain, Albiñana (1986: 228) has defended this formula in the legal sphere and Juliá-Igual & Server-Izquierdo (1992: 96) have done so in the economic scope.

of the cooperative activity. It is therefore only the member who has to be taxed[40]. Fourthly, the economic capacity that is taxed is only held by the member, who is the one who receives the profit, and not by the company, and what is achieved through the formula of fiscal transparency is the taxation of those who manifest this economic capacity (Falcón y Tella, 1984: 160). And, finally, it is suitable for eliminating double taxation on the company's results, a double taxation that may exist in the application of the general corporate tax regime for the cooperative and the taxation of the amounts distributed afterwards in the member's income.

b) Reduced rate of taxation

Under this model, cooperatives would be subject to corporate tax, but at a lower rate than the general rate, which would apply to capital companies. This is a fairly common formula and there are also different techniques to implement it. In the European Union some Member States distinguish between the results deriving from the cooperative's activity with its members and its activities with third parties for taxation purposes, with the latter being taxed to a greater extent[41]. Others allow the tax rate to be reduced according to the type of activity carried out by the cooperative[42].

4. TAXATION OF COOPERATIVE RETURN

4.1. The concept of cooperative return

Cooperative return "is defined as the return by the cooperative to the member of what it overcharged or underpaid him" (Aranzadi, 1976: 89). Therefore, in order to be entitled to it, it is not enough to carry out operations with the cooperative, but it is also necessary to be a member through the joint contribution of capital and work.

[40] The approach is that we are dealing with an entity aimed at obtaining certain social and economic advantages for the members, rather than directly at obtaining a cumulative monetary benefit for the company (Cracogna,1992: 171).

[41] In Spain, for example, a distinction is made between two tax bases for each cooperative: the cooperative tax base and the extra-cooperative tax base. Once calculated, non-protected cooperatives will be taxed on both at the general rate, and protected cooperatives at the reduced rate of 20% for the cooperative and the general rate of 25% for the extra-cooperative. In addition, specially protected cooperatives will be entitled to a 50% rebate on the corporate income tax they would have to pay (Articles 33 and 34 Law 20/1990). Portugal also distinguishes for taxation purposes the mutual activity of cooperatives from transactions with third parties that are not members or that fall outside the corporate purpose (see note 20). Cooperative results are exempt but those from transactions with third parties and from activities outside their own purposes will be taxed at the general rate of 21% according to Law 2/2014 (updated to 2019).

[42] In Spain, only worker cooperatives, agri-food cooperatives, community land use cooperatives, maritime cooperatives and consumer and user cooperatives are eligible for special tax protection (Article 7 of Law 20/1990), provided they meet the requirements laid down in the tax law for each type of cooperative. In Italy, agricultural cooperatives, which have a very varied typology (they can be worker cooperatives, production cooperatives, consortia of companies) benefit from a reduction of the corporate tax base (DPR 29 September 1973, n. 601, Articles 10, 11 and 12 updated by Decree Law n. 63-2002). In France, several types of cooperatives are exempt from Corporate Tax under certain conditions, in particular agricultural and craft cooperatives provided that they operate in accordance with the provisions governing them (Article 207.1-2 and 3 CGI). In Colombia, legal entities called cooperatives (non-profit companies) are subject to income tax at a rate of 20% from 2019 on their surpluses (being the general rate of 33% plus surtax of 4%, resulting in a net tax of 37%. (Law 1819-2016 through which a structural tax reform is adopted, the mechanisms for the fight against tax evasion and tax avoidance are strengthened, and other provisions are issued).

As a first consideration in addressing the issue, it is necessary to start by distinguishing between what we consider to be a strict return and a broad one. As the amounts involved in the return are of a different nature, the tax regime applicable to them must also be different.

A cooperative return in the strict sense can be defined both as, on the one hand, the amount that the member overpays for a supply provided by the cooperative, and which at the end of the year the cooperative returns to him, and on the other hand, conversely, the amount in addition to the price initially paid to the member. The former should be deductible in the taxable base, as it is not a profit made by the cooperative and distributed to the member, but an amount advanced by the member and now returned to the member. The latter should be considered as part of the cost or price of the service or good provided by the member to the cooperative, which could be understood to have been paid in two instalments. It would be a question of determining the exact cost of the member's service to the cooperative, and that amount should be deductible, even if it has been paid in two instalments (Alonso-Rodrigo, 2001: 265)[43].

So much for the most basic functioning of the cooperative. However, as we said before, one of the changes brought about by the evolution of the company is the new positioning of the cooperative in relation to the idea of profit. The cooperative is now presented as a company with the same right to make an income as any other, distributable among the members, although it does not necessarily have to do so, as this is not its essential purpose. This is therefore a return in the broad sense, as the part of the income that is given to each member of the cooperative in proportion to the operations that they have carried out with it, and which includes both the income of what has been underpaid or overcharged to the member (strict return) and the economic result achieved.

4.2. Deductibility of cooperative income for corporate tax purposes

Comparative law has often opted for the deductibility of these incomes in the tax base of the cooperative's results. Amongst all, the main reason is to consider the return simply as a price adjustment, and not as a distribution of the cooperative's profits. Moreover, this formula has been used to avoid double taxation which is caused by the tax borne first by the cooperative and then by the member. Some regulations allow the deductibility and non-taxation of the company for these amounts based on the mandatory nature of the return mechanism[44].

[43] To the extent that the strict return constitutes an adjustment to the price the cooperative pays or collects from the member, it is part of that price and should be taken into account in determining the exact amount of the member's supply in order to take into account for tax purposes the exact amount of that supply.

[44] In the USA, it is even allowed to deduct from the corporate tax base the amount paid by the cooperative as a return to its members, even if it was generated in transactions with third parties, provided that the requirements are met that it is a legally imposed payment and is proportional to the activity carried out by the member (*Internal Revenue Code, Section* 521). In

A different issue concerns the amounts which the co-operative gives to the member as a price for its products or services, i.e., in exchange for the delivery of products or the provision of services by the members. These amounts are deductible from the cooperative's corporate tax base.

However, under Spanish law, they are only deductible up to their market value, so that, whatever the real cost of the product or service to the cooperative is, only its market value can be deducted[45]. Consequently, even if the actual price at which the transaction was carried out between the cooperative and the member is higher than the market price, the cooperative will only be able to deduct the latter; the rest will not be deductible. We understand that the underlying logic is to avoid a fraudulent manipulation of prices, but it distances the cooperative from reality, condemning its volume of deductible expenses to wander at the mercy of the prices agreed in a market to which the cooperative-member relationship does not belong.

Italian law, on the other hand, provides for the deduction of the amounts paid for the benefits of working partners up to the amount of the current salary plus 20%. Whatever exceeds this limit cannot be deductible and is classified as profit sharing. Therefore, although it refers to the amount of the current salary, by allowing for the extension of the amount of the current salary, the margin granted for calculating the deductible amount is greater[46].

Finally, in Germany, they can only be considered deductible under certain conditions that have been determined by case law in order to combat possible hidden profit sharing The general rules that apply for the recognition of cooperative returns as operating expenses are equal treatment of all members, so that all members must be reimbursed in proportion to the activity they have carried out with their cooperative; and that surpluses arise exclusively from transactions between the cooperative

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France, Article 214.1.1.1-2 and 5 General Tax Code, the return is deductible in consumer cooperatives, provided that it is imposed by law, and it is not sufficient for its payment to be based on an option in the statutes or a decision of the general assembly. And production cooperatives can deduct the profit participations of the workers made in accordance with the conditions laid down in Article 33-3° of the 1978 Law on the Statute of Production Cooperatives. This provision has been extended by administrative doctrine to other cooperative, mutual and related companies or groups which, by application of the legal provisions governing them, distribute a fraction of their profits among their members in proportion to the transactions carried out with each of them or to the work provided. However, Article 214.1-6° specifies that the fraction of bonuses exceeding 50% of the surplus is taxable if the sums in question are made available to the co-operative during the following two financial years. Finally, Article 214.1-7 stipulates that cooperatives may not benefit from the deduction of dividends when more than 50% of their capital is held by non-cooperative members. In other countries the deductibility of the return has been based on its proportionality to the activity and not to the capital. Also based on this argument, the deduction of amounts distributed to members in proportion to their transactions with the cooperative introduced by the Netherlands (Law of 1969, replacing the Corporate Tax Decree of 1942) is justified. UK co-operatives under the Industrial and Provident Societies Act also deduct the return from their tax base. In Argentina, some cooperatives have excluded the amount of returns from their tax base because the way cooperatives distribute their surpluses is a legal obligation (Article 42 Law 20.337).

[45] Article 18. 1 Law 20/1990: "The following shall be considered deductible expenses in the determination of cooperative income: 1. The amount of deliveries of goods, services or supplies made by members, the work provided by members and the income from assets the enjoyment of which has been assigned by members to the cooperative, estimated at their market value in accordance with the provisions of Article 15, even if they appear in the accounts at a lower value".

[46] Article 11.3 DPR 29 September 1973, n. 601.

and the members. This implies that transactions with non-members must be accounted for separately and are subject to corporate income tax (Münker, 2014: 76).

4.3. Deductibility of returns for members' income tax purposes[47]

The starting premise here is that in order to receive returns it is necessary to be a full member, i.e., to make a double contribution, in other words, to pay out capital and carry out an activity within the cooperative. For tax purposes, therefore, we assume that the return is a joint return on capital and activity, in other words, it is a joint income from capital and work (activity), since without the combination of both elements it does not exist.

The excess price which the member previously paid to the cooperative and which the cooperative returns to him after making the cost adjustments for the year does not constitute income obtained by the member, and therefore does not form part of the taxable event. In other words, it is a case of not being subject to the tax on the member's income. The part of the income that does not constitute an excess price that is returned to the member, on the other hand, would constitute income and would therefore be taxable and therefore both items are taxable.

Once this assumption has been accepted, it will be necessary to see what type of personal income taxable event each of them fits into. In the case of incomes turning back to members, the doctrine is divided. Some classify returns as income from movable capital (Ferreiro-Lapatza, 1995: 335)[48]. This is established in Spanish law, due to the traditional identification between return and dividend and the conceptualisation of the return exclusively as a benefit resulting from the status of member, and not as a return of the excess contribution made by the member. There are also those who classify them as income from personal work (Rosembuj, 1991: 96-97)[49]. This thesis focuses on the purely labour aspect of the cooperative member and seems to leave aside the social component of the cooperative. And finally, there are those in favour of considering them as mixed income from work and capital (Alonso-Rodrigo, 2001: 283)[50]. According to this thesis, cooperative returns are distributed by virtue of the status of member and not of worker, but the total remuneration of the

[47] We have focused here on the individual member, although we are aware of the possibility that many legal systems allow for legal persons (including limited companies) to be members of cooperatives.

[48] When the income clearly derives from the combination of the two factors, labour and capital, it seems that it should be classified as income from business or professional activities. Only two characteristics allow, according to the law, their classification as professional or business income: the own-account management of the human resources used in the work and that such management is done with the purpose of intervening in the production or distribution of goods or services.

[49] "The return is clearly distinguishable from social benefits, since, firstly, it does not constitute remuneration of capital [...] returns are different from dividends, because they are distributed on the basis of the labour advances allocated, always representing, in this case, a remuneration of labour, not of capital".

[50] By fully identifying the return with the dividend, two essential realities are being ignored: firstly, the member receives these amounts not only as a member, as is the case with dividends in any public limited company, but is also required to carry out an activity in order to be able to access them; and secondly, not all of the return constitutes a profit, but part of it comes from the price adjustments which the cooperative makes at the end of the financial year with its members.

worker-member is, from a tax perspective, mixed (labour and movable capital). Moreover, the returns cannot in any way be equated or assimilated to dividends, because unlike dividends, the mere fact of being a member of the cooperative does not entail the receipt of dividends; it is not an income derived from membership alone but requires the concurrence of a second circumstance: the exercise by the member of an activity in the cooperative.

5. THE TAX TREATMENT OF AMOUNTS EARMARKED FOR MANDATORY RESERVES

5.1. The mandatory reserve

The unavailability of the mandatory reserve for distribution has been one of the specificities of traditional cooperative operation, which implied its indefinite permanence in the cooperative's assets. However, in the light of the most recent cooperative legislation, this principle is evolving[51].

In Spain, from a tax point of view, the mandatory reserve has tax implications in two areas: on the one hand, its operation will determine the classification of the cooperative as protected or non-protected; on the other hand, an adjustment rule provides for the deduction from the cooperative's corporate tax base of part of the amounts set aside for this reserve.

In this respect, three different positions can be found in comparative law.

The first position is based on the non-distributable nature of the mandatory reserve, even in the event of dissolution, and on the fact that its provision is mandatory. Therefore, it is considered that its correct treatment is that which allows the deduction of its full amount from the tax base[52].

Another sector maintains that what is important about the mandatory reserve is not its unavailability for distribution, but the fact that it is earmarked for the same purposes as the mandatory reserves established for conventional capital companies. Consequently, as the latter are not deductible

[51] In Spain, Law 4/1993 on cooperatives in the Basque Country (repealed by Law 11/2019 of 20 December) was the first to introduce the possibility of distributing the amounts constituting this fund among the members, overcoming the dogma of *irrepartibility* (at the time of dissolution of mixed cooperatives if so authorised by the Higher Council of Cooperatives of the Basque Country). Since then, many others have introduced this modification.

[52] This rule of total deductibility in view of the non-distributable nature of the reserve is applied to the amounts allocated to the MRF in Italy, where the sums allocated to indivisible reserves are not included in the taxable income of cooperatives and its unions, provided that the possibility of distributing these reserves among the members, in any form, either during the life of the entity or at the time of its dissolution, is excluded. Furthermore, at the time of the cooperative's disappearance, they must be used for public utility purposes (Law 1977, n 904, Article 1, amended by Law 2004, n. 311). In the USA, the Cooperative Development Agency already suggested in the 1980s that indivisible reserves could be exempted from corporate income tax in exchange for the members' contribution of new capital (Alonso Rodrigo, 2001: 220).

from the tax base for these companies, the amounts set aside for the mandatory reserve should not be deductible for cooperatives either[53].

There is also an intermediate route which provides for a percentage deduction of the results to be used for the mandatory reserve [54]. We note here the problems that are detected in the application of deductions is that there are regulations that allow the distribution of part of the funds, sometimes as an option exercisable at the time of the dissolution of the cooperative: if the basis for the deductibility of the fund is its non-distributable nature, what will happen if the tendency to allow its distribution is consolidated? What will then be the regime applicable to the amounts earmarked for the mandatory reserve of a cooperative whose distributable or non-distributable nature will not be known until its dissolution, it being precisely this nature which determines the existence or otherwise of the right to deduction?

5.2. The apprenticeship and training reserves

This is a typical and specific fund for cooperative societies and its existence is part of the very *raison d'être* of these entities. In our opinion, it is the most obvious example of the social vocation that distinguishes the cooperative society, since, through this fund, the cooperative allocates part of its surpluses to educational and social purposes.

One of the arguments traditionally used to justify the deductibility of the amounts allocated to these reserves is that it is non-distributable among the members, even in the event of dissolution. Without prejudice to the fact that this principle is a distinguishing feature of the cooperative compared to other companies, we consider that the basis for this special treatment lies, above all, in the purpose for which it is used[55].

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[53] Under the Spanish tax regime prior to Law 20/1990, allocations to this reserve were fully subject to corporate tax, however, these amounts were not imputed to the members' base when the cooperatives were taxed on a fiscally transparent basis (see footnote 37).

[54] This is the case in Spain. Article 16.5 Law 20/1990 provides for a deduction of 50% of the results which are compulsorily allocated to the fund. In order to justify this intermediate option, the report of the draft law on the tax regime for cooperatives stated: "although such funds cannot be distributed among the members, they provide them with an indirect advantage in that they allow the company to finance itself. This indirect advantage has been assessed at 50%, hence the reason for the deduction". By referring exclusively to compulsory allocations, it seems logical to think that, for allocations made by the cooperative voluntarily above the legally established limit, there will be no right to deduct anything from the tax base. In the US, measures in order to promote the cooperative funds can be considered to be a must. A good incentive would be the exclusion (or a reduced inclusion) from taxable income of margins devoted to reserves. In the end, if these reserves were not used for the cooperative and, instead, they were distributed to members they would then pay income tax. If the cooperative ended up not distributing the reserve, it would be for the benefit of the cooperative in the long run. (Arana-Landín, 2019: 35).

[55] In Spain, cooperatives must comply with the rules for the operation of the EPF laid down in the applicable substantive law in order to qualify as a fiscally protected cooperative. And three causes for loss of this status relate to the EPF: one, failure to make contributions to the fund under the conditions required by the cooperative provisions; two, distributing it among the members during the life of the company and the surplus assets on liquidation; and three, using the amounts allocated for purposes other than those provided for by the Law. Once these conditions have been met, the amounts which the

6. CONCLUSION

Special taxation of cooperatives is fully justified from at least two points of view.

First, because they perform a genuine social function. This is evidenced by their role in creating and maintaining jobs, their emphasis on education, their contribution to the development of disadvantaged areas and their emphasis on the individual rather than capital. This social function translates into a real contribution 'in kind' to the social group and should be responded to with the recognition of a special tax treatment that includes tax benefits.

Secondly, because the causes of their origin, their traditional principles and their configuration in the rules governing them, lead us to understand the cooperative as a company that is clearly differentiated from the conventional capital company in several respects.

In view of the above, the tax legislation governing cooperatives should respond to them by creating genuine taxation rules that are adapted to them. This is not simply trying to fit them into tax concepts that have been created with the capitalist company model in mind, and which do not fit in with a society inspired by much more personalist criteria. There have been given examples of countries which, on the basis of the cooperative speciality, have designed specific tax measures to adapt corporate income taxation to the idiosyncrasies of this model, seeking to achieve, with greater or lesser success, the ideal of tax justice, which is a fair distribution of the obligation to contribute to the support of public expenditure.

According to the necessary neutral competition, a reasonable alternative is to endow social economy entities once and for all with a regime that distinguishes them in what is different about them and that is sufficiently clear and precise, and even compromised, to be accepted peacefully and not continually called into question (Hinojosa-Torralvo 2010: 88). This kind of special regime for cooperative societies should:

1. Be based on adjustment rules that recognise the necessary adaptation of corporate taxation to cooperatives and must be applied to all cooperatives (Alguacil-Marí, 2007: 43).

2. Have tax benefits applied according to the characteristics they share with other social economy entities or, even, capital companies, which may be characteristics relating to the size of the cooperative or the role it plays in achieving objectives such as job creation, consumer protection, promotion of business models of worker participation in the means of production, necessary

cooperatives set aside to the EPF for compulsory purposes will be deductible, provided that they do not exceed 30% of the net surpluses of each financial year (Articles 13, 18 and 19 Law 20/1990).

capitalisation, etc. (Monzón, 2009: 96-100). Failure to comply with the requirements should not result in expulsion from the tax system, but only in the loss of the right to apply the benefit.

3. Not tax cooperatives on the profit it obtains from transactions with members in the pursuit of its corporate purposes and those directly related to them (Montero-Simó, 2016: 44)[56] —these transactions should also be valued at the price actually paid (Rodrigo Ruiz, 2010: 22)— and tax profits from transactions with third parties in all cases (Montero-Simó, 2016: 43[57]).

In the event that the former are taxed, it would be appropriate to establish a lower rate of taxation than the normal rate of corporate tax based on the internal structure of the company in question, taking into account the subjective circumstances of the shareholders and considering the company's corporate purpose. This would reduce the tax burden in a simple and perceptible way for cooperatives (Monzón, 2009: 89).

4. Consider the cooperative return as a deductible expense insofar as it does not come from operations with third parties (Rodrigo-Ruiz, 2010: 21)[58].

5. Consider deductible in full both the amounts earmarked for the apprenticeship and training reserves and the mandatory reserve, provided that the latter is non-distributable or just to the extent that it is non-distributable (Hinojosa-Torralvo, 2010: 87).

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[56] In Spain, the 50% rebate on the full amount of Corporate Tax, applicable only to specially protected cooperatives, is based on the logic of not taxing the results of transactions with members. Law 20/1990 itself stipulates transactions with third parties may under no circumstances exceed 50% of the total volume of transactions, which in a way indicates that 50% of the total tax liability, which will at least come from transactions with members, will not be taxed.

[57] Also warns that non-taxation could occur by passing on the profit from such transactions by selling to partners at below cost or buying from them at a loss.

[58] The distributed return is conceived as a refund of part of the price of the goods or services acquired by members or a higher remuneration of the contributions made by members, and should therefore be taxed in the member's personal income tax as income of the same nature as that received for the transactions that the member carries out with the company.

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US WORKER COOPERATIVES: A DIRE NEED FOR A PROFOUND REVISION OF THEIR TAX REGULATION AT A FEDERAL LEVEL

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Abstract

Cooperatives in the USA (US) contribute in important ways to many sectors of society not only from a financial point of view but also, above all, from a non-financial one.

Because cooperatives do not act like normal corporations, in many countries they are subject to different tax laws, which should not be considered a handout but an understanding of their differences and fair compensation for their contribution to society.

In the US, the taxation of cooperatives constitutes a very peculiar regime with great differences from that of many other countries. The system, however, is not that different compared to other US entities, as in many instances the fact that an entity is a cooperative makes no difference for taxation.

Therefore, the US system can be considered peculiar in the sense that both its taxation and, above all, its substantive regime are very different from the pattern followed by the vast majority of systems adopted for cooperatives around the world.

Thus, the tax treatment of cooperatives in the US can be regarded as an unusual one with certain peculiarities that originate from the tax clauses in the Internal Revenue Code and judicial doctrine. This happens because how a business is taxed at the federal level in the United States is partly dependent on how it is organized. This is not an easy topic to study but a worthwhile one.

First, because unlike in most legislations where the cooperative form is legally recognized, in the US it is not. What counts when considering an entity a cooperative is not the fact that it has been constituted or registered as such, but that the entity acts on a cooperative basis. Thus, depending on the possible forms that the entity acting on a cooperative basis takes, there are different choices of taxation. This means that there is no single special regime for all cooperatives but several ones, as different tax provisions may apply depending on the legal and tax form chosen. These include both general provisions for those entities and, sometimes, particular ones for acting on a cooperative basis.

Second, the regime is complex because different legal provisions apply to cooperatives, which derive from the type of cooperative they are (as regards their social object). For example, tax measures for agricultural cooperatives do not apply to worker cooperatives or electricity ones. Some of the measures in this system date back to the first half of the twentieth century, so the protection of certain activities that appeared reasonable back then may no longer be so today;

Third, because there are different levels of taxation due to the fact that the US is a multi-level system. There is a federal regime for each of the different legal forms a cooperative may take.

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Furthermore, there are 47 States and the District of Columbia with their state tax regimes. There are also many more local ones, as several municipalities impose corporate income tax.
Fourth, certain provisions are only applicable depending on each cooperative's bylaws, so these need to be acknowledged in advance.
Fifth, the regime is made more complex because the different tax measures passed in the Tax Cuts and Jobs Act of 2017 and other measures recently adopted as COVID-19 relief may also apply to cooperatives.
Fifth, because there is no comprehensive and substantive regulatory framework that deals with cooperatives, some of these entities are also regulated by the judicial interpretation of sections 1381–1388 in Subchapter T of the Internal Revenue Code.
In summary, the US has different tax measures both in general and specifically concerning cooperatives that make understanding taxation hard not only for scholars but also especially for cooperatives.
This paper has two aims: on one hand, to provide an overview of this very peculiar system from a tax law perspective, concentrating only on cooperatives' Income Tax. It should be added that many other types of taxes apply to cooperatives that are not taken into account here, such as Property tax (real estate and personal), Payroll tax or Sales tax (States and local), and License and Excise taxes. There may also be employment taxes such as Social Security and Medicare taxes and Income Tax Withholding and Federal unemployment tax not taken into account for this paper with the purpose of simplification. On the other hand, the paper seeks to delve into the regulation of cooperatives, analyzing their low resilience due to lack of proper regulations and the frequent inadequacy of their measures, and suggest a different approach.

Introduction

At the federal level, the most common forms of business in the US are sole proprietorships, partnerships, corporations, and S corporations. Legal and tax considerations enter into the selection of the business structure for all these forms. The same applies to cooperatives, i.e. there is a great choice of forms for an entity that plans to act on a cooperative basis; there is no cooperative legal form as such.
The legal forms that a cooperative may take in the US are: Corporations, 501(c) cooperatives, "Exempt" or 521 Entities and Partnerships. Limited Liability Company (LLC) is a business structure that is also very often used for entities acting on a cooperative basis.
The complexity lies in the fact that there is a different choice of tax regime for each of these legal forms. Thus, it can be said that cooperatives do not register and take a particular legal form but adapt themselves to the chosen one by working on a cooperative basis and maintaining whatever legal form they have chosen, then paying taxes accordingly.

Income tax for corporations: overview and most recent changes

To understand US Income tax for cooperatives we need to have a grasp of Income tax for corporations. The Tax Cuts and Jobs Act (TCJA) and certain post-COVID 19 provisions have

made very significant changes to Income tax. Moreover, further important changes are to be expected as President Biden has already announced new legislation to address the long-term effects of the TCJA[3].

A distinction needs to be made depending on the form the entity takes (C corporation, sole proprietorship, partnership, Subchapter S, and limited liability company).

Even though double taxation occurs for certain entities, different forms of taxation coexist for otherwise identical businesses without an obvious reason except that of taxing them differently. Several studies have already demonstrated that differences in taxation result in an inefficient allocation of resources, which occurs at the expense of stronger economic performance and standards of living[4].

Corporations in the US are usual C corporations, regulated under Subchapter C of the Internal Revenue Code (IRC). The income of these corporations is taxed once at the corporate level, according to the corporate tax system, and then a second time at the individual shareholder level, according to individual tax rates when the corporate dividend payments are made or whenever capital gains are recognized. As in most systems around the world, this leads to the so-called "double taxation" of corporate income. There may be ways to diminish or avoid this double taxation of dividends or capital gains both domestically or internationally through double taxation conventions whenever there is this international component.

However, this double taxation is not always avoided. As we will see, in corporations acting on a cooperative basis the main difference with other entities lies precisely in the possible avoidance of this double taxation due to the "Single Tax Principle" that applies to them. However, this is not always the case; also, it has some unwanted consequences in the long run.

Businesses that choose any other form of organization (i.e. not corporations) are generally not subject to corporate income tax. Instead, the income of these businesses passes through to their owners and is taxed according to individual income tax rates, which are higher than corporate tax at the moment. Examples of these alternative "pass-through" forms of organization include sole proprietorships, partnerships, Subchapter S corporations, and limited liability companies (LLCs).

[3] There are very different opinions on the long-term effects of this Act. See GALE, W. G., and others (2018), *Effects of the Tax Cuts and Jobs Act: A Preliminary Analysis*, Washington DC: The Tax Policy Center. On its short-term effects, a different opinion is that of YORK, E. and MURESIANU, A. "The Tax Cuts and Jobs Act Simplified the Tax Filing Process for Millions of Households", available at https://taxfoundation.org/the-tax-cuts-and-jobs-act-simplified-the-tax-filing-process-for-millions-of-americans/.

[4] See Congressional Research Service, *A Brief Overview of Business Types and their Tax Treatment*, R43104. See also Department of the Treasury (1992), *Integration of the Individual and Corporate Tax Systems: Taxing Business Income Once*, available at https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Integration-1992.pdf. For a summary of the Treasury report, see also R. Glenn HUBBARD, "Corporate Tax Integration: A View from the Treasury Department", *Journal of Economic Perspectives*, vol. 7, no. 1 (Winter 1993), pp. 115-132. See also IRS at https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations.

Corporate income tax is imposed on all domestic corporations and foreign corporations that carry out activities within the US. For federal purposes, an entity treated as a corporation and organized under the laws of any State is considered to be a domestic corporation. For State purposes, entities organized in that State are treated as domestic ones and entities organized outside that State are now considered as foreign.

However, there have been recent changes in US Income tax that need to be mentioned for their consequences on the system, which could probably influence other systems in the future. The US has a very long tradition of exporting its tax measures to the OECD through their tax technicians. More often than not, US measures are adopted as frameworks and end up becoming "soft law". On too many occasions, these soft law measures end up having the form of regulations (as happened, for instance, with transfer pricing methods).

In the US, a very important reform was passed on 22 December 2017, the TCJA that made significant amendments to the connecting points and the reduction of tax rates for Income tax. Even though this Act is "the largest tax overhaul since 1986" according to GALE and others[5], we consider the TCJA to be significant not only because of these tax cuts but also, most importantly, because it implemented a much-needed change in the concept of nexus of resident entities. This change applies not only to corporations but also to pass-through entities. It is not the purpose of this paper to analyze the international implications of this act. However, it should be noted that up until the approval of this act, corporations resident in the US had to pay for their "worldwide" income, as still happens in the vast majority of jurisdictions in the world due to the prevalence of the residence principle. The act completely redesigned this consensus and the old international system, changing it to one based on "territorial" taxation in the US (only on income derived within its borders and irrespective of the taxpayer's residence). The purpose of the act was to simplify controlled foreign corporation (CFC or Subpart F) rules and passive foreign investment company (PFIC) rules that subject foreign earnings to US taxation in certain situations. However, the act went much further[6].

The TCJA is also known for reducing the Corporation Income Tax rate from a graduated rate that reached 35% to a flat one of 21% for tax years beginning January 1st, 2018. The alternative corporate minimum tax was repealed, which is what interests us in this paper.

Moreover, this act allows businesses to deduct the full cost of qualified new investments in the year they are made (referred to as 100% bonus depreciation or "full expensing") for five years. After five years, in 2023, the bonus depreciation diminishes by 20% each year and is fully eliminated by 2027. Before the TCJA came into effect, the law admitted only a 50%

[5] See GALE, W. G., and others, *Effects of the Tax Cuts and Jobs Act: A Preliminary Analysis* (2018), Washington DC, The Tax Policy Center, p. 2.

[6] As stated by GALE, William and others in op. cit, p.2: "The new law will reduce federal revenues by significant amounts, even after allowing for the modest impact on economic growth. It will make the distribution of after-tax income more unequal, raise federal debt, and impose burdens on future generations. When it is ultimately financed with spending cuts or other tax increases, as it must be in the long run, TCJA will, under the most plausible scenarios, end up making most households worse off than if TCJA had not been enacted".

bonus depreciation in 2017, decreasing it in subsequent years and fully eliminating it after 2020.

However, in terms of interest deductibility, this act imposes a limit of 30% of business income before interest, depreciation, and amortization. Starting in 2022, the adjustment for amortization and depreciation will be removed from this limitation. Small businesses with gross receipts below US$25 million are exempt from the limitation. Previously, interest paid was fully deductible for all businesses when calculating taxable income.

The TCJA doubles the expensing limit for the investments made by small businesses (C corporations acting on a cooperative basis mostly belong to this category) from US$500,000 to US$1,000,000 for qualified property. This is called "small business expensing" and we consider it a measure that could have an impact on cooperatives' taxation. In a way, it also simplifies accounting rules for smaller firms. However, what is being promoted by all these measures is spending, to make the economy grow. Businesses, though, also need to save for "a rainy day" and, as we will see, doing so is penalized. This leads us to the conclusion that the measures in question are good for the economy but can have undesired effects should the outlook worsen.

In general, taxable income for a corporation takes the same deductions as those of a sole proprietorship to calculate its taxable income. A corporation can also take special deductions. The TCJA made fundamental changes to the treatment of multinational corporations and their income from foreign sources. Before the TCJA, dividends distributed by foreign subsidiaries to their US parent corporations were subject to US tax with a credit for any foreign income taxes paid (this system still applies in the vast majority of states worldwide). Now, a 10% return on certain qualified business asset investments is exempt from further US tax, moving toward what could be described as a more "territorial" system.

Moreover, the TCJA introduces the reduced-rate Global Intangible Low-Taxed Income and applies a minimum tax to returns above that amount regardless of whether they are repatriated as dividends or not.

The TCJA also creates a new minimum tax for domestic cases, the Base Erosion and Anti-abuse Tax, which is designed to prevent cross-border base erosion and profit shifting. A deduction for certain foreign-derived intangible income serves as an incentive for corporations to locate intellectual property inside the US.

These changes in nexus after BEPS can be considered of the utmost importance as in the EU's jurisdictions there is a tendency toward extraterritorial taxation, such as the Digital taxes and the Financial Services one, without considering that the new US model is headed in another direction and needs to be acknowledged.

For federal income tax purposes, a C corporation is recognized as a separate taxpaying entity. A corporation conducts business, realizes net income or loss, pays taxes, and distributes

profits to shareholders. The Income tax comes from gross income (business and possibly non-business receipts minus the cost of goods sold) minus allowable tax deductions. Certain incomes, and some corporations, are subject to a tax exemption. Furthermore, tax deductions for interest and certain other expenses paid to related parties are subject to limitations. With regard to the concept of the tax year, in the US corporations may choose when it begins and ends as long as it lasts 12 months or between 52 and 53 weeks. The tax year need not coincide with the financial reporting year or the calendar year, provided books are kept for the selected tax year. It can even be changed with the IRS's prior consent.

As regards state income taxes, most US States determine that they need to be paid on the same tax year as the federal one[7].

Finally, some COVID-19 relief measures need to be discussed because they affect corporations. For example, there is a new tax act that is popularly known as the "Three Martini lunch" tax break, which increases the deductibility of restaurant expenses from 50% to 100%. We believe that this measure is intended for big corporations as a way to revive the restaurant industry battered by the pandemic. It benefits the most exclusive hotels and restaurants, not the smaller ones, which are those that could be working on a cooperative basis. Taking clients out for lunch and lavishing them is a practice suited to bigger corporations, not cooperatives, which in the US usually belong to the small-business sector. Moreover, too many firms and individuals have devised means of deducting personal living expenses as business expenses thereby charging a large part of their cost to the Federal Government. This is a highly inefficient measure for small businesses and equity[8].

C corporations for federal tax purposes

For federal purposes, there are two different kinds of corporations: C corporations and S corporations.

A C corporation must file an income tax return at the end of the tax year in which it reports its income, gains, losses, deductions, and credits to the IRS (generally it needs to do this using Form 1120, US Corporation Income Tax Return). Unless an extension is asked and granted, a corporation must fully pay its taxes no later than the 15th day of the third month after the end of its tax year.

[7] See Congressional Research Service, *A Brief Overview of Business Types and their Tax Treatment*, R43104.
See also JOHANSSON Å., and others, in OECD, *Tax and Economic Growth*, Economics Department Working Paper 620. In this study, the authors delve into the design of tax structures aimed at promoting economic growth. "It suggests a "tax and growth" ranking of taxes, confirming results from earlier literature but providing a more detailed disaggregation of taxes. Corporate taxes are found to be most harmful for growth, followed by personal income taxes, and then consumption taxes. Recurrent taxes on immovable property appear to have the least impact. A revenue neutral growth-oriented tax reform would, therefore, be to shift part of the revenue base from income taxes to less distortive taxes such as recurrent taxes on immovable property or consumption. The paper breaks new ground by using data on industrial sectors and individual firms to show how re-designing taxation within each of the broad tax categories could in some cases ensure sizeable efficiency gains".

[8] Tax Policy Center, "Restoring the Three Martini Lunch Tax Deduction Won't Feed the COVID-19 Economy." Available at https://www.taxpolicycenter.org/taxvox/restoring-three-martini-lunch-tax-deduction-wont-feed-covid-19-economy, accessed January 29, 2021.

Depending on its taxable income, a corporation may be taxed at a rate of 21%. This is the rate since January 1, 2018, thanks to the TCJA that reduced it from a graduated one that could reach 35%. As already mentioned, the fact that this system has moved from a graduated tax to a flat rate does not benefit small businesses in the same way as it does big ones. The vast majority of cooperatives belong to the small-business category and have thus not benefited from the TCJA in the same way big corporations have.

At a federal level, therefore, a C corporation is taxed at 21%; the same is true of shareholders receiving dividends. Corporate profits can also be subject to a second layer of taxation at the individual shareholder level, both on dividends and capital gains from the sale of shares. Dividends need to be separated into two different categories: qualifying dividends, comprising most ordinary dividends of US corporations, and other dividends. As regards capital gains, they can also be differentiated into two groups: long-term ones, for assets held at least one year, and short-term ones for the rest.

Non-qualifying dividends and short-term capital gains are taxed as ordinary income at current rates of up to 40.8% (the top marginal individual income tax rate of 37% plus the 3.8% tax on net investment income).

Qualifying dividends and long-term capital gains have an applicable maximum tax rate of 23.8%. However, depending on the type of corporation, being taxed at the shareholders' level can be avoided, though this is not the case for entities acting on a cooperative basis.

They must pay quarterly installments that are either 25% of the previous year’s income tax or 25% of the estimated income tax.

S corporations, partnerships, and LLCs for federal tax purposes

Many US businesses are not subject to Corporate Income Tax but are taxed as “pass-through” entities. Pass-through businesses do not have an entity-level tax, which means their owners must include their allocated share of the business’s profits in their taxable income under individual income tax.

Pass-through entities include sole proprietorships, partnerships, LLCs, and S-corporations. Cooperatives can take these forms, so they can also be pass-through entities.
Thus, an S corporation is a corporation that elects to pass corporate income, losses, deductions, and credits through to their shareholders for federal tax purposes. S corporations are only responsible for tax on certain built-in gains and passive income at the entity level. Therefore, for the remaining entities, income tax is taxed only to the shareholders. Thus, shareholders of S corporations report incomes and losses on their tax returns and are assessed at their individual income tax rates. This allows S corporations to avoid double taxation on corporate income.

Only certain corporations can qualify for S corporation status. To be an S corporation, the corporation must meet the following requirements:

- be a domestic corporation;
- have only allowable shareholders (individuals, certain trusts and estates but not partnerships, corporations, or non-resident alien shareholders);
- have no more than 100 shareholders;
- have only one class of stock;
- not be an ineligible corporation (i.e. certain financial institutions, insurance companies, and domestic international sales corporations)[9].

If every one of these requirements is met, to become an S corporation the corporation must submit its choice of form as a Small Business Corporation, signed by all the shareholders. This S corporation legal form is one of the preferred forms for cooperatives, particularly worker and retail cooperatives.

All these forms have also a taxation aspect, not as corporate income tax but as personal income tax, which the TCJA has modified because it includes changes specific to pass-through businesses with provisions scheduled to expire after 2025.

In this sense, the TCJA introduces a new deduction that is only applicable to joint tax filers with a personal taxable income below US$315,000 (US$157,500 for other filers). If this is the case, filers can now deduct 20% of their qualified business income (this can come from a pass-through entity acting on a cooperative basis because they are usually small businesses). Thanks to this new deduction, the effective top personal income tax rate on business income goes down to 29.6%.

To summarize, this means that in the US only C corporations have to pay Income Tax at entity level and are thus taxed twice at entity and shareholders' level. Therefore, double taxation cannot be said to be the general rule for entities in the US and single taxation cannot be considered an advantage devised only for cooperatives. It is a very widespread one.

Corporations acting "on a cooperative basis" in judicial doctrine

Corporations may act on a cooperative basis when they are incorporated as such, to provide mutual benefit to their members. There is a separate legal form in this instance, which differentiates this regime from others, whereas there is no legal form, for example, in the case of partnerships. Since 1951, whenever this is the case, corporations acting on a cooperative basis can apply Subchapter T of the Internal Revenue Code (IRC).

[9] See Department of the Treasury (1992), *Integration of the Individual and Corporate Tax Systems: Taxing Business Income Once*, available at https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Integration-1992.pdf. For a summary of the Treasury report, see HUBBARD, R. G. (1993), "Corporate Tax Integration: A View from the Treasury Department", *Journal of Economic Perspectives*, vol. 7, n. 1, pp. 115-132. See also IRS at https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations.

Although there are several sources that contribute to cooperative law, we have to extract the meaning of what a cooperative is from taxation, because at a federal level there is no other regulation that can help us. Moreover, the IRC has to be complemented by the rulings of the Internal Revenue Service (IRS) and above all, by judicial doctrine, which in many cases dates back to the previous century.

However, as we will see, most of the regulations are old and they were usually intended for agricultural cooperatives and not for other types of cooperatives, such as retail, supply, or worker ones, so they may be ill-suited for these cases[10].

Also, there are special provisions designed for other types of cooperatives such as irrigation or electricity ones with a particular regime regulated in section 501 of the IRC.

The IRC provides the basic regulation for cooperatives, so in a sense, the concept of cooperative has to be interpreted through the IRC. The Code contains two sorts of provisions: those applicable to all businesses and those specifically referring to cooperatives.

Through a variety of administrative determinations, the IRS interprets the IRC and applies it to the situation of each taxpayer. We can find IRS rulings that give their opinion on the interpretation of different aspects of the Code and provide very useful guidance for cooperatives.

However, it should be noted that these rulings have no legal value. Thus, even though they might help us understand the interpretation of the IRS concerning certain IRC provisions, we cannot consider them as true sources of law. While rulings can guide us in understanding the IRS's interpretation of a provision, it is really for the courts to interpret the Code and act as final arbiters of any unsettled disputes between the IRS and taxpayers. IRS rulings have sometimes been proved wrong by judicial doctrine[11].

[10] From NESS, M. and NESS I. (2013), *Worker Cooperatives in the United States: A Historical Perspective and Contemporary Assessment*, available at http://www.workerscontrol.net/authors/worker-cooperatives-united-states-historical-perspective-and-contemporary-assessment. In 1890, the Sherman Act, while containing no specific part on cooperatives, was used by government officials to ban them. As agricultural cooperatives could set a common price, they were accused of stifling competition. The Clayton Act of 1914 sanctioned cooperatives by exempting all "agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for a profit", from the Sherman Act. While the Clayton Act legalized non-profit cooperatives that issued no stock, the legal status of other cooperatives remained ambiguous until the 1920s. In 1922, the US Congress passed the Capper-Volstead Act, commonly referred to as the "Cooperative Bill of Rights", allowing farmers to market products without violating antitrust laws. "However, under the new law cooperative members were required to engage in agricultural production and all cooperatives had to follow a one-member-one-vote rule and annual dividends on stock or capital could not exceed eight percent. In addition, non-member business could not exceed 50% of the cooperatives total business. A decade later, in 1933, the US Congress extended the rights of cooperatives through passage of the Farm Credit Act that created a network of cooperative lending institutions to provide loans for agriculture and farmers' cooperatives".

[11] As was the case of Revenue Ruling 61-47, 1961-1 C.B. 193, according to which the amounts distributed by a worker cooperative to its members on the basis of man-hours worked were not true patronage dividends eligible for deduction at the cooperative level. Another example is the case of the so called "50% rule" in Revenue Ruling 93-21, 1993-1 C.B. 188.

The historical background of cooperative regulations in the US

In the War Revenue Act (1898), Congress recognized the contribution and importance of cooperatives. It provided exemption from federal excise taxes to cooperative companies, not-for-profit mutual benefit associations, agricultural or horticultural cooperatives, among others.

At a federal level, different acts were passed to regulate cooperatives; however, they were restricted to agricultural and farmer cooperatives.

The Revenue Act of 1916 (IRC 1916) made a clear distinction in the cooperative regime between farmer cooperatives in section 521 (what is wrongly called "exempt regime"), mutual or cooperative insurance companies, ditch or irrigation companies, telephone companies, and "like organizations" in section 501(c)(12), and all other cooperatives in Subchapter T. Cooperatives that do not apply Subchapter T have no special provision in the IRC.

In 1936, during the Great Depression, the administration started regulating electricity and irrigation cooperatives.

This long history, which dates back to the nineteenth century, reveals that cooperatives can be regulated at a federal level not only by what is inferred from the IRC but also as entities to be promoted. There have been different attempts to do so for agricultural, farmers, electricity, and other sorts of cooperatives. However, this has not been done for all cooperatives. Therefore, there is a need for the proper regulation of all cooperatives, and the principle of mutuality could sustain this operation.

In 1951, Congress passed legislation that was thought to ensure that, when complemented by Treasury rulings, cooperative earnings would be taxable either to the cooperatives or to their patrons, depending on their legal form, to the extent that they reflected business activity.

However, certain court decisions (Long Poultry Farms v. Commissioner, 249 F. 2d 726 [4th Cir. 1957]; Commissioner v. B. A. Carpenter, 219 F. 2d 635 [5th Cir. 1955]) held that non-cash allocations of patronage dividends generally were not taxable to the patron, although the allocations were deductible by the cooperatives. Congress determined that further clarification was necessary.

In 1961, Revenue Ruling 61-47, 1961-1 C.B. 193, was issued according to which the amounts distributed by a worker cooperative to its members based on man-hours worked were not true patronage dividends eligible for deduction at the cooperative level. In this case, the IRS maintained that this holds even when State law provides that labor performed as a member of a worker cooperative is a form of patronage of the cooperative. It concluded that to be deductible as a true patronage dividend, the return had to be "either an additional consideration due to the patron for goods sold through the association or a reduction in the

purchase price of supplies and equipment purchased by the patron through the association." However, Senator Kerr disagreed with this view, arguing that worker cooperatives were the true cooperative form and should exclude patronage refunds, thus designing Subchapter T as it lasts to this day.

Hence, in 1962 Congress added Subchapter T to the Code (consisting of IRC sections 1381–1388) to address the shortcomings of the existing law. The Subchapter clarifies that:

a) A cooperative may exclude, as patronage refunds, amounts allocated in cash or scrip;

b) Its patrons are to be taxed on such refunds.

Despite this clarification, the IRS pursued its objective in litigation as it did not want worker cooperatives to benefit from Subchapter T. However, in Linnton Plywood Ass'n v. United States, 236 F. Supp. 227 (D.C. Ore. 1964), the judge ruled against the IRS.

Still, because the Code does not define what a cooperative is, the only way to decide on the meaning of "acting on a cooperative basis" is through judicial doctrine. Some court cases have dealt with this issue, referring to cooperative principles when addressing the matter. As we will see, cooperatives follow the one-member-one-vote principle, give a limited return on equity, and allocate profits based on business done with the cooperative. However, there is a certain flexibility as regards these principles compared to other systems. Therefore, the US system is more flexible and, certainly, more uncertain.
The Tax Court in Puget Sound Plywood v. Commissioner, 44 T.C. 305, 307-308 (1965), acq.1966-1 C.B. 3 issued a more thorough opinion on the phrase "operating on a cooperative basis" in Code sec.1381(a)(2) and reached the same conclusion, i.e. that worker cooperatives could exclude their patronage refund allocations. Because this case has not been overruled, the exclusion of patronage refunds from the calculation of a worker cooperative income lasts to this day. This rule is known as the Single Tax Principle.
Therefore, the Code says that "any corporation operating on a cooperative basis" may receive the tax benefits of Subchapter T. The Code does not include any specific definition of "operating on a cooperative basis". The regulations repeat the Code's phrasing and add "and allocating amounts to patrons on the basis of the business done with or for such patrons."
As we can see, this lack of regulatory definition does not mean that any entity, corporation or otherwise, can be defined as acting on a cooperative basis and use the provisions stated in the IRC without further proof. Even though there is no univocal regulation, judicial doctrine offers some light on the matter. History and judicial doctrine provide guidelines for what "acting on a cooperative basis" means[12].
There are three basic requirements:
(1) democratic control by the members;

[12] SETO, M. and CHASIN, C. (2002), "General Survey of I.R.C. 501(c)(12) Cooperatives and Examination of Current Issues", CPE.

(2) vesting in, and allocating among, the members all excess operating revenues over the expenses incurred to generate the revenues (i.e. operating at cost);
(3) subordination of capital.
These basic requirements apply to cooperatives described in section 501(c)(12) as well as those described in Subchapter T and IRC section 521.

The substance-over-form principle

As we have seen, Subchapter T cooperatives are governed by IRC sections 1381–1388, which are devoted to cooperatives conducting any kind of business, nonexempt from federal income tax. Depending on their actual legal form, their earnings are taxed at either the cooperative or the member-patron level.

Thus, if it adopts the form of a C corp, the cooperative itself is going to be the taxpayer, while if the form is that of an S corp, it can be a pass-through entity, with the members being the taxpayers. If it is an LLC, it can choose to be taxed either as a corporation or as a pass-through.

The Mississippi Valley Portland Cement v. US case is a clear precedent for the use of the substance-over-form doctrine and the true test for unmasking entities that pretend to be "working on a cooperative basis"[13].

In this case, the taxpayer was an allegedly nonexempt cooperative incorporated in Mississippi that sought to deduct distributions to shareholders from its corporate income tax as "patronage dividends". These payments were made from the corporation's net profits during the tax years in question. After excluding patronage dividends, the taxpayer reported no taxable income for several years.

The District Court ruled as follows: "There is nothing in the method of doing business by the taxpayer in this case that distinguishes it from the average or normal corporation doing business for profit, no matter that the taxpayer is called a cooperative, or that the dividends to stockholders are referred to as patronage rebates. Other characteristics of this taxpayer, akin to that of a corporation for profit is that the dividends were payable only to stockholders of record at the end of each fiscal year, leaving stockholders, who might have sold their shares prior thereto, with no entitlement to a rebate on the basis of earnings during the fiscal year; and the fact that, as stipulated, actually no stockholder used the cement produced. All allocations were assigned to a sales agency or sold by that agency. As further stipulated, any allocations and delivery of cement to a patron were discouraged."

"It is the opinion of this Court, after carefully scrutinizing the structure of this taxpayer and its method of doing business, that it was not doing business with its consumer patrons or assigns in the historical sense of a consumer cooperative, but that its stockholders are in no

[13] 408 F.2d 827 (1969), n. 2561 US Court of Appeals Fifth Circuit. March 14, 1969.

different category from that of any corporation interested in profits, no matter whether the source of that profit be from the production of cement or any other product, and that accordingly the sums paid here are not excludable from taxable income."

The Court decided that the taxpayer's distribution of its net profits could not be categorized as patronage dividends in the sense of Section 1388(a), as added by the Revenue Act of 1962, which provides as follows:

"(a) Patronage Dividend. — For purposes of this subchapter, the term 'patronage dividend' means an amount paid to a patron by an organization to which part I of this subchapter applies — (1) on the basis of quantity or value of business done with or for such patron. (2) under an obligation of such organization to pay such amount, which obligation existed before the organization received the amount so paid, and (3) which is determined by reference to the net earnings of the organization from business done with or for its patrons. Such term does not include any amount paid to a patron to the extent that (A) such amount is out of earnings other than from business done with or for patrons, or (B) such amount is out of earnings from business done with or for other patrons to whom no amounts are paid, or to whom smaller amounts are paid, with respect to substantially identical transactions."

Of particular importance to the disposition of this case is the language requiring that the distribution be made out of earnings from "business done with or for patrons".

On one hand, the Commissioner argued that "with or for" means that the patrons must physically handle the products of the cooperative. On the other hand, the taxpayer argued that neither the statute nor the cases have imposed such a physical contact requirement. In previous cases, evidence that the patron used the product pointed logically to the conclusion that the business was conducted "with or for" such patron. Conversely, the absence of such evidence would support, but not compel, a conclusion to the contrary.

However, agreeing with the Commissioner, the District Court, 280 F. Supp. 393 ruled that notwithstanding the "cooperative camouflage", these payments were in reality no more than dividends paid to the corporation's shareholders, as the taxpayer's method of conducting its business was not distinguishable from normal corporations doing business for profit. Moreover, the so-called "patrons" were just "paper patrons" as they had no actual use of the cement. Thus, the economic reality was uncovered and patronage dividends were ruled not deductible.

As we have said before, though, the language is imprecise and there seem to be two errors:

- first, we cannot speak of a deduction but of an exemption, which is easier to prove than deductions, belonging to legislative grace. The so-called "patronage dividends" should be excluded at the time of calculating income not taken into account and later deducted;
- second, it is also imprecise to refer to "patronage dividends" as we are dealing with

"patronage refunds". The legal nature of dividends from capitalistic entities and refunds from cooperatives is not the same.

Earnings on non-cooperative operations, such as those of investor-general corporations, are subject to taxation at both the firm and ownership levels. Hence, the exclusion of the patronage refund is valid only for cooperative operations. The general regime applies to all other operations.

A possible tax proposal for entities applying Subchapter T

Any corporation or LLC "operating on a cooperative basis" can be taxed under Subchapter T of the IRC.

Subchapter T does not apply to mutual savings banks, mutual insurance companies, or rural electric or telephone cooperatives, as they have their own provisions. All of these organizations are taxed under separate special sections of the IRC (section 501(c)). Consumer and retail cooperatives can be taxed under Subchapter T.

The taxation classification of a cooperative business is separate from its incorporation status. For that reason, an LLC or a corporation operating on a cooperative basis can be taxed under Subchapter T while an entity incorporated as a cooperative would not qualify if it did not distribute patronage based on use and follow the other principles of operating on a cooperative basis.

The basic rationale of Subchapter T and cooperative taxation is that the cooperative is an extension of the patrons who own it. In addition to making deductions for expenses allowed to other businesses (including the new "Three Martini lunch" tax break), Subchapter T allows a cooperative corporation to also deduct certain distributions of net income to its members—known as the Single Tax Principle.

However, a distinction needs to be made between qualified and non-qualified patronage distribution.

For a cooperative to make a patronage distribution either in cash or in stock that can be considered to be "qualified", the distribution must be made within 8 months from the end of the tax year in which the income occurred. The member must receive written notice of the allocation. At least 20% of the total distribution must be in the form of cash. Finally, the member must consent to include the patronage on their tax return as ordinary income.

The rationale for the 20% cash rule is that the member should have enough cash to pay the taxes on the stock patronage received. Many producers have effective tax rates above 20% and would still be in a negative cash flow position if they received a 20% cash and 80% qualified stock patronage refund. For that reason, most agricultural cooperatives try to pay more than 20% cash. The 20% cash requirement applies to qualified stock

distributions. There is no cash requirement associated with a non-qualified stock patronage refund. The patron consent requirement is typically satisfied by having the patron sign an agreement as part of the membership application or is specified as part of endorsing and cashing a qualified check.

When the patronage distribution is tax-deductible to the cooperative in the current year, it is called “qualified”. Cash patronage refunds are always qualified.

Cash patronage is therefore tax-deductible to the cooperative and taxable income to the patron in the year it is distributed. Retained patronage refunds (stock patronage refunds) can be either qualified or non-qualified.

A qualified stock patronage refund is taxable to the cooperative and tax-deductible to the member in the year it is distributed.

Cooperatives also have the option of retaining a portion of member profits as unallocated retained earnings. Because that income is not distributed as qualified retained patronage it is not deductible and the cooperative retains the after-tax portion. The availability of the Section 199A tax deduction has allowed cooperatives to offset that tax effect and has led some cooperatives to retain more member profits as unallocated retained earnings.
If the cooperative does not meet any of the requirements for a qualified distribution or chooses not to classify the distribution as qualified, we are in the presence of a non-qualified distribution. Because cash patronage is always qualified, only the stock portion of the patronage refund can be structured as non-qualified.
Non-qualified patronage distributions cannot be deducted in the year they are issued but the cooperative can deduct the redemption of non-qualified stock. That non-qualified redemption becomes taxable income for the patron in the redemption year.
Historically, personal income tax had lower tax rates than the corporate tax, which was graduated and higher. That made it logical to shift the tax to the patron’s lower tax rate immediately rather than “park the tax payment” with the cooperative until the time of equity retirement.
However, the TCJA of 2017 substantially reduced the corporate income tax from a graduated scale with a maximum rate of 37% to a flat rate of 21%. That resulted in cooperatives having lower tax rates relative to most of their patrons. From that moment onward, more cooperatives are shifting to non-qualified distributions. This may involve tax-motivated shifts from LLCs and partnerships to C corporations working on a cooperative basis. Still, we should take the long view and keep in mind that there is a new tax proposal in the air that might change things once more.

When issuing non-qualified retained patronage, the cooperative pays taxes on that income in the year of distribution and then gets a tax deduction in a later year when the equity is redeemed. The taxation is ultimately transferred to the patron but the timing is shifted to match the cash payment rather than the stock distribution.

Those distributions become taxable income to the member. Consequently, the net income is only taxed once. In some cases, the taxation is immediately passed on to the patron; in others, the income is taxed at the cooperative level and then the cooperative receives a tax deduction while the member accepts the taxation for that income in the future.

Profits from non-member business cannot be distributed as patronage under the general provisions of Subchapter T. Cooperatives pay taxes on non-member profits and any undistributed member profits at the general corporate rate (a flat rate of 21%).

Like other corporations, cooperatives calculate taxable income when they are incorporated but with one main difference due to the distinct way of distributing net margins to its patrons, based on use, rather than to investors, based on investment. What cooperatives get is not profits but income or margins, which allows speaking of net income, net margins, or a net surplus. This difference is the basis for the Single Tax Principle that applies when business income sources and distribution methods can be considered to be "cooperative" in nature. Earnings from sources other than patronage and margins not distributed in the manner specified by the IRC are generally not eligible for single tax treatment.

If the cooperative is a corporation, some types of cooperatives can apply Subchapter T to exclude the patronage-sourced earnings they distribute to member-patrons from their gross income. Profits from non-member business cannot be distributed as patronage under the general provisions of Subchapter T. Cooperatives pay taxes on non-member profits and any undistributed member profits at the general corporate rate. Cooperatives are taxed on any remaining income, including non-member income, non-patronage income, and member income not distributed as patronage, at the general corporate rate.

Only patronage-sourced earnings are eligible for exclusion by the cooperative and the conditions for this tax treatment include an agreement by the patron to recognize the full patronage refund for tax purposes even though it is not received in cash or negotiable form (as allocated income).

Under all other circumstances, cooperatives are taxed at the ordinary corporate rate on their taxable income calculated after cash patronage, qualified retained patronage, and qualified per-unit retained payments.

All cooperatives (except Section 521 ones) must include non-member income in their taxable income. All cooperatives (including Section 521 ones) should also include income from rents, investment revenues, gain on sale of capital assets, and income from sales to the federal government as taxable income. For that reason, even Section 521 cooperatives often have some taxable income.

Income distribution in corporations acting as a cooperative consists of two elements: the distribution based on the utility or work accomplished by each patron and the creation of reserves which contribute to the consolidation of the firm's financial standing. This profit-

sharing model explicitly recognizes the value of employee labor and the importance of making the firm sustainable so that it may be handed over to future generations. However, contrary to what occurs in most parts of the world where substantial norms regulate the allocation of an important part of the net margins to reserves, this provision cannot be found in the US.

Therefore, one of the main differences cooperatives have compared to other entities is precisely the possible exclusion from income tax, at the corporate level, of patronage-sourced income when this is distributed under certain conditions (in cash or as qualified payment). This income is only taxed at the taxpayer level.

However, a Subchapter T cooperative must usually pay tax on the patronage-sourced earnings it retains, which creates a difficulty. When cooperatives have income they want to keep to strengthen their funds, no consideration is given to reserves and they have to pay just as any other traditional corporation would. Hence, the single tax treatment is lost, even though the entity is acting on a cooperative basis. If the funds are later distributed, the recipients must pay a second income tax at the recipient level.

I believe that what was designed as an incentive can become an important disincentive for cooperative resiliency, as it is the money allocated to reserves that makes a cooperative strong in the long run. If cooperatives are to be different from other types of corporations, they have to look after their financial health, avoiding decapitalization.

The patronage refund clause looks at enhancing the distribution of refunds back to patrons, penalizing their non-distribution. Moreover, this incentive for patronage refunds can be said to be contrary to the ones we find in most countries where cooperatives are well developed, where the allocation of margins to reserves is usually compulsory and promoted by law, partly or totally excluding them from taxable income.

For the US legislator, margins have to pay income once, so if they are refunded to patrons, they are excluded from taxation at the cooperative level. However, if they stay in the cooperative, patrons do not receive their share but the cooperative has to pay for them as they can no longer be considered distributed patronage refunds. If later, part of those reserves goes back to patrons, they will pay income tax again. This may not have been the original purpose of the incentive but it clearly promotes decapitalization.

As an example, in Cooperative Oil Ass'n v. Commissioner, 115 F.2d 666 (9th Cir. 1941), the exclusion of patronage refunds was not permitted where some net margins were not allocated or distributed to patrons but were placed instead in a working capital reserve.

This means that there are two different possibilities: first, cases in which taxation is immediately passed on to the patron through patronage refunds and those refunds are not taxed at a corporate level but at a patron's one; second, those cases in which not all income is passed to patrons or it is not passed as patronage refunds. In these cases, these profits become

taxed at the cooperative level and the members accept the taxation for that income in the future. All this needs to be notified to members to avoid shifting the responsibility from members to the cooperative to build in more equity or doing the opposite.

We wish to make a proposal: the exclusion (or reduced inclusion) from taxable income of the margins devoted to reserves might be a better way of promoting cooperatives by enhancing their capitalization. Even if, in the end, these reserves were not used for the cooperative and were instead distributed to its members, the latter would pay income tax on them. If this were to happen, it would just be a deferral of taxes that could greatly help the allocation of resources to these funds and make cooperatives undeniably more resilient. If the cooperative ended up not distributing the reserves, this would be for the long-term benefit of the organization. The cooperative would thus become stronger. A partial exclusion of the percentage that is compulsorily devoted to reserves would be in accordance with what is done in other countries with strong cooperative sectors. Choosing the corporate form for a cooperative has important advantages.

First, flexibility, as being taxed as a cooperative corporation allows using patronage dividends to allocate profits. Thus, these cooperatives can either choose to pay income tax at the corporation level or allocate some or all of the profit to the patrons, having them pay personal income tax;

Second, the possibility of a tax deferral, given that the tax paid by patrons for the refunds is paid in the year that cash or a qualified notice of allocation is received. This can result in the deferral of the tax paid on the patronage dividend for a year.

However, it should be noted that of the five types of businesses recognized in the US, only investor-general corporations pay income tax at both the business and owner levels (these organizations amount to only around 12% of businesses). This means that the proposed advantage is not specific to cooperatives but is a widespread one.

For those benefits that are taxed, the federal tax rate is 21% and State rates vary from 0% to 10%. Keeping those benefits may result in paying around 30% for them in corporate tax, which is very high.
The IRS establishes a benefits minimum of 20% for patronage dividends, which foreign observers find hard to understand because in many other countries it is the other way round. That is to say, most countries oblige their cooperatives to keep a percentage of net income as reserves. This percentage may vary from country to country but it is not unusual to find provisions that mandate cooperatives to keep around 50% of their net income for reserve. In these other countries, the tax provisions are precisely meant to promote reserves by making a percentage of them deductible from the tax base, as happens in Spain, Portugal, and Italy.
The IRC takes the opposite point of view. In the US case, patrons are to be protected, with a compulsory minimum refund of 20% of net income. In other contexts, cooperatives are encouraged to make a minimum retention of net income for their reserves obligatory. This

different approach results in different models and, above all, in very different levels of resiliency.
Thus, it is not surprising that cooperatives in the US are not as resilient as in other countries where reserves are compulsory, but also promoted by different tax measures.

A proposal for other entities that may or may not apply Subchapter T

Subchapter T does not apply to all corporations acting on a cooperative basis, because mutual savings banks, mutual insurance companies, or rural electric or telephone cooperatives cannot apply this regime. These organizations are taxed under separate sections of the IRC, in particular sections 501 and 521.
Not all corporations acting on a cooperative basis apply Subchapter T. Consumer and retail cooperatives may be taxed under Subchapter T and worker cooperatives are usually incorporated as consumer ones. They can take the form of incorporated cooperatives, LLCs, or Limited Cooperative Associations that have elected to be taxed as corporations.
An LLC is a business structure allowed by state statute that may or may not apply Subchapter T. Each state may use different regulations. Depending on the choice of the LLC and the number of its members, the IRS will treat the LLC as a corporation, a partnership, or as part of the LLC's owner's tax return (a "pass-through entity").
Specifically, a domestic LLC with at least two members is classified as a partnership for federal income tax purposes unless it specifically chooses to be treated as a corporation (in which case it may apply Subchapter T).
For income tax purposes, an LLC with only one member is treated as an entity regarded as separate from its owner, unless it files Form 8832 and elects to be treated as a corporation. However, for purposes of employment tax and certain excise taxes, an LLC with only one member is still considered a separate entity.
Owners of an LLC are called members and this can either be physical or legal persons in most States (corporations, other LLCs, and even foreign entities). As we are dealing with State law, regulations may vary but there is usually no minimum or maximum number of members.
LLC is probably the most frequent form for cooperatives. As there is no legal person involved, everything is allocated to individuals and nothing to the partnership as such. Cooperatives taking this form follow the same rules as all other partnerships. All taxes are paid by members, with some unusual exceptions, such as California. However, bearing in mind the changes in taxation made by the TCJA, changing to a form that pays taxes as a corporation may be useful. However, as Watson and McBride have noted, congressional policymakers have proposed to revert the changes made by the TCJA in corporate income tax, including raising the 21% rate to 28% and creating a minimum rate for large corporations[14]. The purpose of the proposal is to raise revenue; however, other side effects need to be taken into account. In the case of cooperative taxation, this proposal could make

[14] See WATSON, G. and MCBRIDE, W. (2021), "Evaluating Proposals to Increase the Corporate Tax Rate and Levy a Minimum Tax on Corporate Book Income", available at https://files.taxfoundation.org/20210224151522/Evaluating-Proposals-to-Increase-the-Corporate-Tax-Rate-and-Levy-a-Minimum-Tax-on-Corporate-Book-Income1.pdf

having the form of a corporation superfluous. While changing from a pass-through entity to a corporation is easy, though, doing the opposite is not. There is a certain amount of flexibility in moving from partnership to corporation but not in doing the opposite. This is why taxation effects need to be considered in the long run.
The reserves of the cooperative do not belong to the partnership; they belong to the partners. Each member reports under his/her personal income tax. Everything gets allocated down to the members. Accrual of cash is in the same year. In this case, there is no deferral as there was for C corporations.
This accrual of cash can be interpreted in different ways depending on the bylaws. Traditionally, it is based on ownership but it can also be based on hours worked. If it was set up in advance, the IRS sets no limit on how to do it. Non-members cannot get allocations, so usually they are just employees.
Special attention needs to be paid to filing the first year because there is a large fine (US$205 per member per month for up to a year). For this reason, some cooperatives that do not file the first year dissolve and start again. The rules depend on the State.
However, because the TCJA has substantially reduced corporate income tax from 37% to 21%, interest in being a pass-through entity has diminished. Nowadays, cooperatives have lower tax rates than most of their patrons, so the choice of having income tax paid at the entity level has increased rebus sic stantibus. This may change if the new proposal referred to above is enacted. As BUNN noted, we should also bear in mind the combined effect of federal and state taxes and the new proposal[15].
Also, although the corporate income tax rate is important, the marginal effective tax rate may be even more so.

Judicial doctrine helps us understand what Subchapter T, sections 1381–1388 of the tax code offers for certain types of cooperatives. Puget Sound Plywood v. Commissioner (44 T.C. 305, 307-308 [1965], acq. 1966-1 C.B. 3) is probably the most important case in this sense because it clarifies the Single Tax Principle: in general, such a cooperative may exclude, as patronage refunds, amounts allocated in cash or scrip whenever its patrons are taxed on such refunds. Therefore, any corporation "operating on a cooperative basis" may receive the tax benefits of Subchapter T.

Thus, a Subchapter T cooperative must usually pay tax on the patronage-sourced earnings it retains. When cooperatives have income that they want to keep to fortify the cooperative funds, no consideration is given to reserves and they have to pay tax just as any other traditional corporation. This way, the single tax treatment is lost. If the funds are later distributed, the recipients must pay a second income tax at the recipient level.

One of the key features in other successful systems, such as the Spanish and Basque ones (well-known because of Mondragón), is precisely constrained property rights. Property rights in cooperatives are different from those in private entities because they are constrained both

[15] BUNN, D. (2020), "How Would Biden's Tax Plan Change the Competitiveness of the US Tax Code?" Tax Foundation, https://www.taxfoundation.org/biden-tax-plan-us-competitiveness

in terms of alienation and accumulation. Alienation constraints limit the capacity to sell or transfer the property while accumulation ones limit the degree of inequality within the group associated with the property.

As regards alienation constraints, the residual value of cooperatives upon sale, closure, or liquidation cannot be appropriated and shared by worker-members. The purpose of this measure is to eliminate any financial incentive to sell the organization, or otherwise liquidate it and cash its economic value, i.e. demutualize and appropriate the market value of the enterprise, or appropriate its residual value upon liquidation. In the Basque system, there are true alienation constraints, as 30% of the annual net surplus must stay within the cooperative for education and environmental projects or difficult future periods. This allows there to be always an important fund for the cooperative. At the same time, these funds are nontransferable and indistributable. Even if the cooperative were to dissolve, the funds would not return to the worker-owners but would have to be transferred to the public administration or other cooperatives. The cooperative, then, does not act as a capitalist corporation and remains an asset for the locality and future generations. Financing problems are also reduced, as financial institutions regard cooperatives as strong entities because of these funds.

The fact that in the US patronage refunds are excluded from the taxable income according to the IRC is a measure that calls for revision. The real spirit of any tax is to obtain resources for the community and the general interest, and that is what cooperatives do. A different taxation system that bears this point in mind is therefore necessary for cooperatives.

Section 501 cooperatives

As we have seen, not all cooperatives can apply Subchapter T. Mutual savings banks, mutual insurance companies, or rural electric or telephone cooperatives have to apply another regime, Section 501 of the IRC. This section is devoted to not-for-profit corporations: religious, charitable, and civic institutions owned and operated for the benefit of their members, some credit unions, mutual insurance agencies, and rural electric and telephone cooperatives.

A major difference between IRC 501 cooperatives and the other types we have been discussing is that 501 cooperatives' earnings are not subject to federal income tax. Thus, they do not need to take deductions if they continue to meet the requirements for exemption under section 501. These requirements, which have their corresponding tests, are as follows.

First, the entity must be organized and operated as a cooperative (the cooperative organizational and operational test). This requirement assures that there is democratic control by members. A cooperative satisfies this criterion by periodically holding democratically conducted meetings with members, each of whom has one vote, and electing officers to operate the organization. It must also operate at cost, in the sense that excess net operating revenues are returned to the member-patrons.

Rev. Rul. 72-36, 1972-1 C.B. 151 sets out organizational and operational requirements an IRC 501(c)(12) cooperative must satisfy to ensure democratic control, operation at cost, and subordination of capital.

- The organization must keep adequate records of each member's rights and interests in the assets of the organization;
- It must distribute any savings to members in proportion to the amount of business done with them (based on the operation-at-cost principle);
- The cooperative must not retain more funds than it needs to meet current losses and expenses (also based on the operation-at-cost principle that we do not share);
- The cooperative cannot forfeit a member's rights and interests in the organization upon termination of membership;
- Upon dissolution, the cooperative must distribute any gains from the sale of any appreciated asset to all who were members while the cooperative owned the asset in proportion to the amount of business done with each.

Second, the organization must conduct activities described in IRC 501(c)(12) and its regulations (the activities test)[16].

Third, it must derive 85% or more of its income from members (the income source test).

Failing these requirements means losing exemption from federal income tax and no longer being regarded as a cooperative for such purposes.

The purpose of an IRC 501(c)(12) organization is to provide certain services to its members at the lowest possible cost. The income must be collected solely to meet the cooperative's losses and expenses.

The Flexible Financing for Rural America Act, which is intended for post-pandemic economic recovery and infrastructure development, appears to be good news for this sort of cooperatives. Even though it is still only a proposal for 2021, should it be passed, the act would allow cooperatives, such as electric or broadband ones, to reprice loans from the US Department of Agriculture's Rural Utilities Service at current low interest rates without prepayment penalties.

"Exempt" or Section 521 cooperatives (farmers' cooperatives)

Subchapter T also includes Section 521 of the IRC, which describes the requirements for a more restrictive form of cooperative termed a Section 521 cooperative, also known as "exempt cooperative", even though it is not so.

Section 521 provides that cooperatives must distribute profits to non-members but they are also allowed to deduct non-member profit distributions, which is the reason behind the term "exempt cooperatives".

However, as we have already said, we consider the term "exempt" to be misleading because these organizations are only exempt from *some* forms of taxation.

To qualify for Section 521, the following criteria must apply:

[16] See SETO, M., op. cit., p. 5.

- The organization must be a farmer's or fruit grower's cooperative operated on a cooperative basis and involved in marketing farm products and/or providing farm supplies and equipment;
- 85% of the capital stock must be owned by producers who market or purchase from the cooperative in the current year;
- Dividends on capital stock are limited to 8%;
- At least 50% of its marketing and 50% of its supplying must be done to members, and the total amount of marketing and supplying to non-members cannot exceed 15% (the so-called "50% rule" that applies only to this sort of cooperatives);
- Members and non-members must be treated equally in terms of patronage, pricing, and pool payments (pay patronage to non-members).

A Section 521 cooperative must also maintain records of patronage and equity and not have excessive levels of financial reserves (unallocated equity). Again, as we have commented in reference to patronage refunds, this requirement seems odd to a foreign eye as in most countries precisely the opposite is promoted. Although many of the requirements in Section 521 make sense in terms of cooperative principles, this one does not.

The advantage of Section 521 cooperatives is that while they have to pay patronage on non-member business, they can deduct those payments along with all qualified patronage and per-unit retain payments to members. In essence, a Section 521 cooperative operates and is taxed as if all of its business were business with members. Additionally, a Section 521 cooperative can deduct dividends paid on capital stock but they are limited to 8%. Therefore, the major tax advantage of Section 521 cooperatives is not a total exemption but the fact that they can deduct patronage paid to non-members and can deduct a certain amount of dividends paid on capital stock.

Conclusions

The latest approved measures exhibit some shared features that can be applied to entities acting on a cooperative basis. The common philosophy behind these features can be summarized as follows:

On one hand, both the TCJA and the COVID-19 relief package have been devised as a way to help the economy through spending, not saving. Even though this is understandable at a time of crisis, it may turn out to be a risky approach. This is particularly clear with the "Three Martini Lunch" measure that allows 100% deducibility of expenses in restaurants, bars, and hotels. Spending is promoted while saving is penalized. The same philosophy is shared in Subchapter T of the IRC concerning cooperatives. Probably the main measure in this sense is the exclusion of patronage refunds from Corporate Income Tax. Sharing benefits is promoted but not accumulating reserves for future difficulties. Moreover, if the reserves are later distributed, both Corporate and Personal Income taxes have to be paid. We believe that these measures should be revised to make cooperative entities more resilient.

On the other hand, the entities that benefit the most from this sort of measure are not those acting on a cooperative basis, i.e. small businesses, but big enterprises. Moving from a graduated tax rate to a flat one means that the savings are meant for big corporations, the bigger the better, as the difference is going to be greater. Therefore, the difference in taxation between big entities and small ones has been diminished without specific measures to promote smaller ones, contrary to the ability-to-pay principle.

As entities acting on a cooperative basis do not usually belong to the big corporation category, the latest tax measures have not benefited them in the way they should. Further measures should be taken to compensate them. Among these, the exclusion from taxation of the benefits destined for reserves could make cooperatives more resilient and at the same time make them save taxes, as the exclusion of these reserves would diminish their tax base.

The money that stays in these funds should be promoted, not penalized, as is the case with US IRC Subchapter T, sections 1351–1358, and other provisions.

Therefore, the existing policy of the exclusion of patronage refunds can be considered harmful to cooperative resilience and should be revised, as it discourages the allocation of benefits to reserves. The exclusion from taxable income of the benefits devoted to reserves could be a way of promoting their resilience.

Furthermore, for 501 cooperatives the requirement not to retain more funds than needed to meet current losses and expenses based on operation at cost shares the same philosophy. Not retaining more funds than needed to meet current losses and expenses can mean not being resilient enough in the long run. We strongly recommend a careful reconsideration of this requirement.

Another important shortcoming is investment in education, training, and innovation. We cannot find the promotion of this aim in the IRC. Should this goal be promoted, US cooperatives could become more flexible on the market and fulfill their mission. Again, the creation of measures to promote this aim would be of great interest and could be helped by the exclusion from taxable income of the benefits devoted to it, as happens in other legislations.

Another important feature for the US cooperative regime would be the creation of a framework by which cooperatives need to be registered as such and comply with certain cooperative principles, giving them their special regime.

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THE COOPERATIVE ACT AND ITS TAXATION IN LATIN AMERICAN COUNTRIES

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Abstract:
This text analyzes the legal figure of the Cooperative Act based on the Latin American doctrine countries, demonstrating that this act is the central element of cooperative societies. From the understanding of the meaning of the Cooperative Act, it is possible to think of a model of taxation of cooperative societies, which must be carried out from the Cooperative Act. The methodology to be used is the bibliographic review of the works on cooperative law and the legislation of the countries.

Keywords: Cooperative Act; Integration; Taxation.

1. INTRODUCTION

The most natural Cooperative characteristic is a constant process of expansion of their base of action. For this, a series of strategic alliances between cooperatives, society and the market are necessary which, legally, are made by a "cooperative act". However, the concept of cooperative act, especially in Latin America, comes from the 1960s and was not updated, mainly making use of national legal systems, making integration between cooperatives from different countries difficult. With this, the current framework allows cooperatives from different countries to have economic relationships with each other, but these relationships are not legally considered cooperative acts.

The cooperative act is the one performed by the associate with his cooperative to obtain the service whose provision it organizes, and for which it was established. So are the acts carried out by the associates of cooperatives that have inter-cooperative agreements for reciprocal use of services, as well as the socio-economic relationships that cooperatives carry out with each other and/or with the integration body. Cooperative acts are regulated by cooperative legislation and the statute of each cooperative and, in a supplementary manner, by the law that regulates the activity carried out, and they do not involve exchange operations that generate income, which is why they are not subject to taxation.

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The practical consequence is the need for a specific cooperative societies tax legal subsystem in Latin American countries. The legal rules that deal with the cooperative act and its taxation are diffuse within the legal systems of the countries, with no adequate organization level, which negatively impacts the operation of cooperatives in the region.

The study aims to review the legal concept of cooperative act and analyze the structure of cooperative acts in the main countries of Latin America, pointing out the convergent and divergent points, as well as pointing out the directions for the change in the concept of cooperative act in that it comes to allow the due taxation of cooperatives and the integration of the businesses of Latin American cooperatives.

2. THE COOPERATIVE ACT - A LATIN AMERICAN VISION

This article will adopt the definition of intercooperation as expressed by the International Cooperative Alliance at its Centenary Congress (Manchester, 1995) and accepted by Recommendation 193 of the International Labor Organization, voted at its 90th Conference, held on 20.06. 2002:

Cooperatives serve their members more effectively and give strength to the cooperative movement, working together through local, regional, national and international structures.

This reference is pertinent, insofar as the principles declared by the Alliance are expressly mentioned in several laws in Latin America, such as art. 7 of the Uruguayan Law[3].

The cooperative act is a concept present in the legislation applicable to cooperative societies in several countries in Latin America. The cooperative act originally accounted for the double quality of the cooperative's member, as an expression of the unique relationship between the two, which is established not only in the corporate dimension, that is, in a proper exercise of the right of property, but in an operational dimension: the cooperative necessarily integrates its economic activity with the economic activity of its cooperative, so that the marginal gain resulting from the operation tends to occur directly in the partner's equity (distribution of results according to the operations) or in the community equity (not divisible).

In this normative organizational structure of cooperatives, an element of the greatest importance for the understanding of the specificity of cooperative societies must be highlighted, and which, when not well understood, results in a complicating factor capable of limiting the vision of the organization and the functioning of cooperatives. It refers to the operational aspect that influences the resulting organization, which is the purpose of cooperatives. It is the fact that they, the cooperatives, are constituted to provide services to their own members.

This principle is called by the cooperative doctrine of double quality, which presides over the operating system, in which the associate is a partner and a user (client partner for the French). It follows that from mutuality (common services) and cooperation (economic collaboration) the cooperative presents itself as an auxiliary company, the purpose of which

[3] Cooperatives must observe the following principles: 1. free membership and voluntary dismissal of members; 2. democratic control and management by the partners; 4. economic participation of the partners; 5. autonomy and independence; 6. cooperative education, training and information; 7. cooperation between cooperatives; 8. commitment to the community.

is to provide services to its members, with its object being the chosen branch of activity (credit, insurance, joint sale of production, supply, etc.).

In legal terms, there are, therefore, the existence of relations between members and the cooperative of two types: corporate and business. The advantage of the member and that results from his status as a member is that of using the services of the cooperative, obtaining a profit or a reduction in costs.

This essential aspect of the formation of cooperatives is so important that not only does doctrine give it meaning and emphasis, but it also regulates it with cooperative laws. Thus, the Brazilian law, Law 5.764/71, was not limited to dispose of the corporate organization itself (constitution, administration, etc.), as occurs in other companies, having gone further, to govern what it called the operating system of companies. For cooperatives under the aegis of this law, it regulates the cooperative act, the distribution of expenses, the cooperative's operations, losses, and the labor system. Thus, emphasis was placed on the business relations between cooperative members and cooperatives, regulating the type of service to be provided, which is connected to the objective of the activity and according to them, the nature of the act, which is therefore configured as a cooperative act (Bulgarelli, 1992, p 337).

At the center of cooperative practices and operations are so-called cooperative acts. Cooperative acts, in their original concept, have essential and indelible aspects that are common to them (Cracogna, 1969, p. 205):

a) partner and cooperative intervention;

b) object of the act identical to the object of the cooperative;

c) spirit of service.

But from an early age there was an intention to say more with the expression cooperative act than its original notion. The most recurrent over the years have designated as cooperative acts

1. all acts and legal business carried out between the cooperative and its partners, including the constitution of the company itself, from which all other cooperative acts derive, and not only the circumscribed acts in operation, but that is also, in the integration of the respective economic activities, which is manifested in the condition of the identity of objects.
2. all business acts practiced by the cooperative for the purpose of carrying out the operation in which the economic activities of the company and its partners are integrated. In this case, cooperative acts can also be those practiced by society with third parties (Krueger, 2004, p. 34).

In 1994, Paraguay enacted Law 438, which defined the cooperative act from the most diffuse notion:

> Art. 8. The cooperative act is the solidarity activity, of mutual help and non-profit purposes, of people who join to satisfy common needs or foster development. The first cooperative act is the constitutive general meeting and the approval of the bylaws. Cooperative acts are also those performed by: a) cooperatives with their partners; b) cooperatives among themselves; c) cooperatives with third parties in

fulfillment of their corporate purpose. In this case, it is considered a mixed act and will only be a cooperative act in relation to the cooperative.

This definition of the cooperative act contrasts with its older position, from 1971, in Brazilian Law 5.764, which is much more restricted (pure):

> Art. 79. Cooperative acts are those practiced between cooperatives and their members, between them and those and by cooperatives among themselves when they are associated to achieve social objects.
>
> Single paragraph. The cooperative act does not imply market operation, nor a contract for the purchase and sale of a product or merchandise

Returning to intercooperation, even adopting the more restrictive definition of a cooperative act, it can be recognized in it: cooperatives practice cooperative acts with each other, not necessarily in an operational relationship organized vertically and formalized in business signed between lower and higher degree cooperatives (singular with centrals and federations and these with confederations).

In the Brazilian case, where, as seen, the pre-existing corporate bond between the parties is a requirement for the qualification of an act practiced by them as a cooperative, the National Cooperative Council, in Resolutions no. 21 and 28, respectively of 20/10/1981 and 13/02/86, recognized the validity of the cooperative association in another of the same degree, regardless of its objects. There is a necessary logical link in these Resolutions in admitting the CNC to practice cooperative acts between them, without which the corporate bond would lose meaning due to the impossibility of providing services, according to the intelligence of arts. 4, I, 7, 8 and 35, IV of Law 5.764/71.

The new Uruguayan Law thus defines the cooperative act:

> Article 9 - Cooperative acts are those carried out between cooperatives and their partners, by them and the members of their partner cooperatives, or by cooperatives among themselves, when they are associated in any way or linked by affiliation to another of a higher degree, in compliance of its corporate purpose. They constitute specific legal businesses, whose economic function is mutual aid, are subject to cooperative law and for their interpretation will be understood as integrated according to the statutory provisions.

About the definition of a cooperative act, it can be said that the Uruguayan Law is as close to the concept of purity as that provided for in Brazilian law, if Paraguayan Law is considered as another end of the arc of semantic possibilities in the current state of the art. There is significant variation in its flexibility, as to the strict correspondence between the operational link resulting from the cooperative act and the corporate link as its formal presupposition: there is a cooperative act between the member of the singular cooperative and the Central to which that partner is associated - and not he which gives meaning to the provisions of art. 80, item D. This device provides as follows:

> Art. 80 For reasons of social interest or when it is necessary for the better development of their economic activity, whenever they do not compromise their autonomy, the cooperatives may provide services of their corporate purpose to non-members, to whom they will not be able to grant more favorable conditions than those

granted to members. The net surpluses that derive from these operations will be allocated as provided for in art. 70 of this Law.

Operations carried out with non-partners, those carried out for the following purposes, shall not be considered:

A) to serve members of another cooperative;

B) to dispose of fixed assets which the cooperative has idle or depreciated;

C) to serve the public, for reasons of general utility, at the request of the government;

D) in the case of second- or later-degree cooperatives, also those operations that are carried out with the members of their partner entities;

E) Operations that are carried out between cooperatives.

Before proceeding in relation to intercooperation, it is interesting to explain the basis for the link between arts. 70 and 80 in such a way as to distinguish that non-partner to which these devices refer, to clarify the meaning of the list of exclusions that appears in the last article cited. It is pertinent here to return to the distinction between purpose and object. In the Walmor Franke lesson (1973, p. 15):

> The purpose of the cooperative is the provision of services to members, to improve their economic status. The economic improvement of the member results from the increase of its income or the reduction of its expenses, through the obtaining, through the cooperative, of credits or means of production, of occasions for the elaboration and sale of products, and the achievement of savings. Object of the cooperative enterprise is the branch of its business activity; it is the means by which, in the singular case, the cooperative seeks to reach its end, that is, the improvement of the economic situation of the cooperative member [translation of authors]

It appears that the cooperatives operate with their members, within a circle, with acts characterized as internal and practiced due to the corporate agreement. Therefore, there is no mandate or representation, in the strict sense, but what we call cooperative delegation, which is characterized by a specifically operational representation, in view of the objectives and formulations of the corporate contract. If commercial law allows the mandate without representation, typical of the commission contract, in which the commissioner operates in his own name, but according to the orders and instructions of the principal, after all being nothing more than a service provider, there is nothing to be done. It is strange that in Cooperative Law, delegation operates, whereby society, receiving a specific mandate through the social contract, operates in its own name, but for the associate, providing him with services from the specific object of the Cooperative (Bulgarelli, 1998, p. 107).

However, the cooperative does not necessarily benefit its members to the full of their potential only by operating with the delegation (mandate without representation). When the cooperative operates without the economic integration of a partner's activity, that is, without the presence of the cooperative act, the cooperative is in a way deviating from its purpose, even if it is in an oblique sense of its economic reason, so it can proceed to better fulfill its purpose.

If the cooperative carries out an operation without practicing the cooperative act, it is because the partner does not appear as a user with no interest opposite to that of society. In this case, the member remains only as a member of the cooperative. He would be the

recipient of the net results of the operation, as the owner of any company. The cooperative would then operate not on behalf of the partner, but on its own to achieve these results and, after all, distribute them to the partners. If these marginal results were distributed according to the equity ownership of the company, it would be in the face of the profit distribution; profit being the purpose of the operation carried out.

However, the solution of the Uruguayan Law, when admitting that the cooperative operates without practicing cooperative acts, admits that the cooperative derives, in its operational starting point, from its purpose. However, this deviation is not consummated in the end by an inhibition: this is the meaning of item 3 of art. 70.

This sense is necessary to identify the so-called accessory businesses, exemplified in item B of art. 80 of the Uruguayan Law. These businesses are indirectly linked to the object of the cooperative or to the purpose of the cooperative, but which in any case exist due to the operations carried out by the partners with their cooperatives. In this way, it is important to always identify a nexus of dependence between the accessory business and the middle business and the end business.

Item C clearly expresses the contemplation of the 7th principle of universal identity of the International Cooperative Alliance in its Centenary Congress (Manchester, 1995) and welcomed by Recommendation 193. Then, in considering the principles expressed in art. 7, it is evident that there is an equation of item C with the appropriate treatment to the operations resulting from the cooperative act, which gives prestige to the principle of economic participation of the partner. In this bias, it is also possible to examine items A and E.

Neither item A nor E need to be considered cooperative acts to adapt the Uruguayan Law to its purposes, as in these cases there is no manifestation of the dual condition of user and owner of one cooperative in relation to the other. Even though item D, as seen, eases the strict formal observance of this condition, it does not dispense with it, as it imposes the need for the succession of corporate bonds, through the lower-level cooperative.

It is necessary to understand the meaning of this imposition: the cooperative act, as a manifestation of will in its original notion, emerges as an entity that differs radically from market acts. Its foundation is the absence of opposition of interests of economic content between the parties that practice the business. This identity of interests of economic content between the cooperative and its individually considered partner manifests itself as a common benefit to all members - all of them equally users of the cooperative.

A misunderstanding of a very common premise among those who talk about cooperatives is the statement that the cooperative members have in common the entrepreneurial unit as a sufficient element to visualize the profit. This status alone is not sufficient to single out a cooperative. Every society has such a connotation. The identity that makes the cooperative unique is the benefit that the cooperative members derive from it. In other words, the kinds of services that the cooperative provides must aim indistinctly at all members, effectively or potentially (Machado, 1975, p. 26).

Otherwise, it would be difficult to assess objectively the abuse in a cooperative way, embodied in the legal prohibition on the distribution of financial advantages or privileges or not in favor of any associates to the detriment of the others, which is not due to the integration of their economic activities.

Common profit is not a subjective element of law. It is an objective element that rises from the comparison of the services that the cooperative provides to its members and its corporate object, in the sense of identifying the unity of its recipients, the group of its members, whose economic activities are integrated into the cooperative in a homogeneous manner of interests.

This perception is fundamental for the distinction between what is a mixed cooperative and the abuse of its form. Naturally, the cooperative may have more than one object. That is, members can perform more than one economic activity with the cooperative, if the recipients of the different services relevant to these activities (cooperative acts) are the same, and not the opposite.

The agricultural production cooperative with a credit section is a mixed cooperative because the user of the different services provided by the cooperative (credit and the processing and marketing of the rural product) is always the same: the rural producer.

The medical cooperative that associates patients constitutes abuse of form. There is no unity in this case in the cooperative's membership. The disunity that concerns the identification of abuse lies in the difference in economic interests at stake. In this case, economic interests are potentially conflicting: the doctor is interested in obtaining the highest possible income for the service provided; the patient is interested in the lowest possible expense for the same service.

Considering that the cooperative precisely serves the economic interests of its member, there is no common economic benefit between the doctor and his patient. Finally, it is impossible to recognize in this case the practice of cooperative acts: doctors and patients do not cooperate in their respective economic activities (Pontes de Miranda, 1972, p. 432). Among them, there is a market relationship, although mitigated by the common interest in preserving health as best as possible.

Although everyone may have a common interest in the best possible education, this interest is not essentially economic. The teacher wants the best possible remuneration for his work and the parents want the lowest possible cost for the best education that they manage to offer to their offspring. It is curious to demonstrate that in this case there is the teachers' under-sufficiency due to the very affirmation of the singularity of voting that characterizes the cooperative: it is reasonable to suppose that there will be more parents than teachers in any cooperative that proposes the affiliation of both.

In this way, it is credible to assume that in the assembly there will be a tendency to outweigh the economic interests of parents to the detriment of teachers, so that the supremacy of the assembly is not sufficient to guarantee the dignity and decency of their work.

What is intended to be argued is that the cooperative act can only be recognized for a specific part of the set of possibilities for intercooperation. There can be intercooperation between parents and teachers, insofar as they organize themselves into cooperatives and they contract with each other. The same is possible between consumer cooperatives and agricultural cooperatives.

There is intercooperation, but not the practice of cooperative acts, as conceptualized in Brazilian or Uruguayan law, consistent with its own original notion, in which it sought to affirm its otherness, that is, what it is not: an act of market. For the economic interest of the

members of one cooperative, which is the same as that of the cooperative, is opposed in the market to the economic interest of the members of the other cooperative since there is only an identity of interests between them.

But what is foreseen in art. 80 of the Uruguayan Law is the equivalence between the adequate treatment given to operations resulting from cooperative acts and those resulting from intercooperative acts in the market. In this sense, the new Uruguayan law was happy to stimulate cooperatives and optimize the mandate for intercooperation, without having to abandon the conceptual tradition of the cooperative act, whose importance lies in facilitating the understanding and preservation of the cooperatives' operational identity in view of what lies ahead the paradigma in market operation. At this point, the Uruguayan Law remains faithful to the original ideas of Salinas Puente, which remain current and still gain greater relevance in a critical circumstance, such as that experienced globally.

The definitions of the market act do not at all deny the existence of two essential factors: interposition in the circulation of goods and profit, which is the reason for this action. This speculative purpose has reached extraordinary proportions, and this leads to a collective imbalance.

In the context of this intensity, the Cooperative Law intends to constrain the members of the cooperative organization to fix a fair price as much as possible, in a continuous effort to obtain a lower cost of living. In this way, all forms of exploitation of man by man will also be avoided, giving each of them the full value of their work (Puentes, 1954, p. 132).

3. GENERAL CONSIDERATIONS ON THE TAXATION OF COOPERATIVES IN LATIN AMERICA

Cooperatives and, in general, companies in the solidarity economy may have tax treatment equal to that of other taxpayers or preferential treatment, which, in turn, may be permanent or transitory; for example, during the constitution; for a certain number of years; or depending on the type of company in question, for example, associated labor companies, agricultural companies or social cooperatives.

The ILO (2002) states that governments could consider adopting policies that recognize that, in principle, cooperatives have to be subject to fiscal contributions in the same way as other commercial enterprises; that the principle of equal treatment should be applied, and that any incentives offered to investment companies and their shareholders should also be made available to cooperatives.

But, in the case of some types of cooperatives, tax breaks may be justified, with a view to stimulating certain activities considered to be in the public interest. Thus, a temporary tax exemption could be convenient so that cooperatives can begin to participate in the national business world in which investment companies are already present.

Cracogna (2005) points out that the reality of the different countries shows different attitudes or policies of the state in tax matters towards cooperatives that are usually related to the degree of development reached by them. In general, when cooperatives are incipient, tax treatment is usually favorable; and as they grow in importance that treatment tends to be less and less favorable.

On the other hand, he observes that the general framework of the situation of each country also conditions the tax policy towards cooperatives: thus, the lower the degree of development of the country, the higher the fiscal support for cooperatives tends to be, since they are considered as contributing factors to economic and social development and, therefore, deserving of a special stimulus.

In other way, in developed countries, the tax treatment of cooperatives tends to differ little or nothing from that granted to commercial companies in general. For this reason, the creation of an advisory body of the tax authority in charge of reporting on issues related to draft rules and procedures processed before the tax authority seems appropriate, provided that it is expressly requested by the claimant; that assumes the interpretation of tax regulations and proposes the most convenient measures for the application of the tax regime (Spanish Advisory Board, created in 1948) (Crespo Miegimolle, 1999).

For their part, Heras and Burín (2013) report a proposal in Argentina to establish a different fiscal body from the AFIP, something like the Federal Administration of Solidarity Income, which is in charge of supervising and administering the taxes that are applied to this sector.

Other important points are the sources of the law. By sources we refer to the regulatory set where the tax regime applicable to the solidarity sector is found. The tax regime of the sector, according to the constitutional order of each country, may be included in the common tax laws, which may be the general tax law or the corporate tax law; in addition, it can be applied in a main or supplementary way.

Another factor is that the tax regime is contained in the general law of the sector, or in a special tax law, as is the case with most laws in Latin America. For López Díaz (1999) this last path seems to be the most recommended due to the peculiar characteristics of the cooperative that, unlike the corporate legal entity, requires a series of rules that we could call technical, which only adapt the planned tax regime for commercial companies, the cooperative phenomenon and the complexity of the applicable regulations, which is not limited to a single tax, such as corporate tax, but affects most of the tax system.

It can be seen that in Latin America there is a great multiplicity and diversity of legislative instruments that regulate the subject in different countries, especially in recent years, as well as the constant reforms and adjustments that they experience.

In addition, good tax practices can be counted as a source, which can be understood as the set of principles, values, norms and guidelines that define a good behavior of the company with respect to its tax obligations. They are aimed at generating relationships of trust, transparency and legal security, both within the organization and with respect to external stakeholders and society as a whole (Martín Fernández, 2017).

3.1.Types of companies according to tax treatment

3.1.1 According to its object

If there is a diverse system of tax treatment, solidarity companies would have a special treatment according to their type, social purpose or area of activity, for example, those of associated work, where the disabled, women, etc. receive a differentiated tax treatment.

In this way, Larrañaga Zabala (1987) considers that not all cooperatives should deserve a stimulating tax treatment, but such stimulus should be limited to those that truly perform a transforming function of the socio-economic structures and of social and community development. This would be the legitimizing source of the fiscal promotion, which would also prevent the constitution of false cooperatives, with the sole purpose of taking advantage of certain fiscal advantages.

On the contrary, it is estimated that the differentiations cannot and should not be made according to the characteristics of each segment (branch of cooperativism (or of the social and solidarity economy), because in addition to the offense of the principle of non-incidence, the absolute disrespect for the constitutional precepts of isonomy is also evident (Teixeira, 2011).

3.1.2 According to their degree of development

Also, there would be a differentiated tax treatment according to the degree of development of the joint venture from an economic point of view; according to the demands of particular sectors or their dimensions, including the various mutualistic purposes that are modeled in the content of the service management they fulfill.

3.1.3 Depending on specific objectives

Pastor del Pino (2012) estimates that, in the face of the problems of the existence of specific tax regimes due to the social type, above all due to the competition problems that are generated, there is a change in the articulation of fiscal stimulation policies and promotion, setting up a uniform model for the allocation of benefits based exclusively on the achievement of specific objectives and not on the form or legal nature of the entity that achieves them. In this way, the fiscal stimulus to cooperatives is justified to the extent that they are shown as an ideal model to achieve certain economic and social policy objectives.

3.2.Tax treatment systems

The regulatory tax treatment of solidarity companies can take many different forms:

Nonexistence

It may be that the legal norm that regulates the cooperative or solidarity entity in a specialized way does not contemplate rules in tax matters at all, so this aspect is regulated by ordinary tax legislation like any other company.

Unique system

It may be that the single system prevails whereby all entities in the sector are given equal treatment, without differences.

In this sense, if there is confidence in the effective application of the principles of the cooperative law, and it is ultimately controlled so that this form is not used for the camouflage of capital companies, it seems logical to accord to all cooperatives, without distinctions, the favorable treatment, from the fiscal point of view, that is necessary to

contribute to the fulfillment of their aims. In harmony with this, a very severe sanctioning regime should be established for cases of fraud.

Thus, by recognizing that all cooperatives are subject to the same tax regime, bureaucratic arbitrariness in the distinction between protected and unprotected would be eliminated. On the contrary, the work already carried out in the substantive legislation defining the specialty of the cooperative would be deepened.

Homogeneous system

It should be noted that the common tax regulation cannot achieve complete uniformity, taking into account the structural, legal, and purpose and objective differences between the different entities. For other reasons, because it is not possible to do without the specific technical or adjustment rules that are sometimes required to carry out the necessary adaptation of tax regulations to corporate or substantive legislation.

That is why this homologous treatment should be limited to the establishment of a lowest common denominator, of some basic forecasts that can be generalized to the entire scope of the social economy, without prejudice - it is insisted - of those specific rules that in some subsectors are precise.

The basic uniformity proposal is based on the following arguments:

1. Due to the unitary nature of the entities given by the Social Economy Law that recognizes them, beyond their differences, however significant they may be, common features, among which are the observance of coinciding principles and the pursuit of related objectives, both aspects that justify the promotion and development of the sector as a whole.

2. For the adequate protection and promotion of the values and principles that constitute the distinctive seal of the social economy and of the entities that belong to that sector. Certainly, some of these principles operate with greater or less intensity depending on the case, depending on the type of entity of the social economy in question, given the wide diversity of existing modalities, but above these differences there is a dominant factor that brings together and identifies all of them: their belonging to a unitary legal category — that of the entities of the social economy — which is distinguished precisely by the concurrence on all occasions of the same guiding principles. It is therefore the global nature of these principles, and not the simple presence or preponderance of any of them in particular, that characterizes the social economy and justifies a common tax regime for all its component parts. Respect for these values and compliance with the constitutive principles of the social economy must therefore suffice for a certain entity to be able to avail itself of the aforementioned tax regime, and such conditions must be considered achieved with the simple, though scrupulous, observance of the norms that regulate the creation and operation of each type of entity, already sufficiently rigorous in order to preserve that said principles are not infringed. A functioning of the entity in accordance with the substantive regulations that regulate it means that it complies with the criteria and reporting principles thereof, and must be a sufficient requirement to access the special tax regime established to protect and promote such principles.

For others, the adoption of a common regime of tax incentives for the creation, capitalization and maintenance of Social Economy entities would be justified, but not, of course, the establishment of a common special tax regime for the taxation of their income. That is unimaginable in the face of the diverse reality presented by the Social Economy.

Diverse system

Under this system, there are rules that provide tax benefits for cooperatives that meet certain requirements, and adjustment rules created to adapt general taxation to the specialties of cooperative operation (Alonso Rodrigo, 1999). Tax benefits are granted to entities that comply with their cooperative obligations, as is the case in Paraguay.

In this way, the maintenance and improvement of the traditional tax model or statute would be achieved, inspired by the double criteria of granting tax benefits (to protected tax cooperatives) and the establishment of technical specialties in the application of the common tax regime (to cooperatives not fiscally protected).

In this sense, according to its tax protection, according to the system adopted in Spain, there would be:

1. Protected cooperatives: those that are established in accordance with the provisions of cooperative laws. In this case, the protection would be intimately linked to the fulfillment of factual assumptions that the legislator considers necessary and unavoidable for their enjoyment, for example, that they conform to the substantive law that regulates them.
2. Especially protected cooperatives: those to which the law, by reason of their corporate purpose and the subjects or associates that constitute them, gives them superior and special protection. For example, those of associated work, agriculture, fishing, etc.
3. Unprotected cooperatives: those that have incurred any of the causes that motivate the loss of the qualification (Crespo Miegimolle, 1999).

The key argument is that of cooperative specificity: although it works in the market, the cooperative is a different company from the others. The Corporation Tax as a tax on the profits obtained by companies is designed from the characteristic structure of conventional capital companies, so it seems logical that its forecasts should be adjusted at the time of applying it to a corporate model, the cooperative, which operates with differentiated operating parameters and rules (instrumental nature of capital, protagonism of the people and democratic participation, mandatory endowment funds that remain captive for the use of the cooperative or even social and educational purposes) (Alonso Rodrigo and Santa Cruz Ayo, 2016).

For Cracogna (2015), the underlying issue consists in granting cooperatives the tax treatment that corresponds to their nature; in other words, they should not be confused with profit-making capital companies and in this way they are intended to be taxed in the same way as these. It is not a question of offering them preferential treatment but rather of considering them according to their own characteristics and of not treating the same companies that are different, particularly in that they are companies of persons and not of

capitals, they do not have profit-making purposes and are created to provide services to their associates.

This position is based on the principle of equality, inherent in constitutional principles, which presupposes that people placed in different situations are treated unequally, in their proper proportions. Giving isonomic treatment to the parties means treating the equals equally and the unequal ones unequally, to the exact extent of their possibilities.

In this sense, the tax incentives enjoyed by financial cooperatives do not constitute a privilege, but are the manifestation of the unequal treatment that should be given to those who are not in the same taxable conditions, that is, the appropriate application of the principle of justice (Lara Gómez, 2018).

A specific tax treatment for social economy entities and companies exists in most EU countries. Opponents of this specific treatment have long argued that it could be considered unequal treatment that constitutes illegal state aid in contravention of free competition rules.

However, in 2011, the Court of Justice of the European Union ruled that the specific tax treatment is justified because social economy entities (cooperatives in the case before it) are different in nature from for-profit companies. A rigorous conceptualization and legal recognition of social economy entities are necessary to highlight the significant differences between the different forms of business (Ciriec-International, 2016).

In this way, despite the various trends and strategies adopted between Latin American and European Law - especially regarding the cooperative act - it is evident that in order to give adequate tax treatment to cooperatives, the law must recognize the special nature of cooperatives and the substantial difference between the transactions between the cooperative and its members and the differentiated nature of the results of those operations, not as a privileged treatment, but as a treatment appropriate to their characteristics (De Conto and Andrade 2016).

In this way, there could be a different tax treatment to the acts carried out by the solidarity company: tax exemption or non-taxation for the activity with its members (cooperative, mutual or solidarity acts) and tax liability to operations with third parties. Thus, in some Western European countries, without explicitly adopting the concept of the cooperative act or activity, there are no different tax bases or types of tax, but any transaction with members is deducted from the tax.

However, as Sánchez Boza (2016) points out, in the 90s, laws were passed in different countries of the Central American region to eliminate all kinds of tax exemptions, as a kind of cleaning up of the tax system. This abolished some of the incentives to establish cooperatives and the facilitation of their initial development as companies, generally made up of people with little knowledge of business activity, the risks that their development implies and the challenges of keeping them in operation, as well as the weak initial capital.

A different issue is that relating to the exemptions or deductions that the State decides to grant to cooperatives in view of the benefits derived from their activities, which correspond exclusively to the fiscal policy adopted in each case.

According to their contribution to development - It is proposed that the laws should achieve a cooperative taxation model that is more appropriate to the values of sustainable development, shifting the tax burden in response to economic and social variables, and not establishing a tax system based solely on the principle of economic capacity (Aguilar Rubio, 2015).

3.3.Justification of the applicable tax regime

Certainly, tax treatment is a critical aspect for the sector. Now, what taxes can be demanded from cooperatives? Should they be treated differently from other economic organizations?

Cracogna (2005) observes that there are different points of view to answer these questions. Some argue that cooperatives should be exempted from paying taxes because they contribute to the economic and social development of the community. Others say that cooperatives should have equal treatment to corporations, etc., without differentiating between them. Still more, others advocate for a tax exemption for cooperatives for a certain time or in the initial period (as it is in Cuba) or in accordance with the volume of transactions or the socioeconomic activity developed.

There are two fundamental positions on the special tax treatment for the sector: no justification and justification.

It may be that there is no real or explicit justification or rationale for giving companies in the sector special tax treatment. As stated by the European Commission (decision 668 of 07/12/2000), the aid granted to companies or cooperatives in the form of tax facilities "falsifies" the competition between them and can affect community exchanges, therefore they are incompatible with the free market, when the truth is that they make solidarity companies (usually small) able to participate in the market on equal terms.

However, Cotronei (2001) argues that only in the event that the magnitude of these facilities is such as to effectively alter the free competition between companies, can a violation of free competition be sustained. It is also necessary to bear in mind the strong limitations that the legislation imposes on the cooperative company regarding the distribution of profits and the reserve, the distribution of residual equity, the mandatory distribution of part of the profits, the subscription of social contributions, etc. that contribute to weaken the relative capacity compared with the other companies (ordinary society), counterbalancing the weight of the, incidentally, limited facilities.

3.3.1 Due to the different nature or specificity of the solidarity entities

The tax treatment of cooperatives must be in accordance with their true nature as entities supported by their own efforts and mutual help to provide services to their own members. Therefore, cooperatives may be subject to some, but not all, taxes (Cracogna, 2005).

Armendáriz (1992) maintains that the exclusion from the taxation of any tax incompatible with the nature of cooperatives does not amount to requesting a privilege but rather recognizes that it is a relationship of a different nature that should receive different treatment. And this, because the cooperative act carried out between the cooperative and the

associate does not constitute a market operation, but rather the fulfillment of the corporate purpose.

In the opinion of Montero Simó (2016), the existence of a specific tax regime for certain types of companies can only respond to the fact that these companies present structural differences with respect to the companies to which the general rules apply and that, therefore, it is necessary to establish special rules, which adapt the general ones to these entities.

The tax benefits provided to cooperatives must be directly related to the fulfillment or development of activities that promote the economic and social purposes provided for in the Constitution, for which the fulfillment of exclusive conditions that affect them must be required.

These tax incentives must be shared with other entities that adopt different legal forms, but that pursue or contribute to the achievement of said objectives. The peculiarities that cooperatives present, inherent to their legal form, must be considered through adjustment rules.

Aspects such as the limitation of operations with third parties, the mandatory restriction of the results of said operations to unredeemable funds and therefore, the inaccessibility of the partners to said benefits, as well as the separate accounting of the results as a guarantee method of the previous budgets, constitute essential aspects of the cooperative which, without a doubt, the current tax regime accommodates.

Therefore, imposing income tax on cooperatives as if they were profit-making commercial companies, ignoring their nature, characteristics, economic regime and lack of profit, would break the principle of tax equity and create a notorious legal inequality (De Conto and Andrade, 2016).

The new cooperative legislation of Bolivia (2013) establishes that tax legislation must take into account the nature of cooperatives, incorporating the economic categories of cooperativism.

The cooperative does not have profit for itself — At present, in the context of a globalized economy, it is necessary to clarify that an adequate tax treatment of cooperatives does not imply a privileged treatment, but rather that such a type of society is considered as a common, non-profit undertaking, in the sense that the positive results of cooperatives, in operations with their members, are owned by the members and not by the cooperative. In other words, the objective of the cooperative is not to obtain results for itself, but for its members (De Conto and Andrade, 2016).

For the purpose of the sector — If taxes are established to apply them to social purposes, as long as they are consistent with the purpose of cooperatives, since the cooperative act pursues the general welfare, it will be unreasonable to impose tax burdens aimed at the same purpose. All cooperative activity is directed, as required by the system, to a social purpose.

Due to the social function — The special tax treatment of the solidarity sector can be based on the constitutional or legislative recognition of the utility, interest or national, public or social function that is given it, or as the legislative application of the frequent

constitutional provisions that agree that the State should promote the solidarity sector or cooperatives.

In this way, the ICA (2015) has determined that the economic and social contribution of cooperatives to a local or regional economy has a social influence that benefits the community and civil society. This contribution of cooperatives can be described as a management of common heritage in favor of the local community, its economy and society.

In the case of cooperatives that make this type of contribution a specific objective and purpose, it would be convenient for public administrations to recognize it by granting them a particular tax and legal treatment that recognizes their contribution to tackling inequalities in terms of wealth.

Strengthening the economy - Álvarez et al (2009) give a macroeconomic justification to the cooperative tax regime, in the fact that if cooperatives tend to generate less liquid income due to the realization of provisions, reserves and the establishment of new business areas, their contribution to the strengthening of the national economic structure would be verified and technical arguments would be established to support the convenience of the tax exemption for cooperatives that with their actions promote employment, general welfare and business growth (aspects that in times of economic crisis are known to boost the economy).

In addition, it is justified by the need to have a tax regime in accordance with the public policies that have been developed from the institutional for cooperatives (Álvarez, 2016).

Encouragement of entrepreneurship - For Pastor del Pino (2016) the fact that justifies the specificity of this model is, in short, that it constitutes a business initiative by a group of people who, apart from the capitalist participation of each partner, has as its purpose the satisfaction of their needs through the recovery of the form of personalistic company and democratic internal functioning.

This differential fact, and the economic and social policy achievements that can be achieved through said model, are those that should underpin the particular consideration and treatment of the cooperative, including at the fiscal level. It may be because the cooperation allows groups of subjects who, having the capacity to work, but scarcely endowed with capital, to develop an economic activity, confronting companies incorporated under another legal form in the Market.

Due to the indivisible accumulation made by the solidarity company - The rule in tax exemption that allows the profits produced by cooperatives to be allocated to indivisible reserves. It is this that has allowed Italian cooperatives to obtain consistent forms of capitalization. This has determined the amount of the members's remuneration, either through the return or the distribution of profits. However, this favorable regulation from the fiscal point of view has inhibited recourse to capitalization through the raising of resources directly from the partners or abroad. The standard does not help the start-up phase of the cooperative.

Due to the parafiscal burdens that it supports - It cannot be forgotten that cooperatives also bear specific parafiscal burdens such as allocations to reserve funds, which

are protected even in the event of liquidation, or to the Cooperative Education and Promotion Fund.

However, the European Commission (2001) considered that the economic situation of the cooperative is not necessarily weakened by the capital contribution to the mandatory funds, since it conserves and uses them in very specific cases.

As compensation - As a compensation measure for the higher costs in terms of internal and external surveillance that companies in the social sector have, especially, cooperatives, and especially in the company creation phase and in the first years of the same.

3.3.2. No subjection to income tax

It is important to observe that as of 2011, the principle of non-taxation of cooperatives and other forms of solidarity began to return, started in Brazil in 1971, continued in Panama in 1977, with the Law of Popular and Solidarity Economy of Ecuador of 2011 and the 2012 reform of the cooperative law in Peru, although there is a current trend to eliminate it. This position of non-subjection of cooperatives and other solidarity entities to the tax is based on various criteria:

By the instrumental nature - It starts from the idea that cooperatives are legal persons of a merely instrumental nature: as enablers of the professional activity of their associates. The funds they receive from third parties do not constitute income because they are temporary income that belong exclusively to their associates (not to the entity), without increasing assets or decreasing social liabilities: they do not alter the liquid assets of the company.

Those funds received from third parties hardly pass through your box, due to the fact that they belong to your associates. This is consistent with the understanding that the only income belongs to the entity is income that modifies the equity of the company, increasing it. Those values that are received but belong to associates, even when they pass graphically in the company's accounting, do not make up its assets and, consequently, are elements incapable of expressing traces of its taxable capacity.

Rosembuj (2000) adds the following idea: ―The non-subjection or exclusion of the cooperative from the duty to contribute is imposed. The cooperative income will always be the one obtained by the member, since, strictly speaking, the cooperative does not demonstrate independent and separate economic capacity nor is it the effective owner of the wealth originated.

Due to the absence of profit motive - Due to the absence of profit motive of solidarity companies, since it is understood that profit is identified with the remuneration of capital. This opinion is based on the fact that no income or profit is produced within these companies, so there is no taxable event on which the company is taxed.

As Schneider and Coelho (2018) point out, the income tax of the legal entity affects the profit that is constituted in the increase of the effective capital or in a positive equity variation in a given financial year. Therefore, income from resources other than an increase in wealth does not serve as the basis for calculating income tax.

Indeed, if the reason for the income tax is to tax the profits generated by capital, cooperatives cannot be subject to this tax, simply because by virtue of their nature and purpose for which they have been created, they do not generate profits. The cooperative has no taxable material because it constitutes a tool that the associate uses to carry out his economic activity; it does not have an autonomous profit, a profit that can be taxed.

If it were taxed, its capital would be reduced or it would be transferred to the associates and, ultimately, they would be paying twice, once in their own individual tax balance and another in that of the cooperative. There would be double taxation or, in the last case, the cooperative would be displaced from the market because, by having to pay higher taxes than those paid by others, it would be out of the possibility of competing.

The benefit that the associate obtains is that of having used the cooperative's service because that is why he was associated; he did not associate to make a profit on that capital. He contributed the capital as a tool so that the service can be provided with it and when he retires he will take only what corresponds to him for the social contributions paid (ACI-Americas).

For not producing income - It seems that the most complete criterion is that of Zabala (2011, 2012 and 2014) according to which economic income is the difference between the payment made to a production factor and the minimum amount that must be spent to be able to use it . It is an economic surplus defined as the earnings of a factor of production in excess of the minimum amount necessary to keep it in use and prevent it from being transferred to other uses. The income tax would be understood as that which falls on all economic income that is capable of producing an increase in the assets of a person during a certain period of time.

Technically, the tax results from applying the percentage rate to the tax base, that is, to the sum of income and the deduction of costs and expenses attributable to it, which translates into applying a rate on the profit received during a given period.

The tax is established according to the taxpayer's ability to pay, which is understood to mean that the income received by the taxpayer is likely to produce an increase in their assets: such operation is called income and for this reason the tax levied on it is called income tax. There are people who do not have this obligation: persons not obliged to pay the tax, due to the fact that the source (generating event) does not cover the economic operation of the taxpayer: it does not generate income.

The cooperative is not constituted with the purpose of increasing the value of the factors involved in the production process, but rather these factors are used to fulfill a single mission: to supply a need for the associated entrepreneur, who in turn is a user.

Therefore, when establishing the factor costs, the surplus values at the end of the year should be applied not to give a greater value to the factors, but to give greater fulfillment to the mission of the cooperative, which translates into the establishment of patrimonial reserves that contribute to the permanence of the organization over time.

Ultimately, the cooperative does not produce an economic surplus whose objective (or ultimate goal) is to increase the assets provided by the associates or the enterprise itself, for which reason there is no economic income for them, strictly speaking. And, therefore, there is no taxable base on which to establish a tax such as income tax.

The Tax is established based on the taxpayer's ability to pay, insofar as the income received by the taxpayer is likely to produce an increase in their assets (income). Cooperatives, as non-profit entities, are not obliged to pay tax due to the fact that the source (generating event) of the same does not cover the economic operation of the taxpayer (it is not a generator of income) (Zabala, 2011).

By incidence, the specifically legal phenomenon of subsumption of a fact to a legal hypothesis is designated, with the subsequent and automatic communication to the fact of the legal virtues provided for in the norm. Therefore, when there is no subsumption of the fact to a legal hypothesis (norm) obviously there will be no incidence of taxes on the operation. This is, to all evidence, a situation that involves cooperatives in the provision of services to their members (Teixeira, 201).

This is the reason why, as expressed by Cracogna (2009), the exemption of certain taxes to cooperatives is because there are no taxable events on which to apply them. In such cases, there is technically no exemption, in the sense of granting favorable treatment, but rather the recognition that there is no matter for the tax.

It is possible to conclude that the income tax regime applicable to entities in the solidarity sector in Latin America differs remarkably. The system of subjection to the income tax law prevails, although the mechanism of tax exemption (total or partial) is preferably used, with only four countries favoring the non-subjection system.

4. CONCLUSIONS - CREATING A NEW FISCAL POLICY SCHEME

We observe that the current model of tax benefit foreseen by the regulations for cooperative societies suffers from important defects from the financial-tax perspective. Having legitimized this possible beneficial treatment on the constitutional basis of the work of promotion of this social type, derived from the important objectives that can be achieved with them, the expected achievements have not been obtained, among other reasons, due to the important inconveniences that have arisen of the articulated model on the simple form and/or the legal nature of cooperative societies.

The specific tax regime based on a purely mutualist conception of the cooperative society, excluding any type of openness, has considerably limited its use to this social model, resulting largely in ineffectiveness and inefficiency, given the demands of the current competitive market, resulting also in incoherency from the simple mutual perspective, given its limitation to these societies, and its impossible transfer to other social models with similar ends.

Proposal

For this, a change is proposed in the articulation of fiscal stimulation or promotion policies. Said change should lead to the configuration of a uniform profit attribution model based exclusively on the achievement of specific objectives, and not on the form or legal nature of the entity that achieves them.

The fiscal stimulus to the entities that make up the so-called Social Economy, and to cooperative societies in particular, will be justified to the extent that they are shown as suitable models to achieve certain and specific economic and social policy objectives.

There is no doubt that cooperative societies develop an important social function, both for their purpose and for their way of functioning, collaborating effectively in the achievement of certain constitutional objectives such as full employment, access to decent housing, or the improvement of cohesion. social and territorial. To the extent that the achievement of these objectives can be achieved through adequate fiscal stimulus policies, those tax actions that try to encourage them would be legitimized.

Once the objectives or purposes to be stimulated have been delimited, the next step will be to carry out a detailed analysis of the most suitable tax measures from a technical-legal and economic perspective, to achieve the proposed objectives (exemptions in taxable events, reductions in tax bases, reduced tax rates , or deductions and bonuses in installments), to be inserted in the most appropriate taxes to achieve the intended objective (Corporation Tax, Onerous Asset Transfer Tax, or Local Tax), without detracting from the legal nature of the tax instrument itself. Finally, it will be essential to monitor the measures envisaged after their application phase to verify their true effectiveness, the only justifying aspect of the indirect expense generated.

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THE "MONOTRIBUTO" REGIME AND THE WORKER COOPERATIVES IN ARGENTINA: THE DIVERSIFICATION OF A FISCAL POLICY.

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Abstract

The "monotributo", implemented in 1998, with the creation of the "Simplified Regime for Small Taxpayers" by National Law 24977, is the main tax option that the Argentine tax system offers to the members of worker cooperatives. Designed with a predominantly fiscal purpose, the regime has undergone significant transformations over the years. In this paper we try to characterize, from a legal perspective, the "monotributo" regime in the Argentine legal system, describing the main changes that it has experienced since its implementation and addressing the underlying reasons for them.

Keywords: Monotributo Regime - Argentina- Evolution - Modifications

I. Introduction

The "monotributo", the centerpiece of the "Simplified Regime for Small Taxpayers", constitutes the main tax option offered by the Argentine tax system to members of worker cooperatives. Originally implemented to facilitate the taxation of low-volume taxpayers, it ended up becoming one of the main features of the Argentine tax regime and a stimulus tool for workers cooperatives.

Implemented in 1998 through National Law 24977 the "monotributo" was originally aimed at reducing the so-called "indirect evasion" of small taxpayers and, with this, making possible the regularization of their activities and their incorporation to the formal circuit of the economy. This type of evasion was generated by the complexity of the system itself and the high costs involved in complying with the administrative procedures, which served as a deterrent for small-scale taxpayers to legally acknowledge their activity and comply with their tax obligations. In this way, "monotributo" concurs, in general terms, with some variants of the simplified system of other countries, in which this type of tax, which represents an exception to the general regime, seeks to increase tax compliance and reduce compliance and administrative costs for small taxpayers[2]. To simplify the process, the

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[2] Terkper, S. "Managing Small and Medium-Size Taxpayers in Developing Economies". *Tax Notes International*, 2003, pp. 211-234. Santos, J. C. G. and Rodrigues, S. "Regimes Simplificados de Tributação dos Rendimentos Profissionais e Empresariais, Objectivos, Modalidades e Experiências. *Ciência e Técnica Fiscal*, No. 417, 2006, pp. 131-153. Pope, J.

"monotributo" adopted an integrated scheme consisting of the payment of a monthly fee that comprises two components: i) the tax that replaces the value added tax and the income tax; and ii) the fixed social security contribution [contributions to the "Public Pension Regime of the Integrated Retirement and Pension System" and the "National Health Insurance System"]. This regime allows integration into the current tax and pension system and provides health insurance. It classifies small taxpayers by listing of a limited number of economic actors, including the members of worker cooperatives. Those actors have to observe certain conditions to be able to access the "monotributo".

Over time, the "monotributo" regime underwent a series of modifications that, in some way, reflected some of the socio-economic changes that Argentine society experienced after the first years of this century. At the end of 2001 and beginning of 2002, Argentina went through a deep economic and institutional crisis because of the economic policies implemented in previous years that led to a scenario of unemployment and social exclusion. In this post-crisis context, worker cooperatives played a prominent role in the development of provision for socioeconomically vulnerable sectors. It was during this period that the number of worker cooperatives began to increase considerably, in a process that included both expressions derived from the collective and spontaneous self-organization of vulnerable people and initiatives based on state support. In view of this panorama and with the purpose of encouraging worker cooperatives as well as other enterprises, many of which formed part of the social economy, the "Simplified Regime for Small Tax payers" incorporated the modality of the "social monotributo" that implied a preferential treatment in tax and social security terms for the economic actors included in it.

Because of the significance of the monotributo for the development of worker cooperatives, this paper attempts to characterize, from a legal perspective, the "monotributo" regime in the Argentine legal system by describing the main changes it has undergone since its implementation and addressing the underlying reasons for them. We argue that monotributo, throughout its evolution, expanded and diversified its purpose in accordance with socioeconomic change. It became an instrument of fiscal policy that both serves to stimulate worker cooperatives and reinforces the labor and socially inclusive function of those cooperatives. In this evolution we can identify an adjustment of the monotributo regime, a renewal of its foundations, an opening of its aims and a reformulation of its intervention strategies. That amounted to recycling public policy.

The structure of this analysis is integrated with the following sections. First, the methodological and conceptual aspects of the study are detailed. Second, the initial stage of

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"Small Business Taxation: An Evaluation of the Role of Special Treatment Policies". *The Business Review, V. 10 No.* 2, 2008, pp. 14-20. Shaw, J., Slemrod, J. and Whiting, J. (2010). "Administration and Compliance." In Adam, S; Besley, T.; Blundell, R.; Bond, S.; C.hote, R.; Gammie, M.; Johnson, P.; Myles, G. and Poterba, J. (Eds.), *Dimensions of Tax Design: The Mirrlees Review, James Mirlees,* Institute for Fiscal Studies and Oxford University Press, 2010, pp. 1100-1162. Dâmaso, M. and Martins, A. "The New Portuguese Simplified Tax Regime for Small Business". *Journal of Accounting and Finance*, V. 15 No. 5, 2015, pp. 76 – 84. Canozzi ConceiÇão, O.; Saraiva, M.; Adelar Fochezatto, A. and FranÇa, M. "Brazil's Simplified Tax Regime and the longevity of brazilian manufacturing companies: A survival analysis based on RAIS microdata". *EconomiA*, No. 19, 2018, pp. 164-186.

the monotributo regime is described. Then the transformations that this public policy underwent are examined, characterizing the substantial changes. Finally, a series of comments are presented as conclusions.

II. Methodological and conceptual considerations

From a methodological point of view, this paper combines a descriptive study with some exploratory typology. It focuses on an Argentinian worker cooperative perspective and combines qualitative analysis, such as consideration of data and indices, with consideration of the relevant literature and analysis of the regulatory framework for "monotributo" in the Argentine legal system.

To explain the evolution itself of the public policy involved in the monotributo regime and the changes involved in this evolution, we use some arguments that sketch out a process that we refer to as "the recycling of public policy". The recycling model makes it possible to identify the content and the direction of change. This facilitates changes to the initial definitions. To develop the recycling perspective to analyze the monotributo policy, we use some theoretical and methodological components of the causal model of Knoepfel *et al.* [3].

The implementation of a public policy over the years cannot be linear. It sometimes changes in ways that are hard to identify. In some cases, a pre-existing public policy can be used to address some issues that were not previously considered. The recycling of a public policy occurs when it is used to satisfy purposes only partially connected with the problem that it seeks to solve. Often, the new purposes are not visible in the first analysis. In the recycling process, the factors that generated the problem and the people who participate in some way in the conflict, require only moderate changes so that the change cannot be defined as the formulation of a new policy. The recycling model makes it possible to identify the new purpose and its relationship with the other elements of the problem considered in the original design of of public policy applied.

The analysis of components, such as the conflict situation and its causes, the group of people implicated in the problem, and those affected by the change assists in understanding the recycling process. These elements are contemplated in the model of Knoepfel *et a.l*[4]. In this theoretical scheme: i) the collective problem refers to the conflict that the public policy must solve; ii) the circumstances or factors that produce the conflict configure the "causal hypothesis" that aims to provide a "political answer to the question of knowing who or what is 'guilty' or 'objectively responsible' (that is, without subjective guilt) for the collective problem to be solved"[5] iii) the people involved in the conflict situation integrate the "target groups", which are made up of people (physical or legal) and associations of such people, whose behavior is considered, politically, the (in) direct cause of the collective problem that public policy tries to solve, iv) people who receive the favorable consequences of public

[3] Knoepfel, P.; Larrue, C.; Varone, F. and Hill, M. *Public Policy Analysis*. Bristol: The Policy Press, 2007a. Knoepfel, P.; Larrue, C; Varone, F and Hinojosa, M. "Hacia un modelo de análisis de políticas públicas operativo. Un enfoque basado en los actores, sus recursos y las instituciones". *Ciencia Política*, No. 3, 2007b, pp. 6-29.
[4] *Ibidem*.
[5] *Ibidem*.

policies are identified as the final beneficiaries, the people (physical or legal) and the organizations of such people who are directly harmed by the collective problem, that is, those who suffer its negative effects and those who suffer its negative effects and hope that public policy will favorably transform the aspect of their lives that the collective problem adversely affects.

The "intervention hypothesis" focuses on feasible ways and procedures to overcome the conflict situation or, failing that, to temper its repercussions. In this way, this kind of hypothesis determines "how the collective problem in question can be attenuated or even solved, through public policy"[6]. Consequently "it defines the modalities of state intervention that will influence the decisions and actions of the designated target groups so that they are compatible with political objectives"[7].

To clarify the changes that occurred during the evolution that the monotributo regime, we added to the Knoepfel *et al.* scheme another conceptual component that we call "the foundation". This conception refers to the long-term purpose. The foundation does not necessarily coincide with the situation or state opposite to the collective problem. Often, it alludes to a set of facts and meanings much broader than the solution to the collective problem.

III. The initial version of the "monotributo"

In 1998, National Law No. 24977 created a simplified regime for small taxpayers[8] that consisted, mainly, in the implementation of the "monotributo". This fiscal modality represented the application of an integrated tax that unified in a single component the value added tax, the income tax, and contributions to the social security system and to health insurance. In this way, it replaced those taxes and contributions with a single tax on certain taxpayers, characterized by a series of criteria established by the regime.

The following were included in the legal concept of "small taxpayer": i) natural persons who exercised trades or were owners of companies or sole proprietorships; ii) single successors of such persons; iii) individuals who are members of civil and commercial companies; iv) individuals who are members of companies not legally formed and of irregular commercial companies; v) individuals who exercised professions that required a university degree and / or professional qualification[9]. In all these cases, the potential "small taxpayers", to be considered as such, had to be included within the parameters of economic income that the law established.

The regime that belongs to the so-called "fixed quota" systems applied a mixed presumptive technique to categorize small taxpayers which, with some nuances, persists[10]. Thus, in order to place the "monotributo" payers in some of the specific categories that it

[6] Knoepfel *et al*, 2007b, p.17
[7] *Ibidem*.
[8] The "monotributo" regime underwent, over the years, several reforms, mainly parametric.
[9] National Law No. 24977 (June 3, 1998) that established the Simplified Regime for Small Taxpayers.
[10] González, D. Regímenes especiales de tributación para pequeños contribuyentes en América Latina. Inter-American Development Bank, Department of Integration and Regional Programs Division of Integration, Trade and Hemispheric Affairs, Institute for the Integration of Latin America and the Caribbean, 2006.

defined, it used a criterion about income and certain other factors such as electrical energy consumed and the area affected by the declared activity[11].

With this tax figure, whose benefits are highlighted by aspects of specialized doctrine, an attempt was made to provide a favorable alternative to the fiscal irregularity generated by the practice of economic activities of small-volume in a clandestine and informal way[12]. In fact, as is known, small business or small-volume economic activities are considered difficult to tax and often involve tax non-compliance[13]. In this way, "monotributo" tried to attack the economic informal of the conduct of economic actors, by overcoming the difficulties that the system imposes on compliance with fiscal obligations. It can be said, considering the conceptual tools of the Knoepfel *et al.* causal model[14], that this panorama of tax noncompliance constituted the original collective problem. We can surmise that in this initial period the foundation of the monotributo system lay in the purpose of generating an adequate tax culture and improving tax collection.

The legal and institutional framework of the "monotributo" underwent various modifications over the years[15] that, in some cases, made the system more complex and unstable. However, aspects of the doctrine recognize the benefits of this category in comparison with the general regime[16]. In the same way, it can be said that the simplified regime represented a trend that was reproduced in other South American countries.

The fiscal scheme inaugurated by National Law 24977 began when the economy was guided by the neoliberal policies of the early 1990's. This neoliberal direction of the economy was revealed in the implementation, among other structural reforms, of a wave of

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[11] Ibidem.

[12] Cetrángolo, O.; Goldschmit, A.; Gómez Sabaíni, J. C. and Morán. D. *Desempeño del Monotributo en la formalización del empleo y ampliación de la protección social*, 1st. ed. Working Paper No. 4. Buenos Aires: ILO Country Office for Argentina, 2013.

[13] Bird, R. and Zolt, E. (2003). "Introduction to Tax Policy Design and Development, Prepared for a Course on Practical Issues of Tax Policy in Developing Countries". *World Bank* [28 Apr.–1 May 2003]

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[14] Knoepfel, P.; Larrue, C.; Varone, F. and Hill, M. *Op. cit.*, 2007a. Knoepfel, P.; Larrue, C; Varone, F and Hinojosa, M. 2007b.

[15] At the time of writing this article, two laws were enacted that introduced specific modifications to the "monotributo" regime. However, neither of the two norms altered the sense of the "monotributo" nor the orientation that its evolution exhibited. Therefore, such changes do not impose, necessarily, revisions to the argument that we develop in this paper. The first of these reforms was introduced by National Law 27618, enacted in April 2021, which implemented the "Tax Support and Inclusion Regime", establishing new values for the different categories of "monotributo" payers, while setting guidelines to facilitate the transition from the simplified system to the general regime. However, the reform received marked criticism because the new amounts of the categories had to be applied retroactively from the month of January, thus generating debts to "monotributo" payers. For this reason, National Law 27639 was enacted in July of that year, which created the "Fiscal Strengthening and Relief Program for Small Taxpayers" aimed at complementing the aforementioned "Tax Support and Inclusion Regime for Small Taxpayers" through a series of measures. Thus, in response to the questions that the reform introduced by Law 27618 had collected when generating the retroactive imposition of the quota increases, the Program returns the values of those corresponding to the months of January to June to the values in force for the month of December 2020. It also establishes an exceptional scale update scheme; contemplates a specific tax relief mechanism for small taxpayers; and provides a debt regularization regime for small taxpayers with the purpose of setting up an economic and financial predictability scheme.

[16] Suozzi, L. A. "El régimen simplificado para pequeños contribuyentes ("Monotributo") ante la eliminación de las Sociedades de Hecho en el Derecho Tributario Argentino". *Revista Lex Mercatoria*, No. 3, 2016 pp. 59-62.

privatization of public services and state companies and in the reduction of the mechanisms of social intervention of the State[17]. As is known, the effects of these policies unleashed the worst socio-economic and institutional crisis in the history of Argentine society. In the sections that follow, we consider the role of the "monotributo" regime in the face of the complex socioeconomic situation caused by that crisis.

IV. The reorientation of the simplified regime

With the modifications introduced to the Simplified Regime for Small Taxpayers by National Law 25865 of 2004, a new orientation was incorporated to this tax scheme. In this way, with this new direction, the recycling process of the initial "monotributo" policy began to be generated progressively.

The normative modification was situated within the severe and complex socioeconomic context that Argentine society was suffering at that time. In those years, the country was facing a process of economic recovery in which it was essential to integrate into the labor market and socially actors belonging to certain population groups which were in a situation of socioeconomic vulnerability due to the crises late 2001 and early 2002. Given the negative consequences of the economic collapse on working conditions, various collective alternatives inspired by and identified with the principles and values of the social and solidarity economy emerged as a response[18].

In this cycle of expansion of the social economy that characterized, among other aspects, the post-crisis panorama, worker cooperatives[19] began to play an important social role as options for labor integration and social rescue. Although worker cooperatives developed early in the second half of the last century[20], since the beginning of this century, the number of the worker cooperatives has increased considerably and acquired social significance in the context of the deep Argentinian socio-economic crisis of 2001 and 2002[21]. This process includes both those cooperatives voluntarily formed as an alternative to salaried

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[17] *Boron, A. "La sociedad civil después del diluvio neoliberal". In Sader, E. and Gentili P. (Comps.)* La trama del neoliberalismo Mercado, crisis y exclusión social, *2nd. ed., Buenos Aires: CLACSO, 2003, pp. 26-50.*

[18] Pastore, R. "Un panorama del resurgimiento de la economía social y solidaria en la Argentina". *Revista de Ciencias Sociales, Segunda Época*, No. 18, 2010, pp. 47-74. García, A. and Rofman, A. Economía solidaria en Argentina. Definiciones, experiencias y potencialidades. *Revista Atlántida*, No. 3, 2013, pp. 99 - 118. Presta, S. "El gobierno de lo posible. Economía social y solidaria, sujetos y poder". *Revista Mexicana de Ciencias Políticas y Sociales*, V. 61, No. 227, 2016, pp. 349-378.

[19] As is well known, the workers cooperatives are one of the traditional expressions of the cooperative movement, widely spread in different countries. Its social and economic impact is an issue that maintains its relevance beyond the course of the years (Staber, U. "Worker Cooperatives and the Business Cycle: Are Cooperatives the Answer to Unemployment?". *The American Journal of Economics and Sociology*, V. 52, No. 2, 1993, pp. 129-143. Zeuli, K. and Radel, J. "Cooperatives as a Community Development Strategy: Linking Theory and Practice". *Journal of Regional Analysis & Policy*, V. 35, No. 1, 2005, pp. 43-54. Burdín, G. and Dean, A. "New evidence on wages and employment in worker cooperatives compared with capitalist firms". *Journal of Comparative Economics*, No. 37, 2009, pp. 517–533. Baskaran, P. "Introduction to Worker Cooperatives and Their Role in the Changing Economy". *Journal of Affordable Housing*, V. 24, No. 2, 2015, pp. 355-381. Edenfield, A. "Power and communication in worker cooperatives: An overview". *Journal of Technical Writing and Communication*, V. 47, No. 3, 2017, pp. 260-279).

[20] Ranis, P. *Argentine Workers: Peronism and Contemporary Class Consciousness*. Pittsburgh: University of Pittsburgh Press, 1992. Brennan, J. *The Labor Wars in Cordoba, 1955-1976: Ideology, Work, and Labor Politics in an Argentine Industrial Society*. Cambridge, MA: Harvard University Press, 1994.

[21] Vuotto, M. *El cooperativismo de trabajo en la Argentina: contribuciones para el diálogo social*. Lima: ILO / Regional Program for the Promotion of Dialogue and Social Cohesion in Latin America, 2011.

employment and the so-called worker recovered enterprises[22], created by workers of bankrupt companies seeking to rescue their jobs[23].

In the context of law reform, the recycling process was deployed in two ways that sought to the expressly include worker cooperatives to the Simplified Regime for Small Taxpayers: a) the "monotributo" for members of worker cooperatives; and b) the "social monotributo" for members of worker cooperatives registered in the National Registry of Local Development and Social Economy Effectors[24] [hereinafter "the Registry"][25].

a) *Members of worker cooperatives and "monotributo"*

National Law 25865 granted favorable treatment to worker cooperatives. Thus, the first paragraph of article 48 of the law exempted the members of worker cooperatives included in the lower category of the "monotributo", from the payment of the integrated tax (income tax and value added tax). For this reason, the members only had to contribute to the pension scheme and the health system (National Health Insurance System and National Regime of Healthcare)[26].

Thus, in the spirit of the law, restrictions on access to the labor market constitute a relevant collective problem that must be actively addressed. Therefore, we can argue that the foundation of the legal position lies in the conviction about the virtuous relationship between work and social inclusion.

b) *The "social monotributo" for members of worker cooperatives*

Undoubtedly, the most significant element in this recycling process was the incorporation of the so-called "social monotributo". Through this innovation, National Law 25865 provided in favor of those taxpayers who were in a situation of economic and, therefore, social vulnerability, a preferential treatment that resulted in the total or partial reduction of the amounts corresponding to the components that make up the classic version of the "monotributo". In order to identify those taxpayers that could be included in the new category, the socioeconomic vulnerability condition was linked, within the mechanism

[22] Currently in Argentina there are more than eight thousand worker cooperatives. See: https://vpo3.inaes.gob.ar/Entidades/BuscarEntidades

[23] Ranis, P. Argentina's worker-occupied factories and enterprises. *Journal Socialism and Democracy*, No. 19, 2005, pp. 93-115. Di Capua, M. A. La experiencia argentina de las empresas recuperadas por sus trabajadores. In Fajardo García, I. G. (Coord.) *Empresas gestionadas por sus trabajadores. Problemática jurídica y social*, Valencia: CIRIEC, 2015, pp. 71-78. Ruggeri, A., Alfonso, D. and Balaguer, E. *Bauen: el hotel de los trabajadores*. Buenos Aires: Callao, 2017. Larrabure, M. Post-capitalist struggles in Argentina: the case of the worker recuperated enterprises. *Canadian journal of development studies*, V. 38, No. 4, 2017, pp. 507-522. Rebón J. Las empresas recuperadas por sus trabajadores en Argentina como forma socioproductiva. *Trabajo. Revista iberoamericana de relaciones laborales*, No. 35, 2018, pp. 6 -21. Hudson, J. P. Les entreprises récupérées en Argentine. Bilan après vingt ans d'autogestion ouvrière. *Les mondes du travail*, No. 23, 2019, pp. 107-122. Vieta, M. *Workers' Self-Management in Argentina. Contesting Neo-liberalism by Occupying Companies, Creating Cooperatives, and Recuperating Autogestión*. Leiden and Chicago: Brill Academic Publishers and Haymarket Books, 2020. Kasparian, D. and Rebón, J. "La sustentabilidad del cambio social. Factores positivos en la consolidación de las empresas recuperadas por sus trabajadores en la Argentina". *CIRIEC-España, Revista de Economía Pública, Social y Cooperativa*, No. 98, 2020, pp. 213-246. Heras, A. y Vieta, M. "Self-Managed Enterprise. Worker Recuperated cooperatives in Argentina and Latin America". In J. K. Gibson-Graham and Kelly Dombroski (Eds.), *The Handbook of Diverse Economies*, Northampton: Edward Elgar Publishing, 2020, pp. 48-55.

[24] In both "monotributo" and "social monotributo", Article 50 of National Law 25865 established that the work cooperative had to act as a withholding agent. This role of the worker cooperative in the monotributo mechanism is still maintained (General Resolution of the General Administration of Public Revenue N ° 4309/2018, Art. 80).

[25] The National Registry of Local Development and Social Economy Effectors ["the Registry"] was created by Presidential Decree No. 189 of February 2004, in order to promote the inclusion and formalization of those who carry out economic activities framed in the social economy, complying with a model of inclusive development and with social justice.

[26] National Law 25865, Article 48.

derived from National Law 25865, with registration in the National Registry of Local Development and Social Economy Effectors.

Due to the impact of the socioeconomic context, it can be said that the "social monotributo" was originally conceived as an experimental fiscal policy measure. The experimental nature of the measure can be seen in the transitory nature with which it was originally designed, manifested in the limited temporal scope that, initially, the benefits implied in this tax type presented. Thus, articles 12, 34, 40 and 48 of the aforementioned law restricted the exemptions included in the measure to two years.

Article 48, referring to articles 12, 34 and 40, extended to worker cooperatives the benefits of the "social monotributo". It exempted individuals associated with worker cooperatives registered in "the Registry", from paying the total of i) the integrated tax [art. 12] and ii) the total contribution earmarked for the Argentine Integrated Pension System [art. 40, inc. to)]. Likewise, it waived their payment iii) of half (50%) of the amount directed to the National Health Insurance System art. 40, inc. a)] and half (50%) of the contribution earmarked for the National Social Work Scheme art. 40, inc. a)], for a period of twenty-four months, counted from the registration in the Registry.

The implementation of the "social monotributo" reveals that National Law 25865 broadened and diversified even more the initial definition of the collective problem with the incorporation of the complex situation of socioeconomic vulnerability. Considering the benefits that the law grants to the members of worker cooperatives, especially the establishment of the "social monotributo", we can argue that the foundation of the simplified regime underwent a profound transformation, with the purpose of positively influencing the social inclusion process.

Social Monotributo National Law 25865 [Article 48]	
Integrated Tax [Article 12]	**100% Exemption**
Contribution destined to the Public Pension Regime of the Integrated Retirement and Pension System [Article 40, inc. a)]	**100% Exemption**
Contribution to the National Health Insurance System [Article 40, inc. b]	**50% Exemption**
Contribution Destined to the National Regime of Healthcare [Article 40, inc. c]	**50% Exemption**

Source: Author's elaboration

IV.a. Trend Confirmation

The social meaning involved in the modifications that National Law 25865 introduced to the Simplified Regime was consolidated with National Law 26223[27] of 2007, which turned the "social monotributo" into a permanent category by removing the twenty-four month limit, thereby removing its temporary nature. Subsequently, in 2009, National Law 25565 replaced the Annex of National Law 25865. However, the central guidelines of the "social monotributo" survived, as did its status as a permanent category derived from National Law 26223. Like the law of 2004, these provisions did not introduce a specific name for the new regime.

Likewise, Presidential Decree No. 1/2010, that regulates National Law 26565, with the modifications introduced by Presidential Decree No. 601/2018, preserves, with some modifications, Chapter III of the Presidential Decree No. 806/2004, concerning the subjects registered in "the Registry". In this section, the obligatory nature of registration in "the Registry" is highlighted as a requirement for natural persons to be able to access the benefits included in the "social monotributo", in accordance with National Law 26565[28]. That presidential decree also highlights the importance of the registration in "the Registry" as the mechanism for the implementation of the "social monotributo", by providing that withdrawal from "the Registry" leads to the loss of the status of "social monotributista"[29].

The social relevance acquired by the new orientation incorporated into the simplified regime for small contributions can be seen with greater clarity, if one considers the status exhibited by the legal regulation of the social economy in Argentina. Indeed, despite the expansion that the social and solidarity sphere has experienced since then, in line with a process that was replicated in different countries of the South American region[30], the sector still does not have a specific legal regime. Although the Argentine legal system has an early legal regulation of cooperative and mutual activities, through the respective national laws, the new expressions and characteristics presented by the field of social and solidarity economy do not yet have a national specific law nature that contemplates, exclusively, the different aspects involved in the development of the sector[31].

[27] National Law 26223, enacted on 03-14-2007; promulgated, in fact, on date: 04-09-2007.
[28] Presidential Decree No. 1/2010, Article 52.
[29] Ibdem, Article 58.
[30] Vuotto, M. *Economía social. Precisiones conceptuales y algunas experiencias históricas, 1era Ed., Serie Colección lecturas sobre economía social*. Bs. As., Altamira, 2003; Hintze, S. *Políticas sociales argentinas en el cambio de siglo. Conjeturas sobre lo posible*. Bs. As., Espacio, 2007. Coraggio, J. L. *Economía social, acción pública y política (hay vida después del neoliberalismo)*. Buenos Aires CICCUS, 2007; Gaiger, L. "La lucha por el marco legal de la economía solidaria en Brasil: déficit republicano y ethos movimentalista". *Revista Cultura Económica*, V. 37, N° 97, 2019, pp. 65 - 88.
[31] Cassano, D. "Aportes jurídico-institucionales para un proyecto de ley sobre la promoción de la economía social y las empresas sociales". In Abramovich, A. L. *et al, Empresas sociales y economía social: aproximación a sus rasgos fundamentales.* Buenos Aires: National University of General Sarmiento, 2003. Roitter, M. and Vilas, A. "Argentina". In Kerlin, J. A. (Ed.) *Social Enterprise: A Global Comparison*. Massachusetts: Tufts University Press, 2009, pp. 139-162. Balbo, E. "La Economía Social: Una mirada hacia los contribuyentes en crisis". *Separata Temática*, No. 1, 2011, pp.3-39. Guerra, P. "Las legislaciones sobre economía social y solidaria en América Latina Entre la autogestión y la visión sectorial". *Revista de la Facultad de Derecho*, 2013, No. 33, pp. 73-94. Castelao Caruana, M. E. and Srnec, C. "Public Policies Addressed to the Social and Solidarity Economy in South America. Toward a New Model?". *Voluntas: International Journal of Voluntary and Nonprofit Organizations*; V. 24, 2013, pp. 713 – 732. Feser, M. E. and Ureta, F. "¿Hacia una ley de economía social? Breve análisis de las normativas provinciales". *Revista Idelcoop*, No. 209, 2013, pp. 209-216. Blasco,

Considering this context, we can see the significance of the "social monotributo" as a tax provision that, in addition to aiming at the eradication of the fiscal irregularity that characterizes economic informality in the segment of small economic actors, also constitutes an institutional mechanism aimed at promoting the social economy sector and contributing to alleviating the socioeconomic vulnerability of individuals belonging to certain disadvantaged groups. Indeed, an examination of the legal dimension of the social economy confirms the importance of the monotributo to the development of the sector. Thus, in a national scenario of legal deficit[32], National Law 25865 with its subsequent modifications and regulations combines with National Law No. 26117 on the Promotion of Microcredit for the Development of the Social Economy and National Law No. 26355 on Collective Brands to create a framework of central national norms that have contributed to the growth of the social and solidarity economy in Argentine society during the last two decades.

IV.b. Modifications in the Intervention Strategy

In the instance of the creation and initial implementation of the "social monotributo", the Simplified Regime was oriented towards an even broader purpose, which recognized as a field of action the difficult consequences of the complex economic situation that the country was going through at that time. Thus, in addition to pursuing the incorporation of a segment of the population that worked under conditions of fiscal and pension irregularity into the formal economy, the simplified regime sought to contribute to social inclusion by facilitating access to medical and social security coverage for informal workers who worked in vulnerable conditions. Therefore, the motives that the regime incorporated in this period diversified and extended the set of fundamentals that had inspired it up to that moment.

Although such incorporation implied a profound review of the fundamentals that drove the monotributo system, it did not represent a reformulation disconnected from purposes. On the contrary, the breadth of the regime's foundations led to opening a long-range purpose directly linked to supporting its original objectives. Indeed, conditions of socioeconomic vulnerability accentuate the trend towards economic informality and generate collective behavior in the vulnerable sector contrary to the culture of tax compliance that the simplified regime seeks to promote.

L. R. and García, A. "Economía social en construcción. Perspectivas y demandas sociales en la legislación reciente (Argentina, 2003-2015)". *Revista Idelcoop*, No. 219, 2016, pp. 216-239. Jurado, E. and Gallo, M. "Economía social y solidaria en Río Negro y Mendoza. Políticas públicas, sujetos y especialidades en debate". *Revista Idelcoop*, No. 221, 2017, pp. 86-103. Neffa, J.; Basterrechea, M.; Pérez, S.; Otero, A.; Barrios, O.; Arpe, P.; Vitoli, A.; Sverdlick, M.; Guglialmelli, M.; Pico, J. and Gargiulo, H. *Aportes a la institucionalización y desarrollo del sector de la economía social y solidaria a partir de una metodología participativa y con una perspectiva comparada entre Argentina y Francia*. Informe final de proyecto. Buenos Aires: National University of Moreno, 2020.

[32] In this panorama of a national regulatory deficit, some provincial legal systems made progress in the legal regulation of the social and solidarity economy in their respective jurisdictions. Thus, some provinces enacted specific laws and consequently implemented legal and institutional regimes on this issue. In this regard, the following provinces can be cited: Entre Ríos [provincial law 10151 for the Promotion and Promotion of the Social Economy]; Mendoza [Law 8435 for the Promotion of the Social and Solidarity Economy]; Chaco [Law 7480 for the Promotion and Development of the Social and Solidarity Economy]; Buenos Aires [Law 14650 that establishes the System for the Promotion and Development of the Social Economy]; Misiones [Law VIII-81 concerning the Program for the Promotion and Development of the Social, Popular and Solidarity Economy].

In the same way, fiscal informality in the development of economic activities can also contribute to increasing the picture of social vulnerability, since informal actors by working outside the system not only limit their quality of life in the future by not paying social security contributions, but in many cases, they also compromise their present condition by being unable to access the health regime. Consequently, it can be argued that, the assumptions that underly the modifications that law 25865 introduced, recognize that both carrying out economic activities in conditions of informality and irregularity and socioeconomic vulnerability, constitute two closely connected realities.

Considering the theoretical and conceptual scheme of Knoepfel *et al.*, we can see that the expansion of the fundamentals reveals changes in the conformation of the causal hypothesis corresponding to the original version of the "monotributo". As mentioned, in the basic modality of the "monotributo", the causal hypothesis recognized initially the subjects themselves and their irregular conduct of fiscal non-observance, the complexity of the system and the costs involved in the compliance process. In the assumption of the social "monotributo" that integration of the causal hypothesis is also broadened and diversified.

Likewise, its configuration is less clear due to the generality of the empirical elements that converge. In this way, its composition includes different limiting contextual factors that lead to the harsh panorama of socioeconomic vulnerability. In addition, in this case, the elements that are added to the causal hypothesis, unlike what happened in the initial variant of the "monotributo", are numerous and varied, and include both individual and contextual factors. Their identification is sometimes imprecise. For this reason, we propose to include them under two categories: i) the unfavorable socioeconomic situation and ii) the conditions for work integration.

Hypothesis			
Type of	**Causal Hypothesis**	**Collective Problem**	**Intervention Hypothesis**
Monotributo Clásico	**Non-compliance Behavior** **System Complexity** **Expenses Involved in Compliance**	**Economic Performance in Tax Informality [Secrecy]**	**Tax Integration Scheme [Income tax + Value Added Tax]** **+** **Contribution to the National Pension Regime and the Health System** **+** **Compliance with Legal Requirements [Categories]** **Intervention of the Federal Administration of Public Revenue [FAPR]**
Classic	**Non-compliance**	**Economic**	**Total Exemption of the Integrated Tax [Income**

Monotributo With Favorable Treatment for Worker Cooperatives [Associates of the Lower Category]	**Behavior** **System Complexity** **Expenses Involved in Compliance** **Conditions for Work Integration**	**Performance in Tax Informality [Secrecy]** **Labor Precariousness**	**Tax + Value Added Tax]** **+** **Contribution to the National Pension and to the National Regime and the Health System** **+** **Compliance with Legal Requirements [Categories]** **FAPR Intervention**
Social Monotributo	**Non-compliance Behavior** **System Complexity** **Expenses Involved in Compliance** **Conditions for Work Integration** **Unfavorable Socioeconomic Situation**	**Economic Performance in Tax Informality [Secrecy]** **Labor Precariousness** **Socioeconomic Vulnerability**	**Total Exemption of the Integrated Tax [Income Tax + Value Added Tax]** **+** **Partial Exemption of the Contribution to National Pension Regime and to the National Health System** **+** **Compliance with Legal Requirements [Categories]** **FAPR Intervention** **"The Registry" Intervention**

Source: Author's elaboration

IV.c. The main element of the renewal of the intervention strategy: The Registry of Local Development and Social Economy Effectors

As we mentioned, the insertion of "the Registry" within the Simplified Regime constitutes one of the main innovations introduced by National Law 25865 with the purpose of implementing the "social monotributo". The incorporation of the Registry into the operating mechanism of this variant of "monotributo" singles out the intervention strategy at this stage of the evolution of the legal and institutional framework of this tax. The regulatory scheme established by the aforementioned law has enshrined the performance of "the Registry" as an indispensable requirement, since its participation represents an unavoidable component in determining the vulnerable condition of the taxpayer. The significance that the role of "the Registry" acquires is demonstrated by the nonexistence, within the regime, of other institutional alternatives that replace or supplant its work.

As a starting point in the characterization of "the Registry", the Resolution of the Secretariat of Social Economy of the Nation [SES] No. 157/20, the current regulations on the subject, describes in its Annex, the purpose of "the Registry" in a generic and comprehensive

way by mentioning the functions it has to perform. Thus, article 1 of the Annex establishes that "the Registry" is responsible for the tasks of "receiving, managing and providing an adequate response to the registration requests of human or legal persons in conditions of social vulnerability, duly accredited by means of a technical social report signed by a professional competent person"[33].

This mention of the general guidelines regarding the performance of "the Registry" is elaborated by the enunciation of the functions contained in Article 2 of the Annex to Resolution SES No. 157/20. In this way, this regulatory device identifies six functions that correspond to "the Registry":

i) To execute the necessary procedures to guarantee access to the optional tax category of "social monotributista" to those human and legal persons who are in a state of social vulnerability in order to promote their incorporation into the formal economy, the Social Security Argentine Integrated System, and the National Health Insurance System[34].

ii) Register human persons who face a situation of social vulnerability, provided that they comply with the registration requirements that the Resolution itself establishes in article 16 inc. A of the Annex[35].

iii) Register the worker cooperatives and agricultural or supply cooperatives that are in a situation of vulnerability, which must be duly accredited and established by means of a technical-social report[36].

iv) Register the "Productive or Service Projects" that meet the registration requirements indicated in the resolution itself[37].

v) Register the producers and / or service providers that make up the associative groups of the Collective Mark and approve the Regulations for the Use of the Collective Mark for the group[38].

vi) Receive the corresponding reports on the National Administration Contracting Regime in relation to the contracting of the National State with local development and social economy effectors (article 24 of Decree No. 1030/2016 and article 60 of ONC Provision No. 62/2016)[39].

As can be seen when consulting the tasks listed in article 2 of the Annex of the SES Resolution No. 157/20, "the Registry" is the institutional body that commands the management of "social monotributo". However, its scope of action is not limited solely to this function, since it also supports the implementation of certain social inclusion policies and participates, directly and indirectly, in the implementation of different public policies to

[33] SES Resolution No. 157/20, Annex, Article 1.
[34] Ibidem, Annex, Article 2.A).
[35] Ibidem, Annex, Article 2.B).
[36] Ibidem, Annex, Article 2.C).
[37] Ibidem, Annex, Article 2.D).
[38] Ibidem, Annex, Article 2.E).
[39] Ibidem, Annex, Article 2.F).

promote the health sector, the social economy, collaborating with networks and organizations of entrepreneurs, promoting projects to apply and promote new initiatives[40].

Due to their relevant social function, worker cooperatives constitute an independent category within the taxonomy of actors admitted to "the Registry". This is provided by article 3 of the Annex of the analyzed Resolution[41], which reiterates, on this aspect, the legal position already contained in its normative antecedents. It stipulates that cooperatives, without specifying what class, together with human persons in a situation of social vulnerability, productive projects or services and groupings of collective brand, that carry out their economic activity under the principles of the social and popular economy, and that have a favorable impact on the local development of their regions, can request registration as a "Social Effector" by fitting into any of the qualities listed[42]. The types of qualities[43] that the article specifically mentions are: i) Human Person; ii) Worker cooperatives; iii) Agricultural and Provision Cooperatives; iv) Productive and service projects; v) Groupings of Collective Trademarks[44].

From the point of view of our analysis, it is interesting to delve into the first two typologies of actors that can enroll in "the Registry". Thus, in relation to the classification of "human persons", subsection 1 of Article 3 of the Annex indicates that they can be both individual entrepreneurs and producers of family agriculture with a reduced volume of production who have the status of social monotributo or that they are included in the regime of Social Inclusion and Promotion of Independent Work or they belong to categories A, B, C and D of the Simplified Regime for Small Taxpayers. In such cases, human persons have the quality of Social Effector[45].

In the case of worker cooperatives, the category refers to entities regularly constituted within the scope of the National Cooperative Law 20337, developed from the direct and personal effort of their members, and aimed at the production of goods and services[46]. As the resolution establishes, both the cooperative and its members must be registered in "the Registry"[47]. With the registration, the worker cooperative acquires the quality of Associative Social Effector[48].

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[40] Basualdo, M. E. *La cooperativa de trabajo. Un análisis crítico en la Argentina del siglo XXI*. Santa Fe: National University of the Littoral, 2020.
[41] SES Resolution No. 157/20; Annex, Article 3.
[42] Ibidem.
[43] The other categories that "the Registry" admits and that, therefore, may have the status of social effectors, are: i) agricultural and supply cooperatives, ii) productive or service projects and iii) groupings of collective brands. According to SES Resolution No. 157/20, agricultural and provision cooperatives are entities that operate within the framework of the National Law No. 20337 of Cooperatives, are based on direct personal effort, and are oriented to the commercialization or production of goods and services. With the registration, they confirm the quality of associative social effectors [SES Resolution No. 157/20, Annex, Article 3, Subsection 3]. Productive or service projects are associative groups with institutional recognition from the National Ministry of Social Development whose purpose is to develop activities within the framework of the Popular Economy. These projects can also be registered as associative social effectors [SES Resolution No. 157/20, Annex, Article 3, Subsection 4]. In turn, groupings of collective trademarks, from a tax perspective, are considered, in fact, companies or companies not formally incorporated. With their registration they can acquire the status of associative social effectors [SES Resolution No. 157/20, Annex, Article 3, Subsection 5].
[44] Ibidem.
[45] Ibidem, Annex, Article 3, Subsection 1.
[46] Ibidem, Annex, Article 3, Subsection 2.
[47] Ibidem.
[48] Ibidem.

Considering what is stated in this last paragraph, a series of interpretations can be formulated on the normative description of worker cooperatives as a specific category of registration. According to the text of the analyzed resolution, this type of worker cooperative must work within the regulatory framework of the National Cooperative Law No. 20337[49]. Therefore, both their constitution and their operation have to comply with the guidelines and provisions established by that law. The direct reference to National Law 20337, which constitutes the norm that establishes the legal regime for cooperatives in general, is due to the fact that worker cooperatives still do not have a specific legal regulation established by national law in the strict sense. At the same time, with the allusion to the "personal and direct effort"[50] of the members of the cooperatives, in some way, the Resolution intends to highlight that the entity formed from the self-management of the workers must be faithful to its own nature, which implies, indirectly, that the requirement that the cooperative, as a condition of registration, does not depart from cooperative principles. Certainly, the meaning contained in the expression "personal and direct effort"[51] is involved a number of cooperative principles admitted by international legal doctrine[52] and institutionally recognized[53] as constituting a substantial component in cooperative ideology[54]. Furthermore, the reference to "direct personal effort"[55] reflects connection with the normative indication concerning the development of "economic activity under the principles of the Social and Popular Economy

[49] In Argentina cooperatives have a historical presence in the society. The first cooperatives appeared in the late nineteenth century, generating, since then, a trend that was consolidated at different rates, according to the circumstances of each historical moment. Its legal regime also went through different phases. At the beginning, cooperatives were incorporated into the Commercial Code [National Trade Law] with the 1889 reform. Subsequently, in 1926, the national law 11388 was passed, which was the first specific legal norm, which would later be replaced by the national law 20337, which it is, still, in force (Cracogna, D. 2013. Las cooperativas y su dimensión social. *Pensar en Derecho*, V. 3, N° 2, 2013, pp. 209-229). Over the years, several aspects, related to cooperatives and their members, are regulated by other laws. However, worker cooperatives still do not have an exclusive and specific legal and institutional framework that can contemplate the different aspects involved in their activities.

[50] SES Resolution No. 157/20; Annex, Article 3, Subsection 2.

[51] Ibidem.

[52] Macías Ruano, A. "El quinto principio internacional cooperativo: educación, formación e información. Proyección legislativa en España". *CIRIEC-España. Revista Jurídica de Economía Social y Cooperativa*, No. 27, 2015, pp. 1-42.

[53] The principles of cooperative activity were institutionally enshrined by the International Cooperative Alliance in the Declaration on Cooperative Identity approved at the Manchester Congress in September 1995 (Martínez Charterina, A. "Los valores y los principios cooperativos", *REVESCO. Revista de Estudios Cooperativos,* N° 61, 1995, pp. 35–46; Martínez Charterina, A. "Sobre el principio de cooperación entre cooperativas en la actualidad". *Boletín de la Asociación Internacional de Derecho Cooperativo*, N° 46, 2012, pp. 133-146.; Martínez Charterina, A. *La cooperativa y su identidad*. Madrid: Dykinson S.L., 2016; García-Gutiérrez Fernández, C. "Las sociedades cooperativas de derecho y las de hecho con arreglo a los valores y a los principios del Congreso de la Alianza Cooperativa Internacional de Manchester en 1995: especial referencia a las sociedades de responsabilidad limitada reguladas en España". *REVESCO: revista de estudios cooperativos,* No. 61 1995, pp. 53-88; Juliá Igual, J. and Gallego Sevilla, L. "Principios cooperativos y legislación de la sociedad cooperativa española. El camino hacia el fortalecimiento de su carácter empresarial", *REVESCO. Revista de Estudios Cooperativos*, N° 70, 2000, pp. 123–146; Fontenla, J. "Las relaciones entre los valores y principios cooperativos y los principios de la normativa cooperativa", *REVESCO. Revista de Estudios Cooperativos,* N°124, 2017, pp. 114-127). These principles, contained in the aforementioned declaration, which imply, to a large extent, an update of those postulates that permeated the spirit of Rochdale, have a global vocation since they were institutionally accepted with the purpose that they could be incorporated and adopted by the various expressions of cooperative activity (Estarlich, V. "Los valores de la cultura económica cooperativa". *Boletín de la Asociación Internacional de Derecho Cooperativo,* No. 36, 2002, pp. 121-138). Defining them as "guidelines by which cooperatives put their values into practice", the 1995 Declaration on Cooperative Identity lists the seven well-known principles: i) Voluntary and open membership; ii) Democratic management by the partners; iii) Economic participation of the partners; iv) Autonomy and independence; v) Education, training and information; vi) Cooperation between cooperatives; vii) Interest in the community.

[54] Vicent Chuliá, F. *Compendio Crítico de Derecho Mercantil*, Volume I, 2nd Edition. Barcelona: Librería Bosch, 1986.

[55] SES Resolution No. 157/20; Annex, Article 3, Subsection 2.

with a positive impact on the local development of the region"[56]. Although the association made between social and popular economy can be questioned, it is noted, however, that the drafters of the normative instrument under examination did not ignore the importance of the principles of the social economy sector in identifying the entities that it is made of[57] . Likewise, it refers to the very nature of the bond between a cooperative and its associates, legally described in article 1 of the Resolution of the National Institute of Associative Activity and Social Economy [NIASE] No. 4664/2013, which stipulates that the legal relationship between the work cooperative and its associates is of an associative, autonomous nature and incompatible with contracts of a labor, civil or commercial nature. Cooperative work acts are those carried out between the worker cooperative and its associates in the fulfillment of the corporate purpose and in the achievement of the institutional purposes[58].

Moreover, the reference to "the production of goods and services"[59] as the destination of the activity of worker cooperatives draws a connection with the legally established margin of action for this type of entity in the social economy. In this sense, mention can be made of National Law No. 25877 on the Labor Regime, which, defining an explicit prohibition for the operation of worker cooperatives[60], establishes that this class of entities "may not act as companies for the provision of eventual services, neither seasonal, nor in any other way provide services of the employment agencies"[61].

The descriptions of each of these categories reflect compatibility, respectively, with the requirements for the admission of people in the social monotributo and their registration in the "the Registry" as Social Effectors and with the purposes required for the registration of worker cooperatives at "the Registry" in their capacity as Associative Social Effectors. In this way, from the combination of articles 4 and 16, inc. A) of the analyzed Resolution[62], those

[56] Ibidem, Annex, Article 3.

[57] Unlike what happens with cooperative activity, there is no established uniformity with respect to the principles that govern the actions of the sector and subsectors of the social economy. For this reason, different taxonomies were tested. Among other enumerations, we can cite the formulation contained in the Charter of Principles of the Social Economy of 2002, generated within the scope of the European Standing Conference of Cooperatives, Mutual societies, Associations and Foundations [CEP-CMAF], a multilateral organization established in 2000 with the purpose of promoting the role and values of the social economy in the European context (Aguilar Alonso, I. "La Ley 5/2011, de 29 de marzo, de economía social". *Actualidad Jurídica Uría Menéndez*, No. 30, 2011, pp. 111-115). This entity ended up establishing itself as one of the institutional references of the Social Economy in the continent (Macías Ruano, A. "La economía social y el desarrollo sostenible, un camino común que marcan sus principios". *XVII Congreso Internacional de Investigadores en Economía Social y Cooperativa*, Toledo, España, October 4 -5, 2018, pp. 1-24). With the description expressed through the aforementioned document, an attempt was made to provide clarity in the conceptual delimitation of the field of social and solidarity economy (Monzón, J. and Chávez, R. "La economía social en la Unión Europea". *Report prepared for the European Economic and Social Committee por el International Centre of Research and Information on the Public, Social and Cooperative Economy* [CIRIEC], 2007) and, therefore, differentiate the initiatives that comprise it from public companies and capitalist companies. (Fajardo García, I. G. La economía social en las leyes. CIRIEC – España, Revista de economía pública, social y cooperativa, Nº. 66, 2009, pp. 5-35). In accordance with the invoked Charter of the European Conference, the functioning and performance of the social economy is guided by the following principles: i) Primacy of the person and the corporate purpose over capital; ii) Voluntary and open membership; iii) Democratic control by its members (except for foundations that have no partners); iv) Conjunction of the interests of the user members and the general interest; v) Defense and application of the principles of solidarity and responsibility; vi) Management autonomy and independence from public powers; vii) Destination of the majority of the surpluses to the achievement of objectives in favor of sustainable development, the interest of the services to the members and the general interest.

[58] Resolution of the National Institute of Associative Activity and Social Economy [NIASE] N ° 4664/2013, Article 1.

[59] SES Resolution No. 157/20; Annex, Article 3,

[60] Carcar, F. and Sosa, G. *Manual de Cooperativas Sociales: su conformación en 10 pasos*. Working Paper No. 4. Buenos Aires: Latin American Faculty of Social Sciences, 2020.

[61] National Law No. 25877, Article 40 *in fine*.

[62] SES Resolution No. 157/20; Annex, Article 4 and Article 16, Subsection A.

human persons who meet both personal and economic requirements can access the social monotributo and enroll in "the Registry". Thus, according to personal conditions, they must be Argentine nationals who have an identity document or foreigners residing in the country; must be over eighteen years old; and not have a university degree. Considering the economic requirements, applicants can only own a maximum of two real estate and three registrable personal properties; they must be unemployed or in a condition of social vulnerability or be current or potential beneficiaries of social inclusion programs and be developing or intending to develop productive, commercial or economic service enterprises oriented towards local development and the social economy; they cannot be employers, or taxpayers of the personal property tax or the income tax; they have to generate economic income that comes exclusively from the declared activity, with the exception of income from social inclusion programs, "Universal Child Allowance [UCA]" and "Pregnancy Allowance for Social Protection [PASP]"[63], non-contributory pensions, retirements, pensions or dependency relationship when gross income does not exceed the minimum pension (article 125 of Law 24,241).

In turn, worker cooperatives that intend to register in the "Registry" have to comply, among others, with the following requirements of a substantial nature, established by article 16, paragraph B) of Resolution SES 157/2020[64]: an authorization to function, conferred by the National Institute of Associative Activity and Social Economy [NIASE][65]; be registered with the Federal Administration of Public Revenues [FAPR][66]; be composed of at least six members[67]; the total of their members must be enrolled in "the Registry"[68]; contemplate that two-thirds of the total of their members can comply with the requirements to be categorized as "social monotributistas" or that they belong to the Regime of Social Inclusion and Promotion of Independent Work or belong to categories A, B, C and D of the Simplified Regime for Small Taxpayers[69]. In addition to these requirements of a substantial nature, SES Resolution 157/2020 imposed on worker cooperatives a series of formal precautions. In this way, worker cooperatives also have to attach: a copy of the Statute[70]; copies of the rubric sheet and the associate book[71]; and a copy of the signature sheet and the act of designation of authorities with a mandate in force at the time of requesting registration[72].

Worker Cooperatives
Requirement for Enrollment in "The Registry" [SES Resolution No. 157/20]

[63] In Argentina, these programs are, currently, emblematic tools for social inclusion.
[64] SES Resolution No. 157/20; Annex, Article 16, Subsection B.
[65] Ibidem, Annex, Article 16, Subsection B.1).
[66] Ibidem, Annex, Article 16, Subsection B.6).
[67] Ibidem, Annex, Article 16, Subsection B.3).
[68] Ibidem, Annex, Article 16, Subsection B.7)
[69] Ibidem.
[70] Ibidem, Annex, Article 16, Subsection B.2).
[71] Ibidem, Annex, Article 16, Subsection B.4)
[72] Ibidem, Annex, Article 16, Subsection B.8).

Requirements	
Substantial	**Formal**
Constitution and Authorization to Function [NIASE]	
Registration in the Federal Administration of Public Revenue [FAPR]	**Copy of the Statute**
Minimum Number of Members: 6	**Copy of the Rubric Sheet and the Associate Book**
Associates Registered in "The Registry"	**Copy of the Signature Sheet and the Act of Designation of Authorities**
2/3 of Members with the Status of "Social Monotributistas"; or Belonging to the Social Inclusion Regime and Promotion of Independent Work; or Belonging to the Simplified Regime for Small Taxpayers [Categories A, B, C, D]	

Source: Author's elaboration

Considering what has been explained, we can make a series of clarifications as a synthesis:

- ❑ The effector of local development and social economy is defined by the National Ministry of Social Development as a new economic subject with its own characteristics[73].
- ❑ Enrolment in "the Registry" is optional and voluntary for worker cooperatives, as well as for the other categories included. However, its registration allows members to access the tax category of the "social monotributo" if they comply with the requirements established in the SES Resolution No. 157/20 itself and with the mandatory elements in the specific regime [National Law 25865, concordant and amendments].
- ❑ For members to be able to access the "social monotributo", both the members themselves and the worker cooperative must be registered with "The Registry"[74].
- ❑ Enrolment may be denied for failure to comply with the requirements requested for admission.
- ❑ The situation of social vulnerability represents a factual assumption that is technically accredited.
- ❑ The worker cooperative can renounce, at any time, its registration in "The Registry". In the same way, it can also be removed by "the Registry" itself in cases of non-compliance with the required conditions or modification of the initial conditions.

[73] National Registry of Local Development and Social Economy Effectors. Official Document issued by the National Ministry of Social Development of Argentina, 10-14-08. Available at http://www.infoleg.gob.ar/basehome/actos_gobierno/actosdegobierno14-10-2008-2.htm

[74] Resolution of the Federal Administration of Public Revenue General [FAPR] No. 4309/2018, Article 69.

V. Conclusions

In this analysis we have tried to characterize the meaning and purposes that drove, over the years, the implementation of the simplified regime for small taxpayers. We were able to see from such a perspective that the course evidenced by this fiscal scheme was not linear and that during its implementation a process of recycling of the regime took place with the aim of covering other socioeconomic problems in accordance with the influences coming from contextual changes. The "monotributo" can be conceived as a specific public policy of a dynamic nature. But this dynamism is not only explained by the rhythm that its operating pattern exhibits, but also originated from the relevant adaptations and the complex adjustments that it incorporated over time.

The simplified regime for small taxpayers has undergone considerable evolution since its inception. In this evolution it underwent structural transformations that affected its main contents. Thus, the modifications were reflected in the mechanism of identification and delimitation of the collective problem, which incorporated issues that were not originally contemplated and therefore caused a review of the functions that this tax scheme had to fulfill.

This new conformation of the collective problem connected, therefore, with the updating of its foundations through a reformulation in some implicit cases of its central guidelines that gave the simplified regime a greater scope. In turn, this configuration implied the detection and individualization of causal factors that had a negative impact on the collective problem and, therefore, also the design and implementation of intervention strategies and techniques in order to provide a contribution to the resolution of the issues included in the collective problem contribute to the realization of the purposes that made up the reasoned foundations.

Therefore, as a result of the recycling mechanism that characterized the deployment of the simplified regime for small taxpayers, we can say that the "monotributo" system, which was created with exclusively fiscal and economic objectives, went through a process that positioned it as a policy of wide-ranging public service that constitutes a useful tool for social inclusion.

VI. References

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VI.b. Legislation

VI.b$_1$. National Laws

National Law No. 24977 on Simplified Regime for Small Taxpayers
National Law No. 20337 on Cooperatives.
National Law No. 25877 on Labor Regime.
National Law No. 26223.
National Law No. 26565.
National Law No. 27618 on Tax Support and Inclusion Regime for Small Taxpayers.
National Law No. 27639 on Fiscal Strengthening and Relief Program for Small Taxpayers.

VI.b$_2$. Presidential Decrees

Presidential Decree No. 189/2004.
Presidential Decree No. 806/2004.

Presidential Decree No. 1/2010.
Presidential Decree No. 1030/2016.
Presidential Decree No. 601/2018.

VI.b3. Resolutions of National State Organizations

Resolution of the Secretariat of Social Economy of the Nation [SES] No.157/20
Resolution of the National Institute of Associative Activity and Social Economy [NIASE] No. 4664/2013.

THE TAXATION OF COOPERATIVES. A PROPOSAL FOR ITS UNIFORM REGULATION IN CUBA

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Abstract

The promulgation of the Constitution of the Republic of Cuba of 2019 supposed the general recognition of the cooperative, overcoming the past distinctions between its different forms and laying down some guidelines for the determination of its legal nature in the socioeconomic system of the country. At the level of ordinary development laws, including legal provisions on tax matters, a full reflection of this transformation has not yet been achieved. Consequently, the objective assumed in this work seeks to argue the premises that should guide the unification of the tax regime of Cuban cooperatives, in accordance with the role constitutionally assigned to them and their identity.

Introduction

The promulgation of the 2019 Constitution of the Republic of Cuba represented the necessary synthesis of a process of transformations that had been developing in Cuban society, in which the decisions to perfect the socialist socio-economic and political model adapted in the last congresses of the Communist Party of Cuba had a decisive impact. These political projections included, as an inherent part of the economic design, an expansion to the non-agricultural sectors of the cooperatives. The corollary of the above is present in the recognition of the institution in the new Magna Carta, in which some guidelines of interest are established for the determination of its legal nature in the national socioeconomic system.

Notwithstanding the aforementioned advances, at the level of legislation, including in tax laws, a full reflection of this transformation has not yet been achieved. In fact, in 2019 new regulations were promulgated that ordered, separately, the two manifestations of national cooperativism: the agricultural[4] and the non-agricultural[5], in an attempt to systematize the

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[4] Decreto-Ley No. 365 «De las Cooperativas Agropecuarias» y Decreto No. 354 «Reglamento del Decreto-Ley de las Cooperativas Agropecuarias», de 24 de mayo de 2019
[5] Decreto-Ley No. 366 «De las Cooperativas no Agropecuarias» y Decreto No. 356 «Reglamento de las Cooperativas no Agropecuarias», de 30 de agosto de 2019

organization and operation of the variety of existing typologies within the first[6] and to perfect the experimental practice of the second[7]. This has meant that a separate perception of its tax treatment persists in which, as a consequence of the general state of regulation of the sector, not all the existing potentialities to stimulate these forms of social production are used.

Consequently, this work attempts to propose premises that should guide the unification of the tax regime of Cuban cooperatives, in accordance with the role constitutionally assigned to them. To this end, the antecedents and the current panorama of the identity of the cooperative in the Cuban legal system are examined, in a first moment, in which the provisions of the current Constitution have significant weight. Next, the tax regime that applies to cooperatives in the country is analyzed and some proposals are based on the uniformity of its regulation and to make its coherent tax treatment feasible.

Bearing this intention in mind, it is pertinent to note that the object of study on which this work is focused presents little doctrinal development in the country. Therefore, the sources used will be, in addition to current legislation, official documents from the country's political leadership and other press materials; all of which will be contrasted with criteria established around the cooperative identity and its legal nature.

To achieve these purposes, the following methods were used: legal historical, exegetical-analytical and the legal-doctrinal analyses. The first type, as it allows the logical and evolutionary study of the institutions of law and the scientific constructions that are made in the time around them, facilitated the study of the antecedents treated here. The second method, inasmuch as it focuses its attention on the study of legal texts and the information collected from the way in which the different regulations are drawn up, was used to specify the meaning of the provisions on the subject in the current regulations. The last of the aforementioned methods, since it deals with identifying the theories that support the objects of study, their conceptual tract and the main criteria for their definition and regulation, was used to support the processes of analysis, synthesis, abstraction and generalization that, with the aforementioned perspective, allow projecting the overcoming of the deficiencies detected.

1. The identity of the cooperative in the Cuban legal system: antecedents and current panorama

As has been explained on other occasions[8], the historical antecedents of the legal regulation of the cooperative in Cuba are fundamentally delimited by three stages: the first is characterized by simple recognition, without attributing its own legal regime or legal protection to develop in its double economic and social aspect. A second stage, marked by the Constitution of 1940, which neglects its associative content, protects its character as a company and directs its promotion from the local to favor public services, a mandate that was

[6] Credit and Service Cooperatives (CCS), Agricultural Production Cooperatives (CPA) and Basic Units of Cooperative Production (UBPC), now grouped under the name of Agricultural Cooperatives (CA)

[7] Non-Agricultural Cooperatives (CNA).

[8] RODRÍGUEZ MUSA, O.: *La constitucionalización de la cooperativa. Una propuesta para su redimensionamiento en Cuba*, Coletânea IBECOOP, No. 1, Ed. Vincere Asociados, Brasilia-DF, 2017.

not generalized. The third and last stage, stemming especially from the 1976 constitutional text, produced the dismantling of the previous design through nationalization; reserves the right to associate in cooperatives to small farmers only; distorts the legal nature of the institution towards a form of agrarian property; limits its purposes to agricultural production and obtaining state credits and services; and it configures an institutional environment with high levels of dependency and interventionism from the public administration. Such a panorama conditioned the existence of the three types of cooperative production in Cuban fields, which are still in existence: Credit and Service Cooperatives (CCS), Agricultural Production Cooperatives (CPA) and Basic Units of Cooperative Production (UBPC).

The VIth Congress of the Communist Party of Cuba, held in April 2011 and reviewed five years later in the VIIth Congress, approved the Guidelines for the Economic and Social Policy of the Party and the Revolution with the aim of establishing the necessary guidelines to conduct the process of updating of the socialist economic model in which the country is currently immersed. These Guidelines established the basic aspects for the insertion of cooperatives in a new "Economic Management Model" that planned to expand these associative forms to spheres of the economy other than agriculture[9].

The referred Guidelines for cooperatives were originally developed by a legislative package on an experimental basis. These provisions came into force on December 11, 2012 when the Extraordinary Official Gazette No. 53 was published, containing Decree-Law No. 305, of November 15, 2012, “On Non-Agricultural Cooperatives” and Decree No. 309 of November 28, 2012, "Regulations for Non-Agricultural Cooperatives"; among other regulations that formed the provisional regulatory framework for the new Non-Agricultural Cooperatives in Cuba.

Upon the occurrence of these legislative developments, which immediately had a practical repercussion[10], the following were identified as legal limitations for the cooperative in Cuba[11].

- ✓ *Insufficiencies in its constitutional regulation* (Cuban Constitution of February 24, 1976, repealed), while the Magna Carta does not protect the right of workers other than small farmers to associate in cooperatives and, therefore, does not recognize their existence beyond the agricultural sector of the economy. In addition, it reduces its legal nature to a form of property, thus neglecting the cooperative bond, the purpose of the service that assists it, and the values and principles that are inherent to it. In short, it does not contain an institutionalization of the cooperative as an autonomous figure, in a complementary relationship with other public and private entities, for the satisfaction of the socioeconomic needs of the people.

[9]*Vid*. VII Congreso del Partido Comunista de Cuba y Asamblea Nacional del Poder Popular: Actualización de los Lineamientos de la Política Económica y Social del Partido y la Revolución para el periodo 2016-2021, abril de 2016, at http://www.cubadebate.cu/wp-content/uploads/2016/09/aqu%C3%AD.pdf, points 15 and 16.

[10] The non-agricultural cooperatives initially approved in the country reached 514. Approximately 88% of these new cooperatives are concentrated in three sectors: Commerce, Gastronomy, and Technical and Personal Services (59%); Construction (19%); and Industry (10%). Oficina Nacional de Estadísticas e Información (ONEI): «Listado de cooperativas no agropecuarias con su código, marzo de 2016, at www.one.cu/ryc/cambian/CNoA.rar

[11]*Vid*. Rodríguez Musa, O.: *Ob. cit.*, 2017, p. 110.

- ✓ *Absence of a harmonizing and unified conception about cooperatives and their legal nature,* which is directly linked to the non-existence of a general unifying and harmonizing legislation for the sector. Current Cuban cooperative law is scattered around in many norms, some with an experimental nature, which divide the sector between the agricultural and the non-agricultural, and present little systematicity and coherence with each other. This is exacerbated by antinomies or contradictions derived from excessive regulation and diversity in the contextual bases to which they respond. In this way, the characteristics and principles of the institution are called into question, as well as the possibility of determining applicable default rules without distorting its nature. All this results in damage to the identity of cooperatives and the empowerment they need to transform their economic-social environment.
- ✓ *Permanence of an absorbing model in the relations of the cooperative with the State,* which, although in recent years it has shown a tendency to become more flexible[12], affects its autonomy from the constitution process to the dissolution, through the determination of its corporate purpose, the planning of its economic activity and the characteristics of its contractual relationships. Added to this is the expansion of public entities that interact with cooperatives, promoting, authorizing, qualifying and controlling them, which have diversified as much as the spheres of the economy in which they operate and, with them, the methods, policies and provisions that apply to them. Such atomization limits the consolidation of the identity of the figure over the sphere of the economy in which it is developed.

In exacerbating the negative effects of these limitations, the generalized lack of cooperative-legal culture has had an impact, which has resulted in the legislator, the applicator of the cooperative norm and society in general, dragging the schemes of the law towards these associative forms, state enterprise or import them from capitalist forms.

As a result of these limitations in the legal-institutional platform, the expansion process of cooperatives to other spheres of the national economy has been affected. Among the officially recognized difficulties is the misappropriation of resources and income; people acting as members of several cooperatives at the same time; deficiencies in accounting records; use of bank loans for different purposes than those for which they were granted; and some acts of corruption. In addition, it has been said that some cooperatives have acted as private companies, where the president acts as if he were the owner, with a minimum of partners, while at the same time carrying out their management mainly by hiring the services of self-employed workers as salaried employees[13].

On this basis, it has been decided, "before continuing to advance in the creation of new cooperatives, consolidate what has been advanced, generalize the positive aspects, which are not few, and resolutely confront the illegalities and other deviations that deviate from the

[12]*Vid*. Rodríguez Musa, O.: "*La autonomía cooperativa y su expresión jurídica. Una aproximación crítica a su actual implementación legal en Cuba",* en *Boletín de la Asociación Internacional de Derecho Cooperativo*, No. 47, Universidad de Deusto, Bilbao, 2013, pp. 142 y ss.

[13] PUIG MENESES, Y.: *«Autoridades explican nuevas medidas respecto a cooperativas no agropecuarias*», La Habana, 9 de agosto de 2017, at http://www.cubadebate.cu/noticias/2017/08/09/autoridades-explican-nuevas-medidas-respecto-a-cooperativas-no-agropecuarias/

established policy"[14]. This guideline has resulted in "making control and inspection more effective"[15] from the State on cooperatives, as well as the decision to dissolve some of the new cooperatives that had been authorized[16].

Within this context, the Cuban Constitution of April 10, 2019 was approved. Its Article 22, paragraph d), recognizes "private property: that which is exercised over certain means of production by Cuban or foreign natural or legal persons ...". Thus comes the appropriate basis to authorize the creation of private companies under legal forms of a lucrative nature. In this way, the need for those who have used cooperatives to cover up this type of economic activity would disappear, as each business form according to its essence, would have its own legal regime.

In addition, Article 22 of the new Carta Magna, in subsection b), recognizes "cooperative property" as "sustained by the collective work of its proprietary partners and in the effective exercise of the principles of cooperativism." A litteral reading implies an evolution with respect to the old Constitution of 1976, as well as other elements that generate uncertainty and various absences that could result in inertia[17], namely:

Inertia: The reduction of the legal nature of the cooperative to a "form of property" persists, neglecting the associative bond that it implies, the corresponding service purpose, the values that are inherent to it and the institutional environment in which - according to its identity - it must be articulated. In addition, the emphatic formulation regarding the “collective work of its proprietary members” as support for cooperatives, could appear as a limitation to establish other types of cooperatives different from work cooperatives, such as consumer or credit cooperatives (nonexistent until now in the country), also inspired by popular socio-economic needs and that could complement / strengthen the Cuban cooperative sector - until now - without uniformity or articulation.

Evolution: In another sense, the agrarian perspective of the old Constitution disappears. Now cooperatives, regardless of the sector of the economy where they develop, will enjoy constitutional protection. In addition, the relevance of some "principles" that should mark the functioning of these institutions is recognized, as they are part of a movement that overcomes and strengthens them all equally.

Uncertainty: However, it is worth asking what “principles of cooperativism” the Constituent Assembly refers to, since in Cuban legislation those raised by the International Cooperative Alliance have never been mentioned, nor has a uniform criterion been used to define them.

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[14] CASTRO RUZ, R.: «*Discurso pronunciado por el General de Ejército Raúl Castro Ruz, Primer Secretario del Comité Central del Partido Comunista de Cuba y Presidente de los Consejos de Estado y de Ministros, en la clausura del IX Período Ordinario de Sesiones de la VIII Legislatura de la Asamblea Nacional del Poder Popular»*, La Habana, 14 de julio de 2017, Versiones Taquigráficas del Consejo de Estado in Granma Newspaper, 15 July 2017.

[15] PUIG MENESES, Y.: *Ob. cit*.

[16] *Vid*. CUBA DEBATE: *«Cierran temporalmente el mercado mayorista El Trigal», La Habana,* 12 mayo 2016, at http://www.cubadebate.cu/noticias/2016/05/12/cierran-el-mercado-mayorista-el-trigal/, in 12/09/2017 and MINISTERIO DE FINANZAS Y PRECIOS: *«Aprobada extinción de Cooperativa de servicios contables SCENIUS*», La Habana, at http://www.cubadebate.cu/noticias/2017/08/07/aprobada-extincion-de-cooperativa-de-servicios-contables-scenius/#.Wb54j3uR7mM, in 12/09/2017.

[17] *Vid*. RODRÍGUEZ MUSA, O. y HERNÁNDEZ AGUILAR, O.: *Unificación del sector cooperativo cubano. Apuntes críticos a la luz de los principios cooperativos*, CIRIEC-España, Revista Jurídica de Economía Social y Cooperativa, No. 37, 2020, pp. 81-103.

Therefore, different interpretations of the Constitution may be made by the legislator, which transcends the legal regime of these associative forms.

Against this background, where the role of the ordinary legislator is decisive to promote the articulation of a national cooperative movement coherent with the cooperative identity, new legal norms stand out, published in the Official Gazette No. 37 Ordinary of May 24, 2019, containing the Decree-Law No. 365 "On Agricultural Cooperatives" and Decree No. 354 "Regulation of the Decree-Law on Agricultural Cooperatives", and Ordinary Official Gazette No. 63 of August 30, 2019, which includes Decree- Law No. 366 "On Non-Agricultural Cooperatives" and Decree No. 356 "Regulations for Non-Agricultural Cooperatives".

However, contrary to what could be expected, the new regulations did not come to unify the sector, nor to establish the general and definitive bases that can contribute to its consolidation in accordance with the universally recognized cooperative identity. On the contrary, these norms did not emanate from the National Assembly of People's Power, despite the fact that in some cases they repeal others that do have this hierarchy[18]; they preserve the division between agricultural and non-agricultural cooperatives; grant important powers to State institutions that were expected to disappear with the implementation of the new 2019 Constitution (V.gr .: Provincial Administration Councils[19]); and, in the case of Decree-Law 366/2019 and its Regulations, aimed at non-agricultural cooperatives, they do not exceed the experimental nature of the regulations that repeal (Article 1), despite the more than eight years that have elapsed in this state of legal uncertainty.

Taking into account this panorama, a reflection of the distorted conception that the Cuban legislator still maintains regarding the institution under study and towards which the 2019 constitutional text offers new expectations, let us proceed to assess the fiscal regime of each of the forms of cooperatives recognized in Cuba.

2. Cuban cooperative forms: assessment of their tax regime

Within the aforementioned context, a tax regime has been established for cooperatives, whose evolution has been limited by the limitations and deviations that its constitutional and legal regulation has determined.

"This special type of taxation has its original source of law in the regulations of the Fourth Final Provision of Law no. 73, of the Tax System, of August 4, 1994"[20], which established certain precepts within which the Ministry of Finance and Prices (MFP) had broad powers to

[18] The Decreto-Ley 365/2019 repeals, among other provisions, the Ley No. 95 "Ley de Cooperativas de Producción Agropecuaria y de Créditos y Servicios", en Gaceta Oficial No. 72 Ordinaria, 29/11/2002.

[19] The Provincial Administration Councils, empowered by Decreto-Ley 366/2019 to present to the Permanent Commission for Implementation and Development, requests for the creation of cooperatives (article 14, section 1), as well as to authorize their constitution (Article 13, subsection b), disappeared with the implementation of the Constitución de la República de Cuba of April 10, 2019 (Articles 170 to 184).

[20] VALDÉS LOBÁN, E.: *La imposición sobre el consumo en Cuba. Valoración crítica y propuesta de reforma,* Publicaciones Universidad de Alicante, Alicante, 2002, p. 435.

dispose of the essential elements of the tax regime. This was reinforced in the fifth final provision, which in terms of incentives practically did not establish limits.

According to the law[21], the CPA and UBPC were obliged to pay the taxes that were established in general, with certain adjustments in taxes on profits and on the workforce, not to mention that all kinds of incentives could be established for any tax. From the very text of the aforementioned provision, it was assumed that the incentives were intended to promote production. Therefore, they were not intended to promote other behaviors that favored cooperative interests.

Based on the bases established by the aforementioned Law No. 73 and the analysis of all the provisions that came to develop said precepts, we can identify the following limitations in the tax regime:

1. *Doubtful constitutional protection and consequently lack of ordering principles of the highest order.* It should be taken into account that, in the matter that concerns us, the Cuban Constitution of February 24, 1976 was the reflection of economic policies that did not consider taxes as an essential source of income for the State, nor as an instrument of economic policy, a situation that did not change significantly with the 1992 reform[22].

2. *The implementation of the tax regime depended almost entirely on subsequent regulatory developments*. Law No. 73, in its general part, as a rule, did not regulate the essential elements of taxation, hence its direct application was impossible. This resulted in the issuance of a number of resolutions, many times casuistic, which in cooperative matters strengthened the differences and not the common elements of the sector[23].

3. *Excessive powers in the hands of the MFP*. The excessive regulation of the provisions of Law No. 73/1994 are the direct result of the lack of constitutional principles that guarantee the justice of the tax system. In the absence of the principle of reserve of law, the MFP freely provided, even empowering its vice minister, in charge of the Directorate of Revenues, so that, through Instruction, it could implement the requirement of the Income Tax that regulated Resolution No. 21 / 1998 to the CPA and UBPC.

[21]From this moment on, future cooperative regulations would recognize the payment of taxes as one of their obligations. *Vid*. Ley No. 95/1992, article 16 l) and the current Decree Laws No. 365/2018, article 40.2 and No. 366/2018, article 6 d), which provide it as a principle, making other references to tax legislation in several of their articles.

[22] It was only introduced in Chapter III "Foreigners", in its article 34 third section, that foreigners residing in the territory of the Republic were equated with Cubans in the obligation to contribute to public expenses in the form and amount that the law states.

[23]*Vid*. Resolutions no. 30/1995, 33/1995, 21/1998, mainly for the CPA (not always exclusively) and Resolutions no. 36/94, 21/95, 21/1996, basically for the UBPCs, all of the MFP; clear examples of excessive legislative production and lack of prevailing systematicity.

4. *Marked normative dispersion*. There could be no other result when adding the need to implement the legal provisions with the excessive powers of the executive, came to regulate the tax regime by type of cooperative, and within it by productive sectors.

5. *Absence of a unitary and harmonizing tax treatment.* As has been seen, the cooperative tax regime resulted in a regulatory framework lacking defined objectives, lacking systematicity and an absolute reflection of the theoretical and legal deficiencies that both the cooperative sector and the tax system possessed. According to Valdés Lobán "we are in the presence (…) of the establishment of a tax regime - of a special nature - in which it has not been possible to establish a general regulation thereof, or at least one for each case[24]".

In cooperative matters, the legislative developments of 2012 were accompanied by the enactment of a new Tax Law, Law No. 113, Tax System Law[25], dated July 23, and therefore the new non-agricultural cooperatives, like their predecessors, the agricultural cooperatives, were included in these new fiscal regulations.

Now, beyond expanding the fiscal regulation to the new non-agricultural cooperatives, the approval of this law brought significant changes in the status quo, although with the limitations that its range establishes and without actually solving all the problems exposed. From the analysis, the following elements can be specified:

Inertia: taking into account that in this period there was no constitutional modification, this law could not overcome the limitations in terms of its constitutionality that had been dragging the general and cooperative tax system in particular[26]. Nor was it able to establish a unitary and harmonizing tax regime, since it divided the cooperatives into agricultural and non-agricultural, in line with the general provisions that regulate the sector.

Evolution: there is a certain coding and reservist tendency, this law, unlike the previous one, establishes the taxable events, tax bases, tax rates and subjects of all taxes, in addition to the rules for determining the debt, which transcends the cooperative sphere, although not with the desired intensity.

It is also established in its First Final Provision that the essential elements of the tax can only be modified by the Annual Budget Law of the corresponding year, so that, without talking about a principle of legal reserve, at least these matters are no longer in the hands of the MFF.

Even so, the Second, Third, Fourth and Fifth Final Provisions continue to grant broad powers to the Ministry of Finance and Prices and the Council of Ministers (in other words, the executive branch), which has been expanded through the laws of the budget. An example is

[24] VALDES LOBAN, E.: *Op. cit.*, p. 436.
[25] Gaceta Oficial No. 053 Ordinaria de 21 de noviembre de 2012.
[26] However, the Law in its terms refers, in addition to the necessary formal foundation - article 75 subsection b) of the constitutional text - to the duty to contribute as necessary material support, which shows a certain corrective vocation with respect to the previous regulations, and that heralded a future constitutionalization of the duty to contribute.

Law No. 137 "On the State Budget for the year 2021"[27], which in its Third Special Provision empowers the provincial councils and municipal administration councils, as appropriate, to grant total or partial bonuses in the payment of taxes on sales and services to non-state management forms.

On the other hand, we could observe some first steps towards a future harmonization of the cooperative tax regime, at least within the agricultural field, since a special regime was established for the entire agricultural sector, where agricultural cooperatives were included.[28] And a special regime for the non-agricultural cooperative sector[29], but that only made reference to income taxation, leaving it to the complementary legislation to determine what taxes the non-agricultural cooperatives (CNAs) were subject to[30].

Within this apparently favorable context, a new Constitution was finally approved in 2019, which clearly and concisely established a positive aspect that we must highlight, the duty to contribute to the financing of public expenditures in the manner established by law. Therefore, in this way, Law No. 113/12 is an investiture of constitutionality, legitimizing our entire tax system.

Taking into account the validity of these regimes, with only minor subsequent modifications, one might wonder how far one is from a future unitary regime.

“In a general sense, the special regime for cooperatives should tend to simplify the requirements in tax regulation and it translates into a set of tax incentives, basically exemptions, bonuses and reduced tax rates (type bonuses) that cover if not all, at least to most of the taxes to which cooperatives are subjected, which must be clear and easy to interpret. We are not talking then about exclusive taxes for the cooperative sector, but about those classic taxes that tax both income, assets and consumption, but especially aimed at encouraging this specific economic sector "[31].

The first issue to be analyzed is precisely the facts subject to taxation. “Perhaps the most important and most discussed effect of the Cooperative Act occurs in the filed of taxation, since the transactions between the cooperative and its partners, not being acts of commerce, they do not constitute a tax-generating event "[32]. In this sense, the Cuban tax regime, also influenced by the general regulations that drive cooperatives towards a profit-making spirit in their operations, above meeting the needs of their partners, taxes all their commercial acts, which in the end, due to the distortions analyzed, they are taking precedence over cooperative acts.

[27] Gaceta Oficial No. 2 Extraordinaria de 11 de enero de 2021.
[28] Ley No. 113/2012, article 105 and fifth book.
[29] Idem, articles 106 to 108.
[30] The Resolution No. 427/2012 first and Resolution No. 124/2016 later. The latter supplemented by Resolution No. 136/2016 and later modified by Resolution No. 486/2016 all of the MFP. Resolution No. 361/2019 is currently in force, repealing the previous ones.
[31] SIMÓN OTERO, L. y CARBALLO MOYA, A.: “Tributación y cooperativismo: el régimen fiscal de las cooperativas no agropecuarias (CNA) en Cuba”, en Revesco. Revista de Estudios Cooperativos, vol. 134, e65489, Madrid, 2020, p. 5.
[32] NARANJO MENA, C.: El acto cooperativo: Concepto estratégico para el desarrollo cooperativo. Incorporación y tratamiento en los países de América Latina, Ecuador, 2019, at https://www.aciamericas.coop/IMG/pdf/carlosnaranjo.pdf

The tax on the income of cooperatives was established based on the specificities that were configured in the Income Tax, which, in its general regulation, recognizes that increases in equity that are produced by non-financial acts are not taxed by this tax lucrative (could be cooperative acts), provided that the purpose of these is not their commercialization.[33]

The CPAs and UBPCs are subject to this obligation, contributing a minimum amount of 5% of the total income obtained from the sales of agricultural products and an additional payment based on per capita net income, which is made at the end of the fiscal year.

The CCS must also contribute to this tax applying a rate of 17.5% on the taxable net profit, provided that more than 50% of their income comes from the commercialization of agricultural products and / or from the provision of services related to this sector. Otherwise they apply the tax rate capped at 35%, generally established for the payment of this tax.

The CNAs pay this tax based on the taxable income per capita, which is made up of the income minus the established discounts, divided by the number of cooperative members.

Apparently, each subject pays the tax in a similar way. However, there are key differences.

1. We are not looking at a uniform tax base.

The per capita net income that constitutes the tax base in the case of CPA and UBPC is calculated by discounting from gross income:

- the exempt minimum,
- the authorized expenditure items,
- taxes paid (with exceptions),
- the minimum amount of tax already paid.

To which result the income paid as advances to its members is added, divided by the number of partners.

The net taxable income from which the CCS is taxed, taking into account the general provisions of the law, is calculated by subtracting from income:

- deductible expenses,
- the proportion of the tax loss from previous years,
- the reserves authorized to create before the tax.

The tax base for CNAs is formed by subtracting from income:

- minimum exempt for each member,

[33] Ley No. 113/2012, article 102 subsection b).

- the expenses associated with the activity, which meet the conditions established by Resolution No. 361/219 of the MFP,
- taxes paid, except for payments on account for profit tax,
- the leasing of movable and immovable property to entities duly authorized to do so, which are exonerated or subsidized, when they undertake repairs in the state premises they lease, which must be justified by documentary evidence,
- a remuneration per member, consisting of the average salary of the province, or where appropriate, in the special municipality of Isla de la Juventud, where the cooperative is established or operates,
- other amounts destined to the creation of reserves to cover contingencies[34].

The result is divided by the number of members of the cooperative.

Similarities in this subject between CPAs, UBPCs and CNAs are evident. However, there is a difference in discounts.

2. The tax rate varies from being progressive to being proportional.

In the case of CPAs, UBPCs and CNAs we are talking about a progressive percentage tax rate, which is, however, not uniform, since the sections of the scale vary and the percentages to be applied do not increase to the same extent. The CCSs, for their part, pay taxes according to a tax rate of 17.5% (understanding that by their nature it is normal that more than 50% of their income comes from the commercialization of agricultural products and / or the provision of services related to this sector), its regime being closer to assigning to the state enterprise than to that corresponding to the cooperative sector itself.

3. The incentives, on the one hand, are aimed at favoring an economic sector and on the other, they try to promote the development of cooperatives.

In the case of the CCS, a deduction is established in the tax rate in order to boost agricultural production, while for CPAs, UBPCs and CNAs what is intended is to benefit this form of management above others. Every year the budget law establishes payment exemptions for some type of cooperative or by economic sectors (example: non-sugarcane cooperatives), almost always seeking greater productivity.

From the analysis carried out above on the elements for calculating the tax, it can be seen that no deduction has been made from the tax base, intended to promote cooperative funds or to encourage the assumption of social responsibilities inherent to the principles it defends.

Sales tax is another of the taxes that has received special treatment[35]. The CNAs are exempt from their payment for the commercialization of agricultural products to the population,

[34] *Vid*. Twenty-fourth section of Resolution No. 361/2019 of the MFP, which complements the provisions of the Tax Law.
[35] It has been regulated every year by the Budget Law.

while the agricultural cooperatives have been paying the 10% provided in the general regime. So it is a benefit that does not seek to encourage the cooperatives themselves, but agricultural production.

Other tributes have enjoyed some kind of benefit each year. In the Labor Force Tax, it is the agricultural cooperatives that receive special treatment, since they are exempt from payment by personnel hired directly to agricultural production. In the Land Transport Tax a 50% discount is granted to the owners or holders of tractors, trailers and semi-trailers, used in the agricultural and forestry sector. Therefore, agricultural cooperatives are also beneficiaries, as in the case of the fee for the Filing of Advertisements and Advertising, since they are exempt from paying for advertisements that identify their headquarters or address, provided they do not contain commercial messages.

The rest of the taxes, including the Territorial Tax and the Property Transfer Tax, do not enjoy a differentiated treatment.

In terms of incentives, one of the clearest is the one that first granted to the CNAs that start their activity three months' exemption from the payment of tax obligations for taxes on profits, on sales, on services, for the use of the workforce and the territorial contribution for local development, which was later extended to six months, with the enactment of the aforementioned Resolution No. 124/2016 of the MFP, because it was considered that three months was a very short time so that a new cooperative could recover the investment, especially for those that were of private origin. In the current Resolution No. 361/2019 of the MFP, this exemption was maintained, which can be extended to almost 7 months, taking into account that the term begins to run from the month following the registration of the CNA in the Taxpayers Registry.

A benefit common to all members of the CPA, UBPC and CNA is that which refers to the exemption from income tax, called in Cuba "Personal Income Tax", for the income that the members of these cooperatives obtain from them, when they are taxed with the Income Tax in the per capita profit modality.

In summary, we could affirm that even though there are certain similarities in the tax regime of the CPA, UBPC and to a lesser extent of the CNA, there are many differences that persist in the face of the possibility of a future uniform regime.

In this regard, it would then be possible to ask: could the future tax law, provided for in the Cuban legislative schedule for the month of July 2022, be able to harmonize a cooperative tax regime that responds to the need to encourage this economic subject while respecting its *sui generis* nature?

3. Proposals to standardize the tax regime of Cuban cooperatives

Based on the preceding analyzes, it is possible to specify three fundamental lines to guide the process that leads to a uniformity of the tax regime of Cuban cooperatives. Although in the following exposition they are treated separately, for the purposes of their better understanding, it is the opinion of the authors that there is a logical relationship between them that provides them with unity.

- Assume the constitutional reference to the "principles of cooperativism" as the basis for the common identity of all cooperatives according to their sui generis nature according to the theory of the "cooperative act".

As has been stated, the allusion to the "principles of cooperativism" in the Constitution of the Republic of Cuba could be accompanied by greater precision. However, the mere presence of this precept has potentialities yet to be explored.

As stated in article 7 of the aforementioned legal text, the Constitution is “the supreme legal norm of the State” and, consequently, “everyone is obliged to comply with it. The provisions and acts of the organs of the State, their directors, officials and employees, as well as of the organizations, entities and individuals are adjusted to what this has". This treatment of the Constitution exceeds its limited understanding as a political program or minimum standard, reaching the entity of a true legal standard. The first consequence that this entails is that its provisions do not need any mediation to be applied[36].

The direct applicability of the Constitution supposes, in particular in the case of article 22, paragraph b) of the great legal body, an exercise of interpretation by the operators. In this sense, action must be taken in accordance with what is established in the entire constitutional text, ensuring the harmony of what is interpreted with the rest of the postulates and with the nature of the institution in question. In this way, it is relevant to assume a position in this regard that ensures the correspondence between the nature of the cooperative and the socialist purpose of the Cuban socio-economic and political system, an issue that cuts across the provisions of the law of laws and the rest of the legal system.

To be consistent with the foregoing, the nature of the institution must adhere to the theory of the "cooperative act"[37]. This act constitutes the main means or instrument for the practical realization of the cooperatives’ *raison d'être.* Salinas Puente refers to it as "the legal assumption, absent of profit and intermediation, carried out by the cooperative in fulfillment of a preponderantly economic purpose and of social utility"[38]. In the same direction, Cracogna explains, the essential and consubstantial notes to these acts that allow to affirm that they do not have a civil or commercial nature or any other, but one that is their own and

[36]*Vid*. MEDINACELI ROJAS, G.: *La aplicación directa de la Constitución*. Universidad Andina Simón Bolívar, Sede Ecuador Corporación Editora Nacional, Quito, 2013.

[37] This theory is of Latin American invoice and that has among its main exponents Salinas Puente in Mexico, Bulgarelli in Brazil and Cracogna in Argentina, in addition to being specified in the Framework Law for Cooperatives in Latin America and in the legislation of at least 14 countries in the region.

[38] SALINAS PUENTE, A.: *Derecho Cooperativo*, Ed. Cooperativismo, México, 1954, p. 2.

that distinguishes them, given the very purpose of the institution: a) intervention of member and cooperative; b) object of the act identical to the object of the cooperative; and c) spirit of service, where there is a corpus (the material or immaterial object it is about) and an animus (the spirit of service that informs the relationship)[39].

Therefore, in the cooperative "… the end is not profit, but service to the member; it is not profit, but the satisfaction of their needs, then, those needs are what united the members to form the cooperative and through mutual contribution and effort, self-provide their source of work, services, supply or marketing of their products, according to the type of cooperative "[40]. For example, in a work cooperative, the economic activity that is developed (*V. gr.*: gastronomy, transportation, accommodation management, etc.) is only a means that serves the higher purpose of satisfying the need for a decent job and optimally remunerated to its associates[41]. Business activity is not an end in itself, but a means to achieve a certain social objective. Capital serves man and not vice versa.

Therefore, the cooperative act is the cornerstone to sustain the peculiar nature of the social relations that result within what Bulgarelli calls[42] the "closed circle" of these associative forms, that is, that between it and its associates, and also in the cooperative sphere, that is, between entities of this type that collaborate with each other in fulfillment of their social objective[43].

Therefore, given the socialist character assumed by the Cuban State[44], this must be the meaning given to the constitutional provisions, since understanding the cooperative from

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[39] CRACOGNA, D.: *Estudios de Derecho Cooperativo,* INTERCOOP Ed. Cooperativa Ltda., Buenos Aires, 1986, p. 21.

[40] NARANJO MENA, C: "*La naturaleza jurídica de la cooperativa y el acto cooperativo",* SIBULE, Asesores Legales, 2014, at http://www.sibule.com/#!La-Naturaleza-Jur%C3%ADdica-de-la-Cooperativa-y-el-Acto-Cooperativo/c104m/1.

[41] The same occurs in consumer or provision cooperatives, where "the cooperative does not produce its own income because when it carries out its activity it charges the service at a price that is estimated to be in line with the market. But that price is provisional, whether the cooperative distributes items, for example, a consumer or provision cooperative, whether the cooperative markets the production of its members. In the first case, the cooperative overcharges the associate when they collect consumer items, to cover their expenses. In the other case, it withholds a sum when paying for its production, also to cover its expenses, because it does not know exactly what its costs are. It therefore charges an approximate market price, and at the end of the year, the balance sheet and income statement are made, then the true and definitive determination of the service price appears. There it is determined whether what the associate was charged in the consumer cooperative is more than the price that should have been charged, and in the marketing cooperative, if what was paid is less than what should have been paid. Then an adjustment is made that results from the distribution of the surplus by way of return. Consequently, in the cooperative there are no profits, no rents, no profits because what was overcharged in consumption or what was underpaid in marketing, is returned to the associate by way of the return pro rata". CRACOGNA, D.: *Problemas actuales del Derecho Cooperativo,* INTERCOOP Ed. Cooperativa Ltda., Buenos Aires, 1992, p. 171.

[42] He distinguished the existence of two types of relationships in cooperatives: one derived from the acts that the cooperative practices with its associates in fulfillment of its corporate purpose, and another derived from the acts that it carries out with third parties that are not members. The former, which are carried out internally, in a "closed circle" he called cooperative acts. *Vid*. BULGARELLI, W.: *Elaboração do Direito Cooperativo*, Ed. Atlas S.A., São Paolo, 1967, p. 107.

[43]*Vid*. Article 7, ACI-AMÉRICAS: *Ley Marco para las Cooperativas de América Latina*, San José, 2008, at www.aciamericas.coop.

[44] Article 1. Cuba is a socialist State of law and social justice, democratic, independent and sovereign, organized with all and for the good of all as a unitary and indivisible republic, founded on work, dignity, humanism and the ethics of its members. citizens for the enjoyment of freedom, equity, equality, solidarity, well-being and individual and collective prosperity.
Constitución de la República de Cuba. Gaceta Oficial de la República de Cuba, Edición Extraordinaria Nº 5, La Habana, 10/4/2019.

these premises offers the necessary support so that it can manifest itself as a counter-capitalist associative space (counter-speculation; counter-intermediaries; counter-patronage; counter-profit) ideal for the practice of the values and principles that adorn the legal nature of the phenomenon such as voluntariness, solidarity, honesty, independence, democratic control, equitable economic participation, cooperative education and social responsibility, among others generally present in the legal or political definitions of the country and that their content and scope are not always sufficiently determined[45].

In addition, consolidating these foundations, giving them constitutional status, would help to avoid confusion or misrepresentation of the legal nature of the institution, would favor its conception and unitary legal development in a special law for the sector and the other norms that refer to said institution included those that inform their tax treatment.

- Promulgate a special law that unifies the Cuban cooperative sector and that functions as a guarantee of its *sui generis* identity

To explain this proposal, it is necessary to begin by admitting that it is not possible for the Constitution to fully develop each of the aspects it addresses. Furthermore, since the promulgation of the Cuban Magna Carta is so recent, it is not realistic or desirable to think of a reform to deal with issues related to the cooperative figure, especially when the legal system has other resources to seek, with general effects, the precision of the questions that still require it.

It is at this point, although the potentialities of systemic interpretation have already been exposed, that it becomes relevant to consider the enactment of a law. This is because it is not suitable to operate exclusively and for an indefinite time on the basis of interpretations, however successful these may be, at least in our system of law in which the normative act is privileged as a source[46].

As a consequence of the above, the feasibility of promulgating a specific law for the entire cooperative sector must be evaluated. A first argument in defense of this demand results from the effects that it would have, if it were a formal law, to clarify those essential points of the identity of cooperatives and, as a result, contribute to their empowerment.

Secondly, it must be taken into account that this would mean the end of the evils that have afflicted the national legal experience in terms of antinomies and gaps derived from excessive regulation and diversity in the contextual bases to which they have responded in their moment. The balance left by the system followed to date, of particular rules for each figure, without a previous and superior provision, has led to the fact that, on some occasions, the characteristics and principles of the institution are called into question. All of this can easily be construed with a general law that regulates the essential elements common to existing typologies.

[45]RODRÍGUEZ MUSA, O. "La cooperativa en la Constitución cubana". En FAJARDO GARCÍA, G. y MORENO CRUZ, M.: *El cooperativismo en Cuba. Situación actual y propuestas para su regulación y fomento.* Ciriec, 2018, p. 43.
[46]*Vid*. FERNÁNDEZ BULTÉ, J.: *Teoría del Estado y el Derecho.* Tomo II Teoría del Derecho, Editorial Félix Varela, La Habana, 2002, p. 78.

The suggestion in favor of a general law to order cooperatives seeks to achieve logical uniformity, not homogeneity. The point is to recognize that, regardless of the sector of the economy in which it is developed, or the qualities of the associated subjects, the identity of the cooperative is the same and, therefore, its legal treatment must have a unity. This does not in any way detract from the fact that it is necessary to resort to regulatory norms to establish the peculiarities of certain typologies, since these, due to their nature within the framework of the system, have a unique function to fulfill.

Finally, it must be considered that this legal development of the constitutional content must also serve as a guideline to harmonize the rest of the rules of the legal system that deal with the cooperative. In other words, the cooperative law would not only have effects to harmonize the regulations of the sector, but would also allow guiding the development of others related to other activities, but with relevance for this area. In this case, the norms that establish the tax treatment of this figure would be found, which would initially have a clear reference on the peculiar nature of these actors and could then better support the adjustments to be applied to them.

The viability of this proposal results from the current legislative situation in which the country finds itself as of the constitutional reform[47]. Even so, it should be noted that a law of these characteristics has not been contemplated in the planned period for the moment, which covers until 2022. This does not prevent it from being inserted in the future, but it does draw attention to the incidence that it may be absent when assessing the demands derived from the *sui generis* nature of the cooperative in view of the issuance, in July 2022, of a new Tax Law.

- Conceive a tax treatment of cooperatives according to their sui generis legal nature

The tax treatment that is applied to cooperatives must be congruent with the legal nature that has been assumed. Based on this same logic, the cooperative requires its own tax treatment that does not violate its essence. It, in its essence, "has no taxable matter because it constitutes the tool that the partner uses to carry out his economic activity, it does not have autonomous profit, a benefit that can be taxed. If it were taxed, its capital would be reduced or it would be transferred to the associates and, ultimately, they would be paying twice, once in their own tax balance and another in that of the cooperative "[48], thus there would be double taxation.

Therefore, a more scientific public policy does not confuse the mere "Privilege Regime" or "Promotional" provided by many States for the institution, with the exemptions or lacks of application that its typical acts deserve with respect to some taxes. This position has important support in cooperative doctrine as will be seen below.

[47] *Vid*. Cronograma legislativo en Acuerdo Número IX-49 de la Asamblea Nacional del Poder Popular, Gaceta Oficial de la República de Cuba, Ordinaria, No. 2, 13/01/2020, modified by Acuerdo Número IX-76 de la Asamblea Nacional del Poder Popular, Gaceta Oficial de la República de Cuba, Extraordinaria, No. 6, 27/01/2021.
[48] CRACOGNA, D: *Problemas actuales del…, ob. cit.,* p.171.

Following Pastorino, it must be admitted that there is no "taxable event in the operation carried out by the cooperative with its associate on which the value added tax may fall, and when the Treasury collects it, it is subjecting the cooperators to double taxation: The associates pay when they go to the market in the form of a cooperative, and they pay again when the same merchandise they brought from the market is distributed. According to what has been seen, there is only one contributor: the associates gathered in a cooperative; and a single taxable event: the purchase made by those associates gathered in a cooperative"[49].

In neither of these cases, Cracogna warns, "is there a taxable matter with income tax because what constitutes the difference between the cost and the price of the service goes to the associates, who are the ones who generated that difference with their respective operations; from which it follows that taxing cooperatives with income tax is inappropriate "[50]. In this regard, Torres Morales maintains that "The same criterion should be applied in the case of worker cooperatives, since the income that the cooperative obtains and which is paid by" third parties "does not belong to the cooperative, but it must be delivered to each one of the partners in proportion to the work done "[51].

Finally, with regard to the Transfer Tax, "instead of declaring its exemption, it is conceived that it is inapplicable for cooperatives since they are not intermediaries but agents or representatives of their partners. The fact that they use usual procedures in commercial companies or sales contracts in certain cases does not modify the reality itself. The tax legislation then begins to see the substance of the cooperative act without having to fall into the simplistic vision of judging by the forms"[52].

The foregoing supports that, in the tax treatment of the cooperative, two different aspects should be followed, one regarding its commercial acts and the other regarding its relationships with its members. The foregoing allows agreeing with García Müller that "the cooperative act does not create a tax base, which is why cooperatives are not subject to tax when they practice them"[53].

In the case of commercial acts, which are subject to taxation, it must be assessed that these have a relevant projection in the stimulus, survival and quality of the performance of the cooperative. If it is assumed, from the proposed constitutional interpretation, that the peculiar non-profit nature of this associative form and its special projection towards the partners, their families and society is common to all the existing forms in the country, it becomes clear that the collective benefit that they generate, and that they must financially sustain with the business activity that is part of their existence, justify a uniform and tailored tax regime.

The question then would be to design tax incentives according to the *sui generis* nature of this figure. They must start from a clear knowledge of the dimensions of cooperative action,

[49] PASTORINO, R.: *Impuesto a las Transacciones Cooperativas*, INTERCOOP, Ed. Cooperativa Ltda., Buenos Aires, 1981, p. 79.
[50] CRACOGNA, D.: *Problemas actuales del…, ob. cit.,* p. 172.
[51] TORRES MORALES, C: "*Reconocimiento del acto cooperativo en la legislación peruana*", at http://www.teleley.com/articulos/art_221013a.pdf
[52] *Ibid*, p. 7.
[53] GARCÍA MÜLLER, A.: *El acto cooperativo, construcción latinoamericana*, at www.aidcmess.com.ar

in order to influence the stimulation of those aspects that the legislator considers desirable. Thus, the incitement to the entities of the sector to create social funds for educational purposes - internally and externally -, sociocultural, or of any other type that result in a manifestation of Cooperative Social Responsibility can be valued[54]. Additionally, to be consistent with a promotion policy, benefits for investment funds that ensure the sustainability of economic activity and its strengthening, which logically impacts the growth of enterprises in this regard.

Within the Tax Law, to achieve these results, there is a set of known mechanisms. These include tax holidays, preferential tax rates, income exemptions, and deductions [55]. In any case, the selection of one or more of these resources is a strategic decision, which must be motivated by dual reasoning, which takes into account the scope of the chosen mechanism and the uniqueness of the cooperative action in which it will have an impact.

Conclusions

As a synthesis of the above, it can be argued that:

1. In Cuba, the legal regulation of the cooperative has historically not been consistent with its identity, insofar as it has been defined from reductionist conceptions that have not favored its development in accordance with the satisfaction of social needs. Despite this, the cooperative has expanded into other spheres of the national economy, based on an experimental legislative framework that still exists. This process has presented difficulties that have distorted the associative nature of the institution and its purpose of service, but the new Constitution of 2019, despite the inertia of reducing the legal nature of the cooperative to a "form of property" and the parsimony that it manifests regarding the purposes of the institution and the principles that should guide its operation, opens a door for the legislator to institutionalize a socioeconomic movement that overcomes the limitations presented so far.

2. The tax system of Cuban cooperatives is a reflection of the distortions, which in terms of the nature and essence of these associative forms, are presented in the constitutional and legal sphere. Law No. 113/2012, the current tax law, established a special tax regime for agricultural cooperatives and another for non-agricultural cooperatives. These two tax regimes have in common the obligation to pay income tax and the presence of some tax incentives. Above all, the tax authorities show the diversity in the treatment of each

[54] *Vid*. ALFONSO ALEMÁN, J. L., RIVERA RODRÍGUEZ, C. A.; LABRADOR MACHÍN, O. "Responsabilidad y balance social en las empresas cooperativas". En *Revista de Ciencias Sociales*, v. 14, n. 1, 2008. At http://ve.scielo.org/scielo.php?script=sci_arttext&pid=S1315-95182008000100002&lng=es&nrm=iso.

[55] *Vid*. ATXABAL RADA, A. "*Las medidas fiscales para favorecer el emprendimiento por las cooperativas". REVESCO. Revista de Estudios Cooperativos,* 133, 2020 y RUIZ GARIJO, M.: "Incentivos fiscales a cooperativas y entidades sin fines lucrativos. ¿Paradigma de las políticas de promoción de la responsabilidad social de las organizaciones?". *CIRIEC*, Nº 19, 2008. At http://ciriec-revistajuridica.es/wp-content/uploads/019-004.pdf

cooperative, since there are significant differences in the main elements of the income tax and the tax benefits are not always aimed at achieving cooperative purposes.

3. In order to standardize the tax regime of Cuban cooperatives, the constitutional reference to the "principles of cooperativism" can be assumed as the basis for the common identity of all cooperatives according to their sui generis nature according to the theory of the "cooperative act". This should lead to the enactment of a special law that unifies the Cuban cooperative sector and that functions as a guarantee of its identity and, on such entries, a tax treatment of cooperatives must be conceived according to their singularities. However, in the event of a reform of the tax law before the legal uniformity of the cooperative sector in the country, the existing constitutional foundation to sustain the unitary tax regime of this figure in the two aspects of its activity should be considered.

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GREEK AGRICULTURAL CO-OPERATIVES: LEGAL CONCEPTS AND TAX LEGISLATION AND TREATMENT

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Abstract

Co-operatives have already been in Greek legal life for 106 years, since the first legal instrument on co-operatives was promulgated in 1915. Special attention is paid to the case of agricultural co-operatives, since it is the most familiar and "regulated" co-operative form. Moreover, the legislative regime concerning the tax treatment of agricultural co-operatives is particularly interesting, since its study provides us with valuable insight as to the general attitude of the Greek State and its legislature towards co-operative organization and operation with a special emphasis on the agricultural sector. We attempt to gather and list all of the current issues specifically as to the taxation system of agricultural co-operatives in Greece, while presenting the historical background of co-operative legislation since 2000. There is a clarifying approach of the concepts of "surplus" and "profit" for agricultural co-operatives, an analysis of the current tax regime (income tax, VAT, etc.), its compliance with the EU competition and state aids provisions and a comparison between the taxation treatments of co-operatives with other capital based legal entities. Despite the fact that co-operative tax legislation is fragmented in several laws, which were themselves repeatedly amended, modified, repealed or re-enacted, at the end of the day the reader shall have an overall view of the issue.

Keywords: agricultural co-operatives; Greek legislation; tax legislation.

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1) Introduction

The current economic trends demand the substantial development of collective economic actors under the umbrella of social economy. Agricultural co-operatives in Greece are long-lasting entrepreneurial forms having existed for more than 100 years within an official regulated environment. Of special interest is their tax legislative regime; its study reveals the attitude of the legislature as regards their establishment and function in general.

In this paper we have tried to collect and present the whole body of current Greek legislation as regards the taxation of agricultural co-operatives. At first we refer to their legal definition and the legal definitions of "surplus" and "profit" of an agricultural co-operative, while doing a historical reference to Greek legislation since the year 2000 focusing on financial and tax issues. Hence, we analyse the relevant tax legislation with an emphasis on the direct (without ignoring the indirect) taxation of co-operatives (and their members where necessary), while we attempt a comparison with the respective tax treatment of capital-oriented entities with an emphasis on Société anonyme (hence SA).[3] Finally, we present the incentives to form and function an agricultural co-operative in Greece and attempt a legal approach in the light of EU state aids legislation.

2) Definition – Basic Elements

According to article 1 of L. 4673/2020, agricultural co-operatives are autonomous voluntary associations of persons, which are formed in accordance with the provisions of this law (that is L. 4673/2020) and seek the economic development and promotion of their members, through a co-owned and democratically run agricultural co-operative enterprise.

Why are co-operatives an ideal form of business for farmers? At first, farmers, regardless of their production volume, are always small units compared to their trading partners. Thus, their bargaining power is very weak, if they act alone. On the other hand, agricultural markets are characterized by the existence of large buyers, who are in a relatively advantageous position vis-a-vis farmer. By creating co-operatives, farmers increase their bargaining power, when their production is to be marketed. They can achieve better prices for their products and meet the demands of buyers by gathering large quantities. They can also approach the market themselves by addressing more potential buyers, even if their farms are geographically dispersed.

[3]. It means anonymous company, it is a share capital entity and is roughly equivalent to public limited company in the United Kingdom and a public company in the United States.

Furthermore, farmers through their co-operatives can achieve more bargaining power to purchase their inputs (seeds, fertilizers, pesticides, machinery, etc.). A co-operative may more easily fund a research project to improve, e.g., its members' production methods, or market research to expand into new markets for its members' commodities. It may assist its members to adapt their crops to market needs and guarantee environmentally friendly cultivation methods and quality products. Last but not least, the co-operation and contact between the members create a quality way of life, promote the sociability of the members and strengthen the social ties that keep the agricultural communities united, while giving their members the opportunity to education, information and skills development (Szabo, 2006).

Co-operatives are *sui generis* private enterprises. It is this special nature that makes co-operatives a unique phenomenon. They differ from the other common commercial legal entities, because they combine an economic and a social facet in their activities (Fefes, 2020). It is wrong to ignore one or the other facets of a co-operative, because it will become either a for-profit enterprise or a charitable institution.

3) The evolution of legislation on Greek agricultural co-operatives

The first piece of Greek co-operative legislation was promulgated in 1914. This legal regime remained until 1979 having been amended several times. Since 1979, there have been seven laws concerning exclusively agricultural co-operatives. Apparently Greek legislation is very volatile as regards agricultural co-operatives amending their regime every now and then, with Law 4673/2020 being the most recent example (Fefes, 2020). In the present chapter we will examine the evolution of legislation since 2000.

a) Law 2810/2000

It is regarded as the best piece of co-operative legislation since 1979. It was a modern legal instrument covering in depth the organization and operation of agricultural co-operatives, while taking into account as its founding basis the internationally accepted co-operative principles as articulated by the ICA (Papageorgiou, 2015).

Article 1 provides the definition and states that "The agricultural co-operative is an autonomous association of persons formed voluntarily and seeks, with the mutual assistance of its members, their economic, social, and cultural development and promotion through a jointly-owned and democratically-controlled enterprise". Fisheries, livestock, poultry, beekeeping, sericulture, forestry, agritourism, agro-crafts, household and other co-operatives,

of any branch or activity of the agricultural economy are also considered agricultural co-operatives. The definition is almost identical to that of ICA.[4]

The law defined co-operatives as legal persons of private law having commercial identity, therefore provisions of Greek Commercial and Civil Codes had an auxiliary application. Co-operatives were organized at three levels (first-level co-operatives, Unions and Central). As to their establishment, there should exist at least ten founding members either individual farmers or other agricultural co-operatives. The members were either natural persons with full legal capacity, who were employed in any branch or activity of the agricultural economy, or another agricultural co-operative, if so provided for by the statutes, with no right to vote for the Board of Directors. As to the function of the co-operative, the statutes were to describe most of the relevant issues such as the aim of establishment and the activities of the co-operative, the terms of entry or expulsion or exit for members, the members' rights, obligations and liability, the sum of co-operative share etc.

The minimum co-operative capital was the amount of € 10,000. Each member participated with a mandatory share, indivisible and equal for all members and had one vote in the General Assembly. If so provided by the statutes, the members could acquire additional mandatory shares, depending on the volume of their transactions with the co-operative.[5] In such case, the statutes defined the additional votes corresponding to the additional shares, which could not exceed three votes in total for each member. The tax year was twelve months and there were procedures for closing the books and preparing the Balance Sheet. The Code of Books and Records (CBR) regulated the book- and account- keeping of the co-operative, while the co-operative was obliged to keep a Registry of Members, a Book of Minutes of the General Meeting and of the Board of Directors and any other book provided by its statutes.

A radical provision (an intersection of the law one might say) was the distinction between surplus and profit of a co-operative, in other words the introduction of the concept of surplus, as opposed to that of profit. The surpluses came from the transactions of the members with the co-operative. At least 10% of them were used for the formation of a legal reserve, while the rest might be distributed to the members in relation to the transactions of each member with the co-operative.[6]. Profits were all amounts in excess of the surplus, and came from the co-operative's transactions with third parties non-members. If the statutes

[4]. https://www.ica.coop/en/cooperatives/cooperative-identity.
[5]. The law defined the meaning of the transaction between co-operative and members as the total value of the products, supplies and services provided to the members by the co-operative.
[6]. Surpluses were considered as contributions of members to the co-operative.

provided that any additional mandatory or optional shares were to receive any reward from the surpluses or the profits or both, the relevant amounts were distributed as a priority, with the exception of the formation of the legal reserve. The final balance for the co-operative came after all kinds of expenses, depreciations and losses were deducted from the total gross income.

Co-operatives enjoyed certain tax benefits. For instance, the shares were not subject to tax or stamp duty or to any other charge in favor of a third party. Any deposits and withdrawals of the members to the co-operative, as well as the granting of loans by the co-operative to its members were exempt from stamp duties or other fees in favor of the State and from any contribution or right in favor of a third party. The surpluses to be distributed to the members were subject to income tax only at the members' level and not at the co-operative's level.

The Ministry of Agriculture exercised the administrative supervision of co-operatives of all levels in reference to their legal operation. Management control was exercised as in the case of SAs.

b) Law 4015/2011

This law was promulgated when Greece was in the middle of a time of economic turbulence and acclaimed by the then government as a landmark. Nevertheless, several of its provisions were violating the co-operative principles and the Greek Constitution, causing fierce criticism either by the literature (Papageorgiou, 2015, Fefes, 2020), or by other Greek actors (e.g., Economic and Social Committee). It was obvious that the legislature attempted to regulate as strictly as possible all co-operative issues leaving limited space to the initiative of the partners and their statutes under the pretense of the aim to avoid any phenomena of fraudulent behavior within co-operatives. It has to be mentioned that to this quest to identify potential fraud, for the first time the State control was extended not only to the legality of the co-operatives' actions but also the substantive reasoning of their expenditure.

The law created a Special Registry, wherein all agricultural co-operative collective entities should be registered and remain there as long as they were functioning. The reason for the new Registry was the closer and more effective state supervision. As mentioned above, the law envisaged the close surveillance of co-operatives and frequent involvement in their affairs.

In this spirit the law provided that at least twenty natural persons might form a co-operative. Other agricultural co-operatives might join a co-operative under strict conditions,

that is they could hold only one share each and up to the limit of 3% of the total shares held by natural persons. The minimum co-operative capital was set at the amount of € 30,000. The law provided for a number of incentives to create a co-operative, such as finance, investment, education, development etc.

As to the tax and financial incentives, it was provided that the statutes (or any of their amendments) were not subject to stamp duty or any other charge in favour of the State. The conversion o merger operations as well as enlistments at mortgage offices were also not subject to any fees. In addition, members' contributions were tax-free, and members' deposits, withdrawals, or loans with co-operatives were exempt from stamp duty or any other fee. As for the surpluses, the avoidance of double income taxation remained.

Goodwill arising from the sale of real estate owned by co-operatives was exempt from income tax, if the proceeds from the sale were to offset debts to the then Agricultural Bank of Greece SA, or went to social insurance funds, or to investment programs based on the respective business plan of the co-operative. Contracts between co-operatives and the State concerning agricultural products and other supplies were not subject to stamp duty or any other fee and charge in favour of the State. Any finance provided for in the law in favour of co-operatives was exempt from fees, other charges and contributions in favour of the State. There were also several VAT exemptions.

As a final remark, one should note that the law provided for an obligatory disposal of 80% of their members' production through the co-operative, while their financial viability should be documented based on their logistical data.

c) Law 4384/2016

The governmental change of 2015 led (as usual) to an abolishment of the former regime on agricultural co-operatives and the promulgation of the new Law 4384/2016. An agricultural co-operative was "an autonomous association of persons, which is formed voluntarily and seeks, with the mutual assistance and solidarity of its members their collective economic, social, cultural development and promotion, through a co-owned and democratically run enterprise",[7] with legal personality of private law and commercial identity, participating in any branch of rural activity with the exception of forestry.[8] It is interesting that for the first time a law on agricultural co-operatives included a clear legal distinction between "mixed" co-operatives and women co-operatives in Greece. The

[7]. The definition is in fact copying the standard definition met in previous legislation.
[8]. Forestry co-operatives were exempted from the provisions of Law 4384/2016 and are still regulated by the provisions of Law 4423/2016, articles 1 to 39.

provision has been criticized, since it created a clear discrimination based on gender (Fefes, 2020).[9]

At least twenty natural persons could form a co-operative. Other agricultural co-operatives or legal persons involved solely in the rural sector might join a co-operative, if so provided for in the statutes. Each member should participate in the co-operative capital with one compulsory share carrying one vote in the General Meeting. Members could, if provided for in the statutes, acquire one or more optional shares with no voting rights. The statutes might also provide for the entry of investor-members, natural or legal persons, not doing business with the co-operative. The investor-members would hold optional shares not carrying voting rights.

The statutes described the rights and obligations of the members. Nevertheless, the law imposed on the members to deliver not less than 80% of their production to the co-operative or buy their supplies by the co-operative at a percentage defined by the statutes. It also prohibited members from developing competitive activities outside the co-operative. Doing so would result in the expulsion of the violating member. Such provisions were rather problematic, since they essentially deprived the members to decide for themselves (Fefes, 2016).

State supervision was exercised by the Ministry of Agricultural Development and Food and the Special Registry remained in force, thus all co-operatives had an obligation to register and provide specific data each year therein, financial statements included. As to the financial management, the tax year lasted 12 months, while each tax year annual financial statements were prepared in accordance with specific legal provisions (Law 4308/2014), approved by the General Meeting together with the auditors' report, and published. The Board of Directors was obliged to prepare an income-expenditure budget for the next year, which should also be approved by the General Meeting.

The distinction between surplus and profit remained. At least 10% of the surplus (if any) should go to a legal reserve, and the rest could be either distributed to the members according to their volume of transactions with the co-operative, or be invested in the co-operative activities, or go to serve social needs or sustainable development actions. At least 2% of the surplus should go to education and training of members. If so decided by the

[9]. "Where restricting membership is a direct response to wider gender discrimination and disadvantage women face in society, restricting membership to women only does not breach this 1st Principle". The legislator's attitude clearly comprehends Greece as falling in the category of countries, which place women at a disadvantageous position. https://www.ica.coop/sites/default/files/publication-files/ica-guidance-notes-en-310629900.pdf, pp. 10-11.

General Assembly, the surplus to be distributed could remain in the co-operative's treasury as members' deposits bearing interest. As for the net profit (if any), it should go in the legal reserve, unless gone to serve social needs or sustainable development actions. As to the books to be kept and the economic and tax incentives, they remained the same as in the previous law.

d) Law 4673/2020

This law abolished Law 4384/2016 and was promulgated a little after the elections of 2019, which brought another governmental change in Greece. It is the current legal regime for agricultural co-operatives in Greece. As for its definition the law repeats in essence the previous one, i.e. agricultural co-operatives are "autonomous voluntary associations of persons, which are formed in accordance with the provisions of this law and seek the economic development and promotion of their members, through a co-owned and democratically run agricultural co-operative enterprise". Co-operatives participate in any branch or activity in the field of agricultural economy, with the exception of forest co-operatives and their associations. They are private law legal persons and have commercial identity.

The new law reduces the minimum number of founding members of a co-operative from at least twenty persons to ten or less than ten, if co-operatives are set up in mountainous areas or islands with less than 3,500 inhabitants. Members may be either natural or legal persons, which shall be either other agricultural co-operatives or legal persons participating in any branch or activity in the field of the agricultural economy. Each member holds one compulsory share and the minimum co-operative capital is set at the amount of € 10,000. Members, employees, investor-members or third persons may acquire optional shares not carrying voting rights.

The statutes may also provide for the entry of investor-members, natural or legal persons, not doing business with the co-operative. Nevertheless, the new law provides that investor-members may participate with more than one compulsory shares in the co-operative capital and each compulsory share corresponds to one vote under the condition that such shares and votes will not exceed 35% of the whole of compulsory shares and corresponding votes. This is a noteworthy change compared to the previous situation, which in fact indicates the wrong trend of the legislature to assimilate co-operatives and SAs in Greek market (Charitonidou, 2020, Fefes, 2020). This trend is also indicated by the facts that Law 4673/2020 provides for the supplementary application of the provisions of Law 4548/2018 on

SAs as regards matters not regulated by the law itself and the ability of co-operatives to give credits up to € 25,000 to each member.

The statutes described the rights and obligations of the members. Members are now obliged to deliver not less than 75% of their production to the co-operative or buy their supplies by the co-operative at a percentage defined by the statutes. As to the State supervision and the Books of the co-operative, the regime remains more or less the same. The Special Registry remains also in force as well as the tax incentives.

The same is valid for the economic provisions of the law. The tax year is 12 months, while each year annual financial statements are prepared in accordance with specific legal provisions (Law 4308/2014), approved by the General Meeting together with the auditors' report, and published. The Board of Directors prepares an income-expenditure budget for the next year, which is approved by the General Meeting.

The distinction between surplus and profit is a standard provision. At least 10% of the surplus goes to a legal reserve, and the statutes regulate the disposal of the remaining surplus (distribution to the members according to their volume of transactions with the co-operative, or formation of a special reserve). If so decided by the General Assembly, the surplus to be distributed may remain in the co-operative's treasury as members' time deposits bearing interest. As for the net profit, it goes in the special reserve, unless distributed to the members after a decision of the General Assembly.

Finally, the law preserves an entity called the Agricultural Corporate Partnership hence ACP), a hybrid company sharing features of both co-operatives and capital companies. Such a partnership has the legal form of SA or Limited Liability Company or Private Capital Company and does business in any branch or activity in the field of the agricultural economy. It is formed by agricultural co-operatives or other ACPs or other persons, its share capital is comprised of nominal shares and no partner will hold more than 20% of the share capital. Partners other than co-operatives or ACPs cannot hold more than 40% of the share capital and in the case the partners are less than five, no one may hold more than 50% of the share capital. As for the rest, an ACP is governed by the relevant legislation in respect to its legal form.

4) The notion of "surplus" and "profit" for agricultural co-operatives

In co-operatives, the total net income is the sum of the subtotal net income and the collected surplus income from investments in other companies. The subtotal net income is the

sum of surplus and profit and equals to the result obtained, if from the total gross income of the co-operative we deduct any kind of expenses, losses, asset depreciation and any interest paid to the optional shares (art. 26§1, L. 4673/2020).

According to the same article, the net result coming from the transactions of the co-operative with its members or the investor-members doing business with the co-operative is considered as surplus. On the other hand, the net result beyond surplus coming from the transactions of the co-operative with non-members third parties is considered as profit of the tax year.

The distinction between surplus and profit makes the fundamental difference between co-operatives and capital-based companies as regards their tax and accounting treatment. The surplus is not subject to income tax at the co-operative level, while the profit is subject to income tax (art. 26§10a). The remaining profit after tax expenses is either going to the legal reserve (art. 26§9a) or is distributed to the members after a decision of the GM. If distributed, the profit is taxed as members' income in the shape of dividends (art. 26§10b).

The notion of surplus springs from the overcharging of products and services that the co-operative offers to its members. If there was pricing at cost, there would be no surplus at all. The surplus may be divided to the members as a return connected to the volume of their transactions with the co-operative, or remain to the co-operative. Such surplus return must not be confused with dividend payments. A dividend is the entrepreneurial/investment reward for the entrepreneur/investor in commercial entities and comes from the profit, if any. Given such distinction, separate accounts are kept for the formation of surpluses and profits for tax purposes of keeping reserves, distributing surplus and distributing profits in co-operatives.

5) The tax treatment of agricultural co-operatives

a) The notion of "profit from business activity"

Though the generation of profit is an essential pursuit for an enterprise, this is not true for agricultural co-operatives. The element of profit is not an essential characteristic. However, co-operatives may generate profit through their activities. This profit is subject to income taxation rules. As an initial remark, it should be noted that the provisions on "Income Taxation" of Law 4172/2013 alongside the special provisions of Law 4673/2020 are applied on agricultural co-operatives.

Law 4172/2013 in art. 21 provides that profit from business activity (for all kinds of enterprises) is the total revenue/income coming from business transactions after the deduction

of the expenses, asset depreciation and provision for bad debts. As revenue/income is also considered any inflow from sale of assets as well as the outcome of the enterprise's liquidation during the tax year. Specifically, for the determination of income from agricultural business activity, the income from business transactions includes the income from the production of agricultural, poultry, livestock, forestry, logging and fishery products. Specifically, for those engaged in agricultural self-employment, in the determination of the profit from business activity are included only the basic aid as well as, in the amount exceeding twelve thousand (12,000) euros, the green and associated aid from the direct aids of Pillar I of the Common Agricultural Policy. Agricultural compensation as a whole is not included in the determination of profit from business activity.

Especially for entities of the Social and Solidarity Economy, a percentage of 35% of their profits before taxes is not considered a profit at all, if distributed to employees. The profit coming from business activity is determined for each tax year based on the profit and loss account, which is prepared according to the Accounting Standards provided in Greek legislation. In case the company applies International Accounting Standards, the profit is determined exclusively on a tax base.

b) Tax Rates

In the following section we present the tax treatment of surplus and profit and the income derived from them. Tax rates are different, depending on the type of income (surplus or profit) and on the person (natural of legal) that receives this taxable income, thus it is of great importance to categorize them case by case:

i) According to article 58§2 of Law 4172/2013 (as replaced by article 22 of Law 4646/2019), the profits of the agricultural co-operatives are taxed at a rate of 10% as from the tax year 2019 onwards. In Circular 1059/18.3.2015, it has been clarified that the term "agricultural co-operatives" includes associations of agricultural co-operatives, consortia of agricultural co-operatives, central co-operatives, as well as agricultural partnerships.

ii) The surpluses held and transferred to the regular or special reserve of the co-operatives are deemed to be an equal contribution of the members, and bear no tax at all (articles 26§10a and 27§1, Law 4673/2020).

iii) If any of the profits are distributed to the members, they are taxed separately as dividends and the tax rate is 5% (article 26§10b, Law 4273/2020 and article 24§1, Law 4646/2019).

iv) The surpluses returned to members-natural persons (whether professional farmers who deliver at least 75% of their production to the co-operative, or not professional farmers, but subject to the compulsory insurance scheme[10]) are included in the members' agricultural income. Agricultural income is subject to taxation, based on the following scale (article 27§2, Law 4273/2020 and article 15§1, Law 4172/2013 as amended by article 6, Law 4646/2019)[11]:

Income (in euro)	Tax rate (%)
0-10,000	9%
10,001-20,000	22%
20,001-30,000	28%
30,001-40,000	36%
40,001 -	44%

v) The surpluses returned to members - legal persons are considered part of their total income of their business activity and such total income is taxed in accordance with the provisions of article 27§2, Law 4273/2020 and article 58, Law 4172/2013 (as amended by article 22, Law 4646/2019). The tax rate stands at 24%. It is worth to note that the tax rate for the above legal entities from the tax year 2016 till 2019 was 29%, a fact that indicates the volatility of Greek tax legislation.

Finally, we should refer to the tax treatment of the co-operative's member's labour, be it voluntary or not. In article 8§4 of Law 4673/2020 it is stated that such labour is not to be considered as a dependent employment relationship and its monetary value is transferred, according to article 26§6 of Law 4673/2020, to the annual surplus of the relevant economic year and is taxed as analyzed above.

c) Advance Payment of Income Tax

The Greek Code of Tax Procedure provides that all persons, natural or legal, co-operatives included, have to file with the tax authority an income tax return declaration for each tax year. Such declaration is filed during the first semester of the following year. Based on this income tax return declaration, each person is obliged to pay in advance an amount equal to 100% of its income tax, that is it has to pay in essence twice the same amount. As

[10]. The Organisation of Agricultural Security (Greek acronym OGA) was the compulsory security fund for farmers and is replaced by the Electronic National Social Security Agency, which is now the single security agency for all Greeks.

[11]. A natural person not being a professional farmer does not enjoy the relevant income tax deductions.

said, such amount is an advance payment of the tax to be incurred the following year. When the accurate tax amount will be calculated, the advanced amount shall be offset. This percentage is reduced by 50% for three tax years for the newly-found enterprises, unless the new entity results from a merger or conversion of another legal entity.

Specifically for the tax year 2019, according to the Circular A.1186/2020, the tax amount to be paid in advance is reduced in respect to the rate of reduction of the annual turnover as reflected in the VAT return declaration[12] that refers to the 1st semester of 2020 compared to the 1st semester of 2019, as presented below:

Reduction of the annual turnover of first semester of 2020 compared to the first semester of 2019	Reduction of the rate of advance payment of income tax
≥ 5% - 15%	30%
15,01% - 25%	50%
25,01% - 35%	70%
>35%	100%

d) Profession Fee

Profession fee is a type of tax that is imposed on all professionals, natural and legal persons. It is supposed to be an "extraordinary" tax, which means that it will not be payable forever. The profession fee was introduced as a minimum tax to be paid by entrepreneurs and freelancers, who present small income amounts in their tax declaration. The tax was imposed in order to combat tax evasion, given that numerous taxpayers would be burdened with this specific tax. Agricultural co-operatives are exempted from such payment, according to Circular 1235/2018.

e) Financial Aids – Tax Incentives and Exemptions – EU Provisions

According to article 27 of Law 4673/2020, co-operatives are entitled to the following aids, incentives and exemptions:

• Members' contributions to agricultural co-operatives are not subject to tax or stamp duty or any other charge in favour of a third party.

• Co-operatives may be included in the development laws that are promulgated in Greece from time to time.

[12]. VAT return declaration is the statement containing the information necessary to establish the amount of VAT due to the Tax Authority.

• The mergers of co-operatives are exempted from the obligation to pay any kind of tax, fee, tax in favour of third parties, mortgage fees, Funds fees, notary rights and any other exemption provided that all legal requirements are met. The registration of such mergers to the Mortgage Offices and the Cadastral Offices is free of any charge. Furthermore, mergers are allowed, even if the provisions of Urban Planning Code has been violated.

• By joint decision of the Ministers of Finance, Development and Investment and Rural Development and Food, additional incentives may be set for the merger and development of co-operatives. The incentives refer to the investments, the development of the co-operatives, the recruitment and training of executives, the eligibility for assignment of projects and the encouragement of initiatives and activities for the benefit of their members.

• Provisions providing facilitations or exemptions from taxes, stamp duties or other public fees, levies or royalties in favour of any third party for mergers, acquisitions, business transfers, spin-offs, etc., apply, mutatis mutandis, to co-operatives, provided they meet the conditions laid down by the relevant provisions.

• Provisions establishing incentives or exemptions of economic, tax or other nature for the conversion of commercial companies into entities of another legal type, apply, mutatis mutandis, to co-operatives.

• Co-operatives, have access to the financial aid, tax exemptions and incentives of the current development laws and European Union programs, and to all development programs, which are announced by the Greek State or on its behalf and are financed from national and EU resources.

Do such provisions violate the EU state aids provisions? In Joined Cases C-78/08 to C-80/08, Paint Graphos[13] the EU Court faced, among others, the following preliminary questions:

"1) Are the tax benefits granted to co-operative societies, …, compatible with the rules on competition and, in particular, are they classifiable as State aid within the meaning of Article 87 EC, …?

2) In particular, for the purposes of determining whether the tax benefits at issue are classifiable as State aid, can those measures be regarded as proportionate in relation to the objectives assigned to cooperative societies; can the decision on proportionality take into consideration not only the individual measure but also the advantage conferred by the measures as a whole and the resulting distortion of competition?"

[13]. https://curia.europa.eu/juris/document/document.jsf?docid=109241&doclang=EN.

The Court stated that co-operative societies conform to particular operating principles which clearly distinguish them from other economic operators and both the European Union legislature and the Commission have highlighted those particular characteristics. In the light of those special characteristics, co-operative societies **cannot, in principle, be regarded as being in a comparable factual and legal situation to that of commercial companies** – provided, however, that they act in the economic interest of their members and their relations with members are not purely commercial but personal and individual, the members being actively involved in the running of the business and entitled to equitable distribution of the results of economic performance. Therefore, it is for the national courts to determine whether any tax exemptions are selective and whether they may be justified by the nature or general scheme of the national tax system of which they form part, by establishing in particular whether the co-operative societies at issue in the main proceedings are in fact in a comparable situation to that of other operators in the form of profit-making legal entities and, if so, whether the more advantageous tax treatment enjoyed by those co-operative societies, first, forms an inherent part of the essential principles of the tax system applicable in the Member State concerned and, second, complies with the principles of consistency and proportionality.

The specific case signals an important landmark in CEU case law as regards the nature of co-operatives and their tax treatment by national authorities.

f) Indirect taxation – Value Added Tax (VAT)

VAT is a general tax imposed on all activities of production and distribution of products and services. It is calculated gradually, based on the additional value that each product or service acquires at each stage of its production and distribution. This kind of tax is not paid in whole but in parts, as the tax payer, i.e., the enterprise that sells the product or provides the service, can deduct from the output VAT (the total VAT of the sold products) the input VAT (the total VAT of the raw materials and all the expenses needed for the production and distribution). VAT burdens the final consumer as a percentage of the final price of the product or the service, while the seller is obliged to collect and pay the VAT on behalf of the tax authority.

As for agricultural co-operatives, VAT is imposed on the agricultural products and agricultural services. Co-operatives are subject to VAT, according to art. 2 of Law 2859/2000, and the applicable VAT rate is 13%. Co-operatives, as all enterprises, are obliged to file VAT return declaration: i) for each calendar month, if they apply a double – entry method of bookkeeping and ii) for each calendar quarter, if they apply a single – entry

method of bookkeeping, until the last working day of the month following the end of the tax period, be it monthly or quarterly (article 38§4, Law 2859/2000).

g) Sales of products produced by members that are of the Special VAT Scheme through agricultural co-operatives

There are farmers that fall within a special VAT scheme regulated by article 41 of the VAT Code.[14] Since 2014 (pursuant to Law 4254/2014), agricultural co-operatives holding agricultural products on behalf of members falling under that special scheme, are obliged to impose VAT on the sales of such products. Following that, those members may apply for and receive a flat-rate refund of the paid VAT, based on the amount of their sales as reflected in the books of the co-operatives.

h) Intra-Community Deliveries of Agricultural Products and Exports

Since 1993, a new VAT control system was introduced to intra - community trade.[15] According to this system, intra-community deliveries (sales) of goods are exempted from VAT in the Member – State of delivery (shipment) when they are sold to a taxable person in another Member - State. VAT is paid at the State of arrival.

As a prerequisite of the above, any and all persons residing in a Member - State must be able to verify quickly and easily that their customers in another Member - State are taxable and have a valid VAT registration number for intracommunity trade. For this purpose, an electronic database is available to each national Tax Authority containing the VAT registry data of all national businesses that are taxable and have a valid VAT registration number, that is their VAT registration number, the date of issue, the company name, the address and, where applicable, the expiration date of the VAT registration number. Thus, an electronic VAT Information Exchange System (VIES) was set up and all Member - States of the EU (and Northern Ireland) are participating in. This system allows the exchange of information between the Members – States' authorities and businesses.

According to art. 28 of Law 2859/2000, when co-operatives with a valid VAT registration number for intracommunity trade sell their products to buyers in another Member – State, they are exempted from VAT payment. We should note that the said provision does not apply for goods sold by individual farmers of the special VAT scheme.

When co-operatives sell products to a buyer residing in a non – Member – State, they are exempted from VAT payment, if the following conditions are met:

[14]. Farmers of the special VAT scheme are those who sell products or provide services, whose total value is less than 15,000 euros or those who have received subsidies less than 5,000 euros.
[15]. https://www.taxexperts.gr.

a) There is a Customs Export Document that indicates the VAT identity number of the exporter,

b) there is an invoice that bears the indication "exemption from VAT pursuant to art. 24 of Law 2859/2000",

c) there is documented proof of the exportation of the goods from EU territory and

d) there is a full payment of the total sum of the invoice through a banking institution.

6) Agricultural co-operatives tax treatment compared to capital-based companies

The comparison between the two entrepreneurial vehicles makes clear the importance of the distinction between surplus and profit for co-operatives. Such distinction differentiates the logistical results forming an important factor for further development of co-operatives.

At first, the part of the total annual revenue that forms the surplus remains tax-free, while the part of the total annual revenue that forms the profit is taxed at a rate of 10%. In contrast, in capital companies there is profit and it is taxed at a rate of 24%.

Secondly, the surplus returned to the members - natural persons (members or investor-members, who hold either mandatory or optional shares entitled to surplus, if so provided in the statutes) is income from agricultural activity and it is taxed according to the rates mentioned in the section above. Conversely, in companies of limited liability, there is no such possibility.

Thirdly, the surplus returned to the members - legal entities (members or investor-members, who hold either mandatory or optional shares entitled to surpluses, if so provided in the statutes) is income from business activity and it is taxed at a rate of 24%, while, as above, there is no such possibility for capital companies.

Fourthly, whenever the statutes provide for the distribution of profits to members, they are taxed as dividends, i.e., they have the same treatment as in the case of the distribution of profits to capital companies. The tax rate on dividends is 5%.

Finally, a tax advance payment is provided for both co-operatives and capital enterprises, while the co-operatives, in contrast to the capital companies, are exempt from the payment of the profession fee.

7) A Brief Critique

It is important to underline that the viable functioning of agricultural co-operatives should be a matter of priority for all Greek governments over time. Within this scope, special

attention should be given to any and all investments from the members through their agricultural co-operatives. Having this in mind, even if we accept that the new Law 4673/2020 achieves a "tidying up" and a simplification of administrative procedures (e.g., setting up, operation and management) of agricultural co-operatives, making them more "investment attractive", this is not the case for tax issues.

The current Law (and more generally the legal tax regime) insists on a tax treatment, which remains to a great extent extremely complex and ineffective. What we need is a stable tax environment and fair tax rates, so that co-operatives shall become an attractive entrepreneurial model for farmers and the agricultural sector as a whole shall become more competitive leading to more investments and increased entrepreneurship. However, instead of adopting a simple, fair and stable tax system, which would encourage co-operation among farmers, in Greece we have a different approach.

Somewhat more specifically, in regard with direct taxation, although there is a low tax rate for the profits of agricultural co-operatives, this fact does not constitute a preferential treatment or an advantageous factor, given that the essence of co-operative activity does not focus on profit creation but on the provision of services to its members. On the other hand, the surplus returned to the members is taxed at a high rate, while the tax should be lowered in order to act as an incentive for the members to market the totality of their production through their co-operative or to invest in their co-operative.

As regards the Advance Payment of Income Tax, we strongly believe that agricultural co-operatives should be exempted from such a scheme, just as they are already exempted from payment of the profession fee. Finally, we suggest that VAT should also be decreased to the lower rate of 6%, as agricultural products are essential for all consumers. Furthermore, decreasing VAT would make the agricultural sector more attractive for further investments meaning a dynamic impact in the social, economic and technological aspects within co-operives.

8) Summing up

We have tried to sketch the tax treatment of agricultural co-operatives in Greece. It is apparent that in several cases the legislation is complex and tricky. Moreover, the almost constant amendments of both the legislation on agricultural co-operatives and the tax legislation creates a number of impediments for their development and consolidation in the economic life of Greece. Nevertheless, one should point out that there is a shift since 2016,

which clearly stems from the need for harmonization with EU requirements. Let us hope that the recent tax incentives may motivate farmers to view membership in co-operatives as an advantage and do business through their co-operatives, even if the tax environment seems unstable and problematic for the average co-operative businessman-farmer.

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CRITICAL PROFILES OF THE TREATMENT OF SOCIAL COOPERATIVES IN THE ITALIAN TAX SYSTEM

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Abstract

Under Italian law, social cooperatives governed by Law no. 381 of 8 November 1991 benefit from particularly advantageous fiscal rules, which have been specifically conceived in accordance with that provision's "mutualistic" purpose. The reform of the third sector also introduced rules on social cooperatives. Specifically, such entities are classified as social enterprises ope legis and are also referred to as third sector entities. However, it is not clear whether that classification will have any consequences for the tax regime applicable to them. The aim of this paper is first and foremost to verify whether any aspects of the legislation on social cooperatives, including provisions on tax, have been affected by the reform mentioned above, and if so which ones. Secondly it will also seek to establish whether the tax regime applicable to social cooperatives is consistent with the role performed by them within the third sector.

1. Introduction

The social cooperative has always been regarded as the *trait d'union* between the world of enterprises (albeit in cooperative form) and that of non-profit organisations. Indeed, from the time it was first introduced into Italian law, it has been defined within authoritative commentaries in the literature as the primordial form of the social enterprise.[1]

In redrawing the limits to the overall domain of non-profit entities, the reform of the third sector laid down by Legislative Decree no. 117/2017 (hereafter, the Third Sector Code or TSC) and Legislative Decree no. 112/2017 on social enterprises[2] also made provision in relation to social cooperatives (hereafter SC). In particular SC – which were already regarded *ex lege* as non-profit social utility organisations (hence the Italian acronym "Onlus" [*organizzazioni non lucrative di utilità sociale*])[3] – are not only classified as a "social enterprise *ope legis*" but are also designated as third sector entities. These are private entities that have been established in order to pursue "civic, solidarity and social utility purpose[s] without any profit motivation" by "carrying out, either exclusively or on a predominant basis, any activity or activities of general interest through voluntary action or the provision without consideration of cash, goods or services, mutual action, or the production or exchange of

[1] Cf. Fici A., *Impresa sociale* (entry), in *Dig. disc. priv., Sez. civ., agg.*, Turin, 2007, 12 et seq., 13.

[2] Those decrees were issued in order to implement Law no. 106 of 6 June 2016, by which Parliament granted authority to the Government to regulate the overall non-profit sector from a private law and tax law perspective with the specific purpose, "giving effect to Articles 2, 3, 18 and 118(4) of the Constitution", of sustaining private initiatives aimed at satisfying essential public interests and realising objectives guaranteed under the Constitution.

[3] According to the combined provisions of Articles 102(2) and 104(2) of the TSC, the tax classification of Onlus will be revoked with effect from the tax period following that in which the new tax provisions laid down in Title X of the TSC enters into force. During the transition period, an entity included in the register of Onlus may continue to apply the tax provisions laid down by Legislative Decree no. 460 of 1997, provided that it fulfils the formal and substantive prerequisites specified in that Decree.

goods or services, provided that the entity has been included in the single national register for the third sector".[4]

However, it is not clear whether that classification, which appears to be consistent with the role that SC have performed within the Italian economic and social fabric, and in particular, from 2008 onwards, within welfare policy,[5] will have any consequences for the tax regime applicable to them. In fact, in contrast to the previous legislation laid down in Legislative Decree no. 155/2006, Legislative Decree no. 112/2017 on the "new" social enterprise introduced a specific tax regime[6] for entities with the status of social enterprise.[7]

This paper is intended first and foremost to verify whether any aspects of the legislation on social cooperatives, *including* provisions on tax, have been affected by the reform mentioned above and, if so, which; and secondly, to establish whether the tax regime applicable to SC is consistent with the role performed by them within the third sector. With this in mind, it is necessary to start by identifying the defining characteristics of SC from a private law perspective, with reference to which they have been granted "favourable" tax status since the outset.

2. The characteristics of social cooperatives

The institute of the social cooperative was established in the Italian legal system by Law no. 381 of 8 November 1991. This Law is regarded as a precursor for a line of legislation which, over the past thirty years, has pursued the purpose of promoting organisations active in sectors considered to be of "general interest".[8] This has culminated most recently in the reform of the third sector and, insofar as relevant for our present purposes, in the classification of SC as third sector entities (hereafter TSE) as social enterprise *ope legis*.

The enactment of Law no. 381 was a key development since, in making provision for SCs, the law recognised for the first time the compatibility of corporate status with a purpose rooted in solidarity,[9] or a purpose that is neither dictated by profit nor mutual.

The distinguishing feature of this institute compared to the model of a cooperative company provided for under the Civil Code is in fact the purpose that it pursues. The purpose of such an entity is not "mutual" in a strict sense (i.e. service management for the members), but consists in the pursuit of the "general interest of the community in human promotion and the social integration of citizens".[10] The law expressly provides that this interest must be

[4] Cf. Article 1(1) of Law no. 106 of 6 June 2016 and Article 4 of Legislative Decree no. 117/2017.
[5] Cf. Bancone V., *Le cooperative sociali, al tempo del Coronavirus, meritano dignità*, in *Cooperative e enti non profit*, 2020, 5, 13 et seq.
[6] This tax regime has not yet entered into force, pending authorisation by the European Commission pursuant to Article 108(3) TFEU.
[7] Eligibility for the regime is specifically granted to all private entities (including those established in partnership form) and moreover the "nature" whether commercial or not) of the activity carried out that generates income is immaterial for the purpose of taxation.
[8] Cf. Marasà G., *Imprese sociali, altri enti del terzo settore, società benefit*, Turin, 2019, 81.
[9] Cf. Martinelli L. - Lepri S., *Le cooperative sociali*, Milan 1997, 17 et seq, who define social cooperatives as an initial typical codified form of social enterprise.
[10] On this point see Court of Cassation, Employment Division, judgment no. 8916 of 11 May 2004 in which the court – relying on the fact that the notion of cooperative mutuality must ordinarily be deemed to include also "*external mutuality*", that is a form of mutuality "*che trascende (...) gli interessi immediati dei soci*" – argues that social cooperatives on the one hand "*perseguono, al pari di ogni altra società cooperativa, lo scopo mutualistico*", although

realised alternatively[11] through: a) the "management of social, health and educational services", the scope of which activities was clarified within the context of the reform of the third sector, and include for example "non-school education aimed at preventing school dropout, achieving success within school and training, preventing bullying and combatting educational poverty"[12] (known as "type A" cooperatives); b) the conduct of various activities (agricultural, industrial, commercial or services) aimed at job promotion for disadvantaged persons as defined under Article 4 of Law no. 381 (known as "type B" cooperatives).

In particular, the legislation identifies two different models for social cooperatives which, whilst sharing the same institutional purpose and whilst being regulated in part by the same core legislation,[13] differ in functional and structural terms owing to the differences between their social objects.[14]

SC from type A are considered to be more distant from the standard civil law model as they may in some cases entirely lack a mutual purpose. According to the prevailing interpretation, since the recipients of health and social services are not identified by the law, which refers to the category of "members", they may be – even exclusively – non-members.[15]

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on the other hand "*perseguono o concorrono a perseguire … l'interesse generale della comunità alla promozione umana e all'integrazione sociale dei cittadini*". See for the same argument Court of Cassation, judgment no. 17252 of 27 June 2019, holding that "*la cooperativa sociale è una società a mutualità prevalente, ossia che svolge la sua attività soprattutto con il lavoro e i beni dei soci e a favore soprattutto dei soci. Lo scopo quindi è quello della solidarietà sociale e per questo hanno diritto alle agevolazioni fiscali previste dalla legge*". This thesis is criticised by Salamone L., *Cooperative sociali e impresa mutualistica*, in *Riv. soc.*, 2007, 2-3, 500, who argues that "*la formula 'mutualità esterna' − nell'accezione e nell'uso argomentativo della Cassazione − è del tutto vuota di significato*". According to the author, "le cooperative sociali seguono *tanto il modello organizzativo quanto il modello funzionale della cooperativa del codice civile".* It is argued that the SC is "*una impresa mutualistica esercitata in forma di società cooperativa, poiché sia le cooperative comuni sia le cooperative sociali hanno per scopo la gestione di una impresa con programma mutualistico*"; the values of social inclusion − which enter into play as special criteria for managing the undertaking − constitute *the political basis justifying beneficial status for tax purposes (Article 7 l. 381/1991; Article 111*-septies *of the Provisions implementing the Civil Code and Transitory Provisions) as well as for social security purposes (Article 2(3) and Article 4(3) of Law 381 of 1991)*; and finally that "*la 'mutualità esterna' delle cooperative sociali, per usare la formula enfatica della Cassazione, vale a dire la utilità che i non soci possono ritrarre dall'attuazione del rapporto sociale in una società cooperativa, resta estranea al codice civile e guarda, al vertice, all'art. 45 Cost.; esattamente come vi guarda il sistema dei fondi mutualistici per la promozione e lo sviluppo della cooperazione, istituito dalla l. 59/1992*".

[11] It has been provided that social cooperatives may only operate in one of the following sectors. This rule does not apply in the event that the two activities are functionally related to each other; in such cases however, it is necessary to report the accounts relating to the two activities separately in the financial statements. Cf. Employment Ministry circular no. 153 of 8 November 1996.

[12] Cf. Article 17(1) of Legislative Decree no. 112/2017, which provides that social, health and educational services also include those (activities) of general interest provided for under Article 2(1)(a), (b), (c), (d), (l) and (p) of Legislative Decree no. 112/2017. That amendment has formally expanded the scope of the activities that may be carried out by type A cooperatives. Specifically, it amounts to an "update" of those activities in order to take account of the evolution of activities involving the provision of social, health and educational services. On the other hand, the operational scope of type A cooperatives was expanded under previous special legislation, for example in the area of social agriculture (Article 2(4) of Law no. 141 of 2015) as well as on the re-purposing of assets confiscated from organised criminals, which may be allocated to social cooperatives according to Article 48 of Law no. 159 of 2011.

[13] This core is comprised in part of the provisions of the Civil Code, which are applicable to all SC as entities from the cooperative genus, and in part of the special provisions enacted by Law no. 381 and the implementing regional legislation.

[14] Cf. Bano F., *Cooperative sociali* (entry), in *Dig. disc. priv., sez. comm.*, IV, Turin, 2000.

[15] On this point it has been noted in the literature that "*la legge nulla dice circa i destinatari dei servizi, ma deve ad ogni modo ritenersi che le cooperative si rivolgano, in linea di massima, a soggetti terzi*". Cf. Bano F., *Cooperative sociale* (entry), cit., who also points out that this aspect has called into question the mutual purpose of SC and the equivalence granted to cooperatives the purpose of which is to satisfy the special needs of non-members. According to the author by contrast, the special characteristic of SC consists in the "*tipizzazione legale di finalità altruistiche quale componente essenziale, ancorché non esclusiva, della causa del contratto. In questo senso si parla spesso delle c.s. come di 'imprese sociali' ove la buona gestione ed il profitto non rappresentano il fine, bensì la condizione per massimizzare l'utilità sociale*".

On the other hand, type B cooperatives are similar to production and labour cooperatives, except as regards the obligation to promote the entry of disadvantaged persons into the world of employment. In fact, they may carry out any type of activity whatsoever (and thus may be agricultural, craft, industrial or commercial), provided that the "disadvantaged persons" (for example, former prison inmates or former drug addicts, disabled persons, persons suffering from psychiatric illness, etc.)[16] account for at least 30% of the cooperative's workers. In actual fact however, type B cooperatives may also operate for the benefit of non-members, albeit to a lesser extent, since the "disadvantaged persons" who benefit from the activity carried out must also be members of the cooperative only where compatible with their individual status (i.e., essentially, where they are of sound mind).[17] Effectively some of those who benefit from the activities carried out may not be members[18].

Owing to the possibility of conducting activities for the benefit of non-members, there were initial doubts as to the legitimacy of this type of cooperative, in particular in relation to type A cooperatives, due to the absence of any mutual purpose.

Those doubts proved to be clearly unfounded since, as has been pointed out in the literature, the social function of cooperatives, which is recognised and protected first and foremost by Article 45 of the Constitution,[19] "may prove to be even greater where the cooperative is designed in order to pursue the general interest of the community".[20]

Proof of this can be found in the fact that, since the reform of the Civil Code in 2003, SC have been regarded as equivalent to cooperatives that operate predominantly for the benefit of their members (known as "predominantly mutual cooperatives", hereafter PMC). As a result, they have been considered eligible for the tax benefits provided for in relation to PMC. This is the case in particular under Article 111-*septies* of the Provisions implementing the Civil Code, according to which – subject to compliance with the requirements laid down by Law no. 381 of 1991 – social cooperatives are considered to be PMC irrespective of the prerequisites stipulated under Articles 2512 and 2513 of the Civil Code.[21] In other words,

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[16] On this point see Marasà G., *Cooperative e ONLUS*, in *Studium iuris*, 1998, II, 913, especially 919, who argues that, whilst type A cooperatives are "*vere e proprie cooperative di solidarietà sociale che ... producono servizi (socio-sanitari ed educativi) destinati a soggetti diversi dai cooperatori al fine di realizzare l'interesse generale della comunità*", the latter pursue "*l'obiettivo ..., tipicamente mutualistico, di favorire le occasioni di lavoro per particolari soggetti, cioè persone svantaggiate*" and can essentially be classified under the category of production and labour cooperatives. Owing to these characteristics, the "*realizzazione di qualsiasi finalità economica da parte dei cooperatori*" must be excluded for the former, whereas it is possible to envisage some remuneration, subject to pre-determined limits, on the capital of the latter.

[17] Cf. Pepe F., *La fiscalità delle cooperative. Riparto dei carichi pubblici e scopo mutualistico*, Milan, 2009, 255 et seq; Id., *Note in tema di società cooperative, cooperative sociali e regime fiscale Onlus (con cenni alla neonata "impresa sociale")*, in *Riv. dir. trib.*, 2007, I, 827 et seq, especially 838, where the author clarifies that "*il secondo modello di SC prescinde dalla gestione mutualistica del rapporto di lavoro, ben potendo sussistere una SC che assume esclusivamente persone svantaggiate-non socie, senza per questo perdere tale qualifica"*, since *"non necessariamente, ..., essi debbono essere soci della cooperativa, ma solo ove ciò sia compatibile con il loro status psico-fisico*".

[18] To sum up, whereas the class of persons who benefit from the activities of type A cooperatives may be comprised entirely of non-members, this cannot be the case for type B cooperatives.

[19] It should be recalled that this provision "*riconosce la funzione sociale della cooperazione a carattere di mutualità e senza fini di speculazione privata*" and reserves the task of promoting and favouring it to ordinary legislation.

[20] See Fici A., *Funzione e modelli di disciplina dell'impresa sociale in prospettiva comparata*, in *Jus civile*, 2015, 9, 473 et seq, especially 498, who argues that "*Chi a quel tempo in Italia cercava una forma giuridica per l'impresa sociale poté dunque facilmente rintracciarla nella forma cooperativa, di cui solo andava modificato legislativamente lo scopo*".

[21] This is not the only exception to the rule according to which a prerequisite for classification as a predominantly mutual cooperative is that activities must be carried out predominantly for members in accordance with Articles 2512 and 2513 of the Civil Code This also applies for agricultural cooperatives (Articles 2513(3) of the Civil Code and Article 111-septies of the Provisions implementing the Civil Code), for cooperative lending banks (Articles 28(2-bis)

they have this status irrespective of whether they in actual fact operate predominantly for the benefit of their members as required under those provisions[22] or not. The reasons for the result of this provision may be identified, on the one hand, in their specific structural characteristics[23] and, on the other hand, in the purposes pursued through the conduct of the predominant activity.[24]

Moreover, further definitive confirmation of the social function inherent to SC may be found within the reform of the third sector. On that occasion, lawmakers in fact provided, first of all (i.e. in Legislative Decree no. 112/2017), that "social cooperatives and their consortia … shall have *as of right* the status of social enterprises",[25] and secondly (i.e. in TSC) that they form part of the third sector and therefore must be included in the single national register (abbreviated in Italian to RUN [*registro unico nazionale*]) in the section for "social enterprises".[26]

This reform did not actually entail any substantive change to the characteristics typical of SC since, under this legislation, social cooperatives *only* qualify as social enterprises *ope legis* upon condition that they respect the specific legislation set forth in Law no. 381; it is not therefore necessary to verify whether the essential prerequisites for acquiring that status are fulfilled by them, as by contrast occurs for all other types of bodies.

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and 150-bis(4) of the Consolidated Finance Act) and for agricultural consortia. Lawmakers have moreover provided for the power of ministers to allow exceptions from the criteria of predominance laid down by Article 2513 of the Civil Code (Article 111-undecies of the Provisions implementing the Civil Code). This legislative choice has been criticised by Marasà G., *L'odierno significato della mutualità prevalente nelle cooperative,* in *Giurisprudenza commerciale,* 2013, 5, 847, according to whom "*In sintesi, quello che avrebbe dovuto essere uno degli obiettivi qualificanti della riforma, cioè restringere l'ambito di applicazione delle agevolazioni fiscali, subordinandole non più, come in passato, alla presenza delle sole clausole statutarie 'antilucrative' ma anche ad una verifica in punto di fatto, di un adeguato livello di mutualità, inteso come gestione dell'impresa prevalentemente in direzione dei soci, è stato parzialmente svuotato di significato nello stesso momento in cui è stato introdotto e ciò a causa della previsione di numerose eccezioni*".

[22] However, this is without prejudice to the requirement to include within its articles of association the clauses provided for under Article 2514 CC (the overall purpose of which is to establish a profit distribution constraint). These clauses include a prohibition on the distribution of reserves amongst the cooperative members as well as the duty to distribute all of the cooperative's assets to mutual funds for the promotion and development of cooperation in the event that the cooperative is wound up. In addition, Article 2514 CC provides that the articles of association must include a prohibition on the distribution of dividends in an amount exceeding the maximum interest rate on interest-bearing postal savings bonds, increased by two and a half percentage points, on the capital actually paid up as well as a prohibition on remunerating financial instruments subscribed to by cooperative members by more than two points in excess of the maximum limit stipulated for dividends.

[23] Cf. the report on the Legislative Decree no. 6/2003, which asserts that, since the structure of SC may differ from the protected model generically construed by virtue of the way in which the prerequisite of predominance applies under it, there is a need for their classification to be established by law, as is the case for PMC.

[24] On this point, see Fici A., *Cooperative sociali e riforma del diritto societario,* in *Riv. dir. priv.*, 2004, 75 et seq spec. 79 et seq, who argues that, in enacting this provision, the lawmakers adopting the reform embraced the notion of the SC as a "special" cooperative that is profoundly different from the civil law model as it is no longer directed at the members as such, but rather at a particular category of persons. The author states in particular that, in contrast to ordinary cooperatives, SC are causally characterised by "external" mutuality and that this special feature of theirs, which operates on a causal level, has established a specific legitimation for SC on a normative level , which would not otherwise be admissible under the provisions contained in the Code. On the meaning of the provision under examination see also Marasà G., *L'odierno significato della mutualità prevalente nelle cooperative,* cit., 850, who stresses that, as a result of that provision, this classification also applies to social cooperatives provided for under Article 1(1)(a) of Law no. 381 of 1991, which do not manage any services for the benefit of members but rather provide social, health and educational services for non-members.

[25] See Article 1(4) of Law no. 112/2017.

[26] Specifically the TSC refers to SC first and foremost in Article 4)(1) and Article 46(1)(d) in order to clarify what can already be inferred from their status as social enterprises.

More specifically, according to the majority doctrine, by virtue of this rule the social cooperative should not be regarded as equivalent to a social enterprise.[27] Thus, all SC should *automatically*, as such, also have the status of social enterprises.[28]

This thesis appears to be supported by the implementing provisions contained in the Ministerial Decree of 16 March 2018, Article 3 of which provides that "*social cooperatives and their consortia pursuant to Article 1(4) of Legislative Decree no. 112 of 2017 shall have as of right the status of social enterprises by the exchange of data between the register of social cooperatives and the register of companies*". Essentially, on account of that provision, all social cooperatives included in the register of cooperatives are thus entered *ex officio* into the special section of the register of companies reserved for social enterprises, without having to wait for the entity to state its intention to avail itself of the new provisions.

However, as has been noted in some particularly sharp analysis within the literature, if the provision under examination is interpreted in this manner, it means that this status is not acquired "as of right" but rather "as an obligation".[29] It has been argued that this interpretation is at odds with the "promotional", as opposed to "authoritative", nature of the provisions governing social enterprises, and more generally the wider law on TSE.[30] Based on these observations, it would perhaps have been more appropriate to subject the acquisition of status as a social enterprise to the presentation by the SC of an application for inclusion in the RUN in the section intended for social enterprises.[31] This is because such registration now has the effect of establishing classification as a third sector body.

Leaving aside these considerations, it is clear that the reform has consolidated, and in some respects "expanded", the favourable treatment of social cooperatives that had been provided for in the past, *inter alia*, within the provisions on Onlus and social enterprises.

Legislative Decree no. 460/97 laid down the tax rules applicable to Onlus – in an analogous manner to Legislative Decree no. 112. Specifically, it foresaw that Onlus are "automatically" be classified as SC (Article 10(8) providing that "The social cooperatives

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[27] See Cusa E., *Le cooperative sociali come imprese sociali di diritto*, *Studio del Notariato 205-2018/I*, 2 et seq., in https://www.notariato.it.

[28] See further Fici A., *La nuova impresa sociale*, in *La riforma del terzo settore e dell'impresa sociale,* edited by Fici, Naples, 2018, 343 et seq, spec. 354 where the author asserts that there is no requirement in relation to social cooperatives for "*un'apposita iscrizione al RUN, poichè i relativi dati transiteranno verso quest'ultimo registro dal registro delle imprese presso il quale, in quanto società cooperative, sono tenute ad iscriversi*", also stressing that this provision is "*in linea con quanto previsto nella legge delega*" and in particular that it was the "*intenzioni del legislatore delegante che ha voluto migliorare la situazione delle cooperative sociale rispetto alla previsione di cui all'Article 17, comma 3, dell' abrogato Legislative Decree 155/2006 che riservava 'di diritto' la qualifica di imprese sociali alle sole cooperative sociali che osservassero le disposizioni … sull'obbligo di redazione del bilancio sociale e sul coinvolgimento di lavoratori e destinatari dell'attività*".

[29] See Marasà G., *Imprese sociali, altri enti del terzo settore, società benefit*, cit., 87-88, who argues that the opposite interpretation is not supported by the literal wording of the law.

[30] Cf. De Giorgi M.V., *Note introduttive*, in *La nuova disciplina dell'impresa sociale, Commentario al d.lgs. 24 Marzo 2006, n. 155*, edited by De Giorgi M.V., Milan, 2007, 2 et seq. According to the author, the most important characteristic of the legislation enacted in order to provide support for cooperatives is "*l'assenza di carattere autoritativo, nel senso che la condotta non è imposta ma suggerita: ciò che qualifica la legislazione promozionale è la libertà di rinunziare all' utilizzazione della norma senza subire conseguenze civili penali o amministrative*".

[31] See further Marasà G., *op. ult. loc. cit.*, who argues that "*la richiesta dell'iscrizione si configura per gli enti che aspirano alla qualifica come un onere dal cui assolvimento dipende, qualora l'iscrizione sia conseguita, la possibilità per l'ente di fruire della disciplina di favore che discende dalla qualifica di ente del terzo settore*". According to the author, Article 1(4) does not permit "*una conclusione diversa per le sole cooperative sociali ma avrebbe soltanto il significato di esonerare le cooperative sociali da quella verifica in ordine alla sussistenza dei requisiti di qualificazione propri delle imprese sociali, cui sono invece sottoposti tutti gli altri enti*".

provided for under Law no. 381 of 8 November 1991 … shall *under all circumstances* have the status of Onlus, having regard to their structure and purposes"[32]), although the effects were relevant exclusively for tax purposes.

On the other hand, Legislative Decree no. 155/2006 (which, as mentioned above, regulated social enterprises) did not enable SC to acquire that *status* automatically, although it did allow it subject to conditions that were less onerous compared to those applied to other bodies. Specifically, it subjected the acquisition of that status solely to two prerequisites, both of which pertained to the issue of the corporate social responsibility. In particular, the charters of social cooperatives had to provide both for the preparation of social accounts and the filing of those accounts with the register of companies (Article 10(2)) as well as the "involvement" of workers and beneficiaries of activities (Article 12(2)).

In keeping with the guidelines laid down by the parent statute, the provisions contained in Legislative Decree no. 112/2017 are thus more favourable for SC, as these last-mentioned conditions would appear to be no longer applicable.[33] It should be reiterated that, as a result of the amendment, the acquisition by SC of the status of a social enterprise is not conditional upon the fulfilment of any obligation, including those relating to the object and purpose of the social enterprise. In particular, the scope of permitted activities remains that set out by Article 1 of Law no. 381 (as amended by Legislative Decree no. 112) and under other special legislation,[34] and as a result only overlaps in part with the scope of the activities of general interest listed in Article 2 of Legislative Decree no. 112, which must as a general rule be conducted by entities that wish to acquire the status of social enterprise.[35] As regards the purpose, or rather the absence of the purpose of distributing profits, the provisions of Article 2514 of the Civil Code that are applicable for social cooperatives are essentially equivalent to those laid down by Article 3 of Legislative Decree 112 for IS, and only differ in marginal respects. However, this does not imply that the conduct of a social enterprise in the form of an SC is entirely equivalent to the conduct of the same enterprise according to a different corporate structure. In fact, as a result of the refund mechanism provided for under Article 2545-*sexies* of the Civil Code, the pecuniary benefits for members of SC may nonetheless be greater than those obtained by the members of other types of social enterprise, including the members of cooperatives other than SC. This is because these cooperatives should not be subject to the provisions laid down by Article 3(2-*bis*) of Legislative Decree no. 112, which expressly provides that the prohibition on distribution does not apply to distributions to members *only* of refunds resulting from the conduct of activities of general interest as well as from the part of activities that has been conducted on a mutual basis.[36] Essentially, in contrast

[32] There was not even any requirement to register in the single register of ONLUS in order for ONLUS to qualify as SC.
[33] In fact, doubts remain as to whether there is an requirement to draw up social accounts.
[34] See note 5.
[35] Cf. Article 1(4), second paragraph, of Legislative Decree 112 of 2017, which expressly provides that the provisions on SC are without prejudice to "*l'ambito delle attività di cui all'articolo 1 della citata legge n. 381 del 1991, come modificato ai sensi dell'Article 17, comma 1*".
[36] Cf. Article 3(2-bis) of Legislative Decree 112/2017, which was introduced by Legislative Decree no. 95/2018 provides that "*non si considera distribuzione, neanche indiretta, di utili ed avanzi di gestione la ripartizione ai soci di ristorni correlati ad attività di interesse generale di cui all'articolo 2, effettuata ai sensi dell'art. 2545-sexies del codice civile e nel rispetto di condizioni e limiti stabiliti dalla legge o dallo statuto, da imprese sociali costituite in forma di società cooperativa, a condizione che lo statuto o l'atto costitutivo indichi i criteri di ripartizione dei*

to the rule laid down by paragraph 2-*bis* for other social enterprises operating in cooperative form, social cooperatives may distribute refunds pursuant to Article 2545-*sexies* without being subject to any further limitation.[37]

That conclusion is supported by the provision that Legislative Decree no. 112 is applicable to SC "subject to the specific legislation on cooperatives and insofar as compatible".[38]

In enacting that provision, lawmakers appear in fact to have established a kind of hierarchy between sources that are valid only for SC. At its apex stands Law no. 381/1991, which without doubt prevails over Legislative Decree no. 112/2017, as is confirmed by Article 40(2) TSC.[39] In view of the literal wording of the provision, and in particular the reference to the legislation on cooperatives, second place in that hierarchy is taken by the legislation common to predominantly mutual cooperatives (which is largely contained in the Civil Code). This is followed in third place by the provisions on social enterprises in Legislative Decree 112. The application of the above legislation is moreover subject to the precondition that the rules provided for thereunder must not be incompatible either with those contained in Law no. 381 or with those laid down by the Civil Code. Accordingly, the legislation is *de facto* applicable only as regards those aspects that are not foreseen under the law on cooperatives, provided in all cases that they are compatible with the special legislative system applicable to cooperatives. Finally, in last place are the provisions of the TSC, which according to Article 3(1) apply, "unless set aside and insofar as compatible, also to categories of third sector entity[ies] that are subject to special legislation".[40]

In conclusion, in the light of this tiered applicability of the legislation the literature is, generally speaking, substantially in agreement in asserting that the provisions of Legislative Decree 112, which set out rules for classifying social enterprises, are not applicable to SC,[41] and that accordingly the object, purpose and structure of SC are those provided for under Law no. 381. In other words, as has been succinctly put in the relevant literature, if "the 'soul' of SC is one of a social enterprise, its 'body' remains that of a cooperative".[42]

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ristorni ai soci proporzionalmente alla quantità e alla qualità degli scambi mutualistici e che si registri un avanzo della gestione mutualistica".

[37] Cf. Marasà G., *op. ult. cit.*, 92, note 25.

[38] Cf. Article 1(4), second paragraph, of Legislative Decree 112/2017.

[39] Provision is also made to this effect by Article 40(2) of Legislative Decree no. 117 of 2017, according to which "*le cooperative sociali e i loro consorzi sono disciplinati dalla legge 8 novembre 1991, n. 381*".

[40] For the sake of completeness, it should be pointed out that the hierarchy of sources applicable to cooperatives that acquire the status of a social enterprise is different. According to Article 1(5) of Legislative Decree no. 112 of 2017, these are governed in the first instance by Legislative Decree no. 112 of 2017, then by the provisions of the TSC that are compatible with Legislative Decree no. 112, and finally, "*in mancanza e per gli aspetti non disciplinati*," by the provisions of the Civil Code and the related implementing provisions on cooperatives.

[41] It must however be pointed out that it is not entirely clear which provisions have that status.

[42] Cf. Fici A., *Funzione e modelli di disciplina dell'impresa sociale in prospettiva comparata*, cit., 499 et seq . According to the author, leaving aside the features that are common to all social enterprises (including in particular the full or partial constraint on the distribution of profits and the disinterested allocation of the residual assets in the event of dissolution), a social enterprise with cooperative status also operates as a democratic social enterprise.

3. The income tax framework for SC

The characteristics of social cooperatives described above have had direct implications on the tax regime applicable to them since the enactment of legislation providing for this type of entity.

Starting from the premise that social cooperatives do not compete with non-profit-making companies and that they play an important role in implementing the principle of subsidiary, lawmakers have granted and continue to grant preferential tax treatment compared to other types of PMC. In fact, they qualify for all arrangements provided for in relation to PMC without however, as mentioned above, being subject to any requirement of predominance foreseen under Articles 2512 and 2513 of the Civil Code. Moreover, depending on their actual operations and provided that specific prerequisites are met, SC are eligible to benefit from the more favourable tax arrangements foreseen under Articles 11 et seq of Decree of the President of the Republic no. 601/73.[43]

Focusing the analysis specifically on the measures provided for in relation to PMC, it should be noted that SC, as is the case for all cooperative companies, are subject to corporate income tax (imposta sul reddito delle società, abbreviated to IRES[44]) and calculate their taxable income as a rule (i.e. unless specified otherwise[45]) according to the ordinary criteria applicable for determining the corporate income of resident capital companies. Specifically, they are subject to the rules both on taxation of profits and the deductibility of interest payments on loans provided by members, as well as on the tax treatment of rebates.[46]

As far as the treatment of operating profits is concerned, with the specific purpose of promoting the self-financing and capitalisation of cooperatives, under Article 12 of Law no. 904/1977 lawmakers initially provided a complete exclusion from taxation for any profits allocated to non-distributable reserves, foreseeing that "it is not possible to distribute them amongst the members in any form, either during the lifetime of the entity or following its dissolution".[47]

That provision takes full account of the effective allocation of profits by cooperatives, also in view of the constraints imposed by the law. However, its scope has been progressively reduced over time not only in order to take account of changes to the system for taxing corporate entities,[48] but presumably also in the conviction that the detaxation of reserves

[43] See for instance the exclusion from IRES granted to production and labour cooperatives and consortia thereof, upon condition that "*l'ammontare delle retribuzioni corrisposte ai soci*" is not "*inferiore al 50% dell'ammontare complessivo di tutti gli altri costi tranne quello relativo alle materie prime e sussidiarie*". If this percentage falls between 50% and 25%, IRES is reduced by half (Article 11 of Decree of the President of the Republic 601/1973). There is no need for the social employment cooperative to fulfil the prerequisite that the work of the members must account for a predominant share of the total cost of labour pursuant to Article 2513(1)(b) CC because, as mentioned above, SC are still regarded as PMC under the law.

[44] Cf. Article 73 of Decree of the President of the Republic no. 917/86 (hereafter TUIR); in addition, according to Article 3(1)(a) of Legislative Decree no. 446/97, they are liable to the regional production tax (*imposta regionale sulle attività produttive*, IRAP) at an ordinary rate of 3.90% (which may be increased by the regions by up to a maximum of 0.92%), the taxable base for which (the "net value of production") is different from that used for IRES.

[45] Cf. Article 75(1) TUIR.

[46] These are amounts that are allocated to members by way of the ex post allocation of mutual benefits.

[47] A clause must therefore be included within the Charter or in the Memorandum (if comprised within one single instrument) prohibiting the distribution of reserves in any manner, both during the lifetime of the entity and following its liquidation.

[48] See the reform of the TUIR provided for under Legislative Decree no. 344/2003, which introduced the new corporation tax (IRES) to replace the previous income tax for legal persons (imposta sul reddito delle persone giuridiche, IRPEG).

amounted to "favourable treatment liable to alter the competitive equilibrium between enterprises with different legal status".[49]

These changes thus only applied to SC to a limited extent.

With effect from 2012,[50] those bodies become liable to a 10% tax on any portion of the profits allocated to the legal reserve; the amount allocated must not be lower than thirty percent of the net annual profits "irrespective of the value of the legal reserve".[51] On the other hand, under the terms of an express statutory provision,[52] the further restrictions on the detaxation of profits allocated to non-distributable reserves, which were provided for in relation to PMC in general under the finance laws for 2005 and 2009[53] do not apply to SC. These finance laws foresaw that Article 12 should only apply to a specific portion of the annual profits, which varies depending on the type of activity carried out by the PMC.

In addition, the share of the net annual profits that must be paid to mutual funds for the purpose of promoting and developing cooperative relations is deductible in full.

Therefore, in contrast to other PMC – except in relation to the 10% taxation of the share of the net annual profit allocated to the mandatory minimum reserve[54] – SC continue to benefit from the full exclusion from income tax foreseen under Article 12 in respect of any amounts allocated to un-distributable reserves. They also benefit, where the prerequisites are met, from the exclusion provided for under Decree of the President of the Republic no. 601/73.

As regards interest payable on loans from members, which are regarded as capital contributions paid by members to cooperatives and usually repayable over the short to medium term ("social loans"), this interest is not deductible in full for cooperatives – as is the case for capital companies – but only in part. However, the provisions laid down for cooperative companies differ entirely from those applicable to capital companies.[55] This difference in treatment is because the provisions are based on the premise (which has moreover been departed from following the reform of company law) that the cooperative is

[49] See Paladini R. - Santoro A., *Il ruolo economico delle riserve indivisibili*, in *La disciplina civilistica e fiscale della "nuova" cooperativa*, edited by Uckmar-Graziano, Padua, 2005, 158. This is also supported by the heading to Article 6 of Decree-Law no. 63/2002, entitled "*Progressivo adeguamento ai principi comunitari del regime tributario delle società cooperative*".

[50] Cf. Article 6(1) of Decree-Law no. 63, as amended by Article 2(36-*ter*) of Decree-Law 138/2011 (introduced upon conversion into Law no. 148 of 2011). In particular, whilst the original wording of Article 6 provided for the application of Article 12 of Law no. 904 of 16 December 1977, i.e. the exclusion from taxation "under all circumstances" of the portion of the net annual profits allocated to the mandatory minimum reserve, following the amendments introduced by paragraph 36-ter, the law now provides that the deduction from taxable income "*non si applica alla quota del 10% degli utili netti annuali destinati alla riserva minima obbligatoria*".

[51] Cf. Article 2545-quater CC

[52] Cf. Article 1(463) of Law no. 311/2004.

[53] Cf. Article 1(460)-(462) of Law no. 311/2004; Article 22(28) of Law no. 133/2008. As mentioned above, this legislation limited the scope of Article 12, by providing for an exclusion from taxation in respect of a percentage portion of the net annual profits, which varies depending upon the type of cooperative. In particular, as regards CMP, the minimum quota of taxable profits is: i) 65% for consumer cooperatives; ii) 20% for agricultural cooperatives and small fishing cooperatives; and iii) 40% for other cooperatives and consortia of cooperatives.

[54] According to the tax authorities, cooperatives (including social cooperatives) may benefit from tax provisions establishing the detaxation of any amounts allocated to un-distributable reserves as well as the tax deductibility of any payments made to mutual funds only in respect of the share of the net profits *in excess* of the part that must be subject to tax under all circumstances pursuant to Article 1(460) of Law no. 311/2004. Cf. Revenue Agency circular of 15 July 2005, no. 34/E.

[55] Cf. Article 96 TUIR, which provides that, as a general rule, interest due and equivalent charges are deductible during each tax period up to the amount of interest earned and equivalent revenues. The excess thereby arising is then deductible up to a maximum of 30 percent of the gross operating result earned from ordinary operations.

an entity that is "closed" to the capital markets[56] In particular, it is stipulated that, provided that the conditions laid down under Article 13 of Decree of the President of the Republic no. 601/1973 are met, interest on sums loaned by resident individual members to a cooperative company is non-deductible for the part that exceeds "the amount payable as interest to the holders of interest-bearing postal savings bonds increased by 0.9 percent".[57]

Finally, as far as refunds/transfers are concerned (amounts assigned to members for the "final" allocation of the mutualistic advantage), from a tax point of view these represent a cost that can be deducted in full by all cooperatives for the purposes of determining the taxable income for IRES.[58] This deductibility is subject to the condition that these sums paid do not exceed the surplus resulting from mutual management.[59] Therefore, on the basis of that rule, on the one hand deductibility is not dependent on the manner in which those amounts are allocated to members,[60] whilst on the other hand a transfer/refund can only be paid if the operations that the cooperative conducts with its members have generated a surplus. Essentially, it is possible to pay back as a refund any documented surplus from operations generated exclusively through transactions concluded with members, but not also from transactions concluded with non-members.[61] That aspect is particularly important above all for SC from type A, whose members may not be able to benefit from transfers due to a lack of mutual operations.

Furthermore, according to the analysis set out above, it is apparent that the favourable treatment granted to SC for the purposes of IRES consists in the different (and not insignificant) level of taxation of profits allocated to un-distributable reserves. Presumably due to the inherent social vocation of SC, these profits are currently taxed at a rate of 10%. Otherwise, the rules applicable to SC reflect those governing PMC.[62]

The introduction of the tax regime for Onlus and the allocation of that status to SC *ope legis* do not appear to have had any implications for the taxation of the income of SC. This is the position taken by the tax authorities, according to which the special regime provided for in relation to Onlus under Article 150 (previously Article 111-*ter*) TUIR is not applicable to SC. In this regard, it is noted that, in providing in paragraph 1 for the classification as "non-commercial" of the institutional activity of Onlus, this provision expressly excludes

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[56] On this issue see Montanari F., *Il finanziamento dei soci nelle società cooperative: profili tributari*, in *Riv. dir. trib.*, 2009, 4, 437.

[57] Cf. Article 1(465) and (466) of Law no. 311/2004. It is important to clarify that this tax regime applies both to PMC and to those that lack this fundamental prerequisite (CMNP).

[58] Cf. Article 12 of Decree of the President of the Republic no. 601 of 1973 (as amended by Article 6 of Law no. 388 of 2000), which identifies the regime as being applicable to all cooperatives, including those that are not predominantly mutual.

[59] It should be recalled that, according to Article 2545-*sexies* CC, amounts resulting from mutual exchange with members must be reported separately within the financial statements from those earned from relations with third parties pursuant to Article 2545-*sexies* CC and, prior to this, refunds are divided between the members in proportion with the quantity and quality of the mutual exchanges concluded with the company according to the criteria set out in the memorandum. Therefore, capacity as a member is a necessary prerequisite for the right to a refund; however, its amount is dependent upon the financial transactions actually concluded between the individual member and the cooperative.

[60] These amounts may be allocated "directly" to members in the form of a restitution of part of the price of goods or services purchased by the members (consumer cooperatives), of increased payment for produce furnished (production cooperatives) or in the form of remuneration for the salaries of the members (work cooperatives); or b) are recognised as capital pursuant to Article 2545-sexies CC and thus allocated to each member in the form of a proportional increase in their respective shares or through the issue of new shares or financial instruments.

[61] Cf. Revenue Agency Circular no. 53/E of 18 June 2002

[62] This is subject, as mentioned above, to the provisions of Decree of the President of the Republic 601.

"cooperative companies" from its scope, and does not draw any distinction between cooperative companies in general and SC[63]. Therefore, based on a literal interpretation of the provision, these should not be able to benefit from the detaxation provided for Article 150 (1) for income resulting from "institutional" activities.[64] The position is no different as regards the exclusion from taxation for income resulting from the conduct of directly related operations under Article 150(2). Although that provision does not indicate which entities are eligible to benefit from it, a systematic, logical interpretation suggests that the entities to which it applies are those expressly referred to in paragraph 1, and that cooperative companies, including SC, cannot therefore benefit from it.

In conclusion, SC cannot infer any beneficial rules in terms of income tax from their automatic status as Onlus, as they are not subject to the special rules provided for in relation to Onlus by Article 150 (previously Article 111-*ter*) TUIR.

In the light of the repeal of the provisions governing Onlus and the enactment of the third sector reform, it is now necessary to identify the tax consequences associated with the acquisition by SC of the status as social enterprises.

4. The implications of Legislative Decree no. 112 on the taxation of SC

In contrast to the previous legislation on social enterprises, Article 18(1) and (2) of Legislative Decree no. 112 establishes a specific tax regime for the income earned by entities with that status[65].

A solution must be identified starting from the hierarchy of sources laid down by Article 1(4) of Legislative Decree no. 112 which, as mentioned above, recognises the pre-eminence of special sectoral legislation, allowing for the application of the provisions laid down by Legislative Decree no. 112, although only where compatible. It is therefore necessary to establish whether or not the measures provided for in relation to social enterprises are

[63] Authoritative doctrine supports a different position. Cf. Fedele A., *La disciplina fiscale delle Onlus*, in *Rivista del Notariato*, 1999, 537 et seq, where he states that "*la possibilità di ONLUS 'strutturalmente' commerciali risulta limitata alle sole cooperative sociali … per l'operare di una norma (art. 111-ter Tuir) che 'decommercializza' tutte le attività degli enti che abbiano i requisiti richiesti per le ONLUS*". See also Ficari V., *Onlus* (entry), in *Enc. dir.*, Milan, 2000, 2; Pepe F., *Note in tema di società cooperative, cooperative sociali e regime fiscale Onlus (con cenni alla neonata "impresa sociale")*, cit., 837 et seq, who states that "*lo spettro delle agevolazioni concesse alle SC dalla normativa sulle Onlus è più ampio rispetto a quello previsto per le ordinarie cooperative. Esso infatti comprende, oltre agli incentivi operanti nel settore delle imposte indirette (Iva, registro, bollo, ecc .. ..), anche il citato art. 150 Tuir. L'operatività di quest'ultimo, infatti, non esclude le SC alle quali, quindi, il relativo regime di de-commercializzazione si applica appieno*".

[64] Leaving aside the literal wording of the provision, the underlying philosophy that characterises this regime, according to which the exclusion from taxation of income would appear to be strictly conditional upon an absolute prohibition on any distribution of profits, even indirectly, would appear to preclude the applicability of Article 150 to SC. In other words, the exclusion of SC would be a consequence of the fact that those companies, as Onlus according to law, "*nel rispetto della loro struttura e della loro finalità*", retain the ability to distribute operating profits according to Article 2514 CC, albeit on a limited scale. It should also be considered that the legislation expressly mentioned SC within Legislative Decree no. 460/97 when putting in place a special regime for them.

[65] Although this regime reflects the body of rules applicable to cooperatives in terms of its structure, it is not entirely equivalent to it. On this issue see Boletto G., *Le imprese del terzo settore nel sistema di imposizione dei redditi: tra sussidiarietà orizzontale e concorrenza*, Milan, 2020, *passim*; Castaldi L., *La disciplina fiscale dell'impresa sociale. Spunti di sistema?*, in *Analisi giuridica dell'economia*, 2018, 1, 175 et seq.; Girelli G., *Il regime fiscale del terzo settore*, in *Il Codice del Terzo settore, Commento al Decreto legislativo 3 luglio 2017, n. 117*, edited by Gorgoni M., Pisa, 2018, 393 et seq.; Ficari V., *Prime osservazioni sulla fiscalità degli enti del Terzo settore e delle imprese sociali*, in *Riv. trim. dir. trib.*, 2018, 1, 57 et seq.; Ortoleva M.G., *La valorizzazione dell'utilità sociale nella normativa tributaria*, in *Diritto e processo*, 2020, 3, 497 et seq.

compatible with the system of taxation for SC sketched out above, and as a preliminary matter whether they concern aspects not already provided for under that system.

As regards the first paragraph, it provides for the de-taxation not only of "amounts intended for the payment of the contribution for inspection activities pursuant to Article 15" but also of profits that must be allocated to un-distributable reserves intended for the conduct of activities provided for under the charter, or for increasing assets.[66] Since these reserves must be regarded as un-distributable according to the combined provisions of Articles 3 and 12, as a result of that provision essentially only profits or surpluses that are distributed in some form are subject to tax, subject to the limits set. On the other hand, those allocated to un-distributable reserves are entirely exempt from tax.

However, the legislation on SC contains other specific provisions concerning profits – Article 12 of Law no. 904/77 in conjunction with Article 6(1) of Decree-Law no. 63/2002 – which, from 2012 onwards, has provided for taxation at a rate of 10% of the annual profits allocated to the mandatory minimum reserve, which is un-distributable according to law.

Taking account of the provisions laid down in relation to the hierarchy of sources, this distinguishing feature is capable of exempting SC from the scope of Article 181(1), as that legislation must be regarded as incompatible with that on SC.

As regards the rule laid down in the last indent of Article 18(1) along with Article 18(2), these essentially reiterate the provisions on cooperatives.[67] The former – Article18(1) – essentially foresees that un-distributable reserves may be used to cover any losses and this utilisation does not entail any forfeiture of the "benefit" of tax relief, although a prohibition remains on distributing any further profits until the reserves have been reconstituted. The latter – Article 18(2) – is intended to avoid the so-called effect of "tax on tax" arising as a result of the changes provided for under Article 83 of the TUIR and in particular as a consequence of the fact that the portion of the profits allocated to un-distributable reserves (that is exempt from tax) is comprised not of taxable income but rather of profit after tax allocated to reserves.[68]

In view of these considerations, in a nutshell it does not appear that the provisions governing of social enterprises can be regarded as primary and overriding compared to the special provisions laid down for SC,[69] the tax regime for which should not therefore be affected.[70]

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[66] Cf. Article 18(1) of Legislative Decree no. 112/2017, as amended by Article 7(1)(a) of Legislative Decree no. 95/2018. That provision enhances the functional constraint applicable in relation to the allocation of income: the obligation to allocate the profits from operations or the operational surplus to the conduct of activities provided for under the Charter or to increase the assets is now offset by the detaxation of profits (or the operational surplus) allocated to the un-distributable reserves of a social enterprise.

[67] Cf. respectively Article 3(1) of Law no. 28/1999 and Article 21(10) of Law no. 449/97.

[68] Article 18(2) provides that "*Non concorrono altresì a formare il reddito imponibile delle imprese sociali le imposte sui redditi riferibili alle variazioni effettuate ai sensi dell'articolo 83 del testo unico delle imposte sui redditi, approvato con decreto del Presidente della Repubblica 22 dicembre 1986, n. 917. La disposizione di cui al periodo precedente è applicabile solo se determina un utile o un maggior utile da destinare a incremento del patrimonio ai sensi dell'articolo 3, comma 1*". In short, the income taxes corresponding to the increases in taxes on the statutory profit according to Article 83 Tuir (due, for example, to the non-deductibility from tax of some costs) are disregarded from taxable income, on condition that the resulting fall in the taxable income results in a profit, or an increase in profit, that is allocated to the indivisible reserves.

[69] No question of incompatibility arises in relation to the measures provided for under Article 18(3) to (5), the direct beneficiaries of which are natural and legal persons who invest in social enterprises, including those organised as operatives, that

However, that conclusion, which is based on a rigorous application of the tiered applicability of the provisions laid down by Article 1 of Legislative Decree no. 112, raises some perplexities from a systematic viewpoint.[71]

If one starts from the assumption that the de-taxation of the profits that must be allocated to un-distributable reserves on the grounds that they are intended for operations of general interest does not constitute tax relief, but is rather premised on a reduced or otherwise different capacity to pay tax,[72] then it must be concluded that a similar constraint applies in relation to SC. These cooperatives have always been considered to be capable of satisfying broad, general interests likely to be regarded as beneficial from a public law perspective, as they are required by law to carry out activities with social purposes. Moreover, in a similar manner to social enterprises, they cannot distribute dividends on the capital actually paid in at a higher rate than interest-bearing postal savings bonds, increased by two and a half percentage points.[73] It is admittedly true that, as an effect of the operation of refunds, members of cooperatives with the status of social enterprises may derive greater pecuniary benefits compared to, for instance, members of capital companies with the status of social enterprises. However, it is also the case that – as mentioned above – refunds may in tangible terms end up being of marginal relevance for SC (above all for those in type A) due to the negligible extent (if not the outright absence) of activities that have been conducted on a mutual basis.

Finally, further doubts result from the fact that, in view of the different hierarchy of sources of law provided for in relation to them under Article 1(5), cooperatives (other than social cooperatives) that acquire the status of social enterprises would appear to be eligible to benefit from the provisions on taxation of income laid contained in Article 18(1).

5. Conclusion

In the light of the above arguments, it would appear that the difference in the law applicable to amounts allocated to un-distributable reserves is a relic of a conception of cooperatives that has now been superseded. It is not firmly rooted in any capacity to pay tax of SC that is different from that of other social enterprises. The third sector reform could have

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have acquired the status of a social enterprise within the last five years. These provisions, which (as is clear) apply indirectly to SC, allow - within specific limits - for a deduction from tax (or respectively a tax allowance) equal to thirty percent of the amount invested in respect of gross income tax payable by natural persons and the taxable income of entities liable to IRES.

[70] See Cusa E., *Le cooperative sociali come imprese sociali di diritto*, cit., 6, who argues that "*alle cooperative sociali si applica la disciplina tributaria di cui all'art. 18, commi 3-5, d.lgs. 112/2017, non essendo essa incompatibile con la disciplina delle cooperative sociali e delle cooperative tout court".* A different position is taken by Fici A., *La nuova impresa sociale*, in *La riforma del terzo settore e dell'impresa sociale*, cit., 357, who argues that Article 18 is applicable in full since "*non hanno natura di norme di qualificazione della fattispecie*".

[71] The same applies in relation to the beneficial provisions in the area of indirect taxes and local taxes provided for under Article 82 TSC in relation to TSE, including social enterprises and SC, but not also other cooperatives. See also Article 89(11) TSC on the provisions applicable to "*soggetti che effettuano erogazioni liberali agli enti del Terzo settore non commerciali di cui all'articolo 79, comma 5, nonché alle cooperative sociali*".

[72] Cf. on the concept of capacity to pay tax as the aptidude to pay tax and not mere economic capacity, see Zennaro R. - Moschetti F., *Agevolazioni fiscali* (entry), in *Dig. Comm.*, Turin, 1987. This thesis appears to be endorsed by Gianoncelli S., *Regime fiscale del terzo settore e concorso alle pubbliche spese*, in *Riv. dir. fin. sc. fin.*, 2017, 3, 295 et seq, especially 301 et seq. On this issue see Boletto G., *Le imprese del terzo settore nel sistema di imposizione dei redditi: tra sussidiarietà orizzontale e concorrenza*, cit., 169 et seq.

[73] Cf. Article 2514 CC.

been embraced as an opportunity to reorganise the law applicable to SC which, as argued above, is currently fragmented and disjointed as a whole. This is a result of the various layers of legislation enacted over time along with the adoption of legislation dictated by concerns that have in part been resolved, coupled with pressure and vetoes from stakeholders directly involved.

The hope is that the legislator will intervene as soon as possible to "bring some order" into the overall taxation regime of SC, eliminating the aporias created by the stratification of legislative provisions and the changes in the regulatory framework provided for in relation to third sector entities.

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COOPERATIVES IN BELGIUM IN THE ERA OF THE CODE OF COMPANIES AND ASSOCIATIONS: CURRENT DYNAMICS AND PROSPECTS FOR TAX LAW AND NON-TAX LAW[1]

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Abstract

In this paper, we consider the tax treatment of cooperatives in Belgium. To this end, we analyse the connections between tax and non-tax law, an analysis that is essential for understanding the current tax system (*de lege lata* perspective). In view of these connections, we highlight issues that should imperatively be addressed in the context of a reform of this tax system (*de lege ferenda* perspective).

Introduction

1. Overview. The cooperative society was introduced into Belgian law as a commercial company through an Act of 1873. The framework has always been very liberal and therefore entrepreneurs, who were not inspired by the cooperative ideals, have used this framework for its flexibility. Does the new Code of Companies and Associations considerably change the situation? (I)

From a fiscal point of view, under Belgian law, a resident legal entity is necessarily subject to either tax on legal persons (TLP) or corporate tax (CT), two very distinct regimes. How are cooperative societies treated in this system? (II)

If we consider the tax and non-tax aspects of cooperatives (or, more broadly, of legal persons) together, the interdependency of these different branches of law appears. These links are the key to understanding the rationale for the "TLP/CT" system and the status of companies in this system (III).

In view of this interdependency, and taking into account the major developments in the law of legal persons and economic law, the Belgian tax system – which remains unchanged – appears to be completely obsolete (IV).

In a forthcoming tax reform the Belgian legislator could, as encouraged by some supranational institutions, promote cooperatives or even social enterprises. In this context,

[1] The author refers, for further developments, to her doctoral dissertation (Contribution to the study of the direct tax regime for social enterprises in Belgium: An illustration of the interactions between tax law and non-tax law) presented at the University of Liège on 30 August 2019 (https://orbi.uliege.be/handle/2268/239298). The thesis will soon be published in the collection "Normes" of the Presses Universitaires de Liège.

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other connections between tax and non-tax law should in our view necessarily be taken into consideration, i.e., the links between legal frameworks and public policies (V).

The purpose of this paper is twofold. On the one hand, it is to provide a critical description of the Belgian legal system (tax and non-tax aspects). One the other hand, it is to raise a number of issues that need to be addressed in order to reform an outdated tax system. In this context, the aim of this paper is not to outline a new tax system that we would consider adequate (political opportunity concern) but to highlight constraints to which the Belgian legislator would be subject to grant special tax treatment to cooperatives or social enterprises.

I. Non-tax law aspects[3]

"Any excess is harmful, the excess of flabbiness more than any other"[4]

2. Cooperative societies before the Code of Companies and Associations. The cooperative is a specific legal form under Belgian law. The cooperative society was established by an Act of 18 May 1873 as a commercial company composed of partners whose number and contributions are variable and whose shares are non-transferable to third parties[5].

Despite several legal changes[6], its framework has remained flexible. Due to this, some people adopted this form without sharing the cooperative ideals (democratic governance, indivisible reserves, etc.); a distinction was therefore made between "true" and "false" cooperatives. In the beginning of the 1960s, an accreditation for true cooperatives was created (CNC accreditation[7]).

In the mid-1990s, the social purpose company was created to fill a gap: the lack of a framework to combine large-scale commercial activity with a disinterested purpose. A company could not pursue a disinterested purpose[8]; conversely, a non-profit association (NPO) could not carry out a principal commercial activity[9]. The social purpose company was not conceived as a legal form, but a variant that could be grafted onto most companies with a commercial form, including the cooperative society[10].

The accreditation of cooperatives and the variant of the social purpose company can be cumulated, although they are not necessarily compatible: a social purpose company is

[3] See T. Tilquin, J.-A. Delcorde and M. Bernaerts, "A new paradigm for cooperative societies under the new Belgian code of companies and associations", *International Journal of Cooperative Law*, n°3, 2020, pp. 98-121.
[4] Free translation of "Tout excès est nuisible, l'excès de la mollesse bien plus que tout autre" (Sénèque, *De la providence*).
[5] Act of 18 May 1873 containing Title IX, Book 1st of the Commercial Code relating to companies, *Belgian Official Journal* (hereinafter: *M.B*), 25 May 1873.
[6] See notably P. Nicaise and K. Deboeck, *Vade Mecum des nouvelles sociétés coopératives*, 2e éd., Bruxelles, Creadif, 1995; M. Coipel, "Les avatars de la coopérative en droit belge", in D. Hiez (dir.), *Droit comparé des coopératives européennes*, 2009, Bruxelles, Larcier, pp. 125-143.
[7] Act of 20 July 1955 (*M.B.*, 10 August 1955) and Royal Decree of 8 January 1962 (*M.B.*, 19 January 1962).
[8] Art. 1st of the Code of Companies.
[9] Art. 1st of the Act of 27 June 1921 on non-profit associations, foundations, European political parties and European political foundations, *M.B.*, 1st July 1921.
[10] Art. 1st, al. 3 and 661 of the Code of Companies.

prohibited from being primarily oriented towards serving its members, which is the very essence of traditional cooperatives. In 2016, an exemption was provided for social purpose cooperatives in order to allow the legal complementarity of the two systems: the main purpose of the cooperative society, if it is a *social purpose cooperative*, must not be to provide members with an economic or social benefit in the satisfaction of their professional or private needs[11].

Belgian economic law has been completely reformed in recent years. This reform was carried out in three steps: firstly, the reform of insolvency law (Act of 11 August 2017[12]); then, the reform of business law (Act of 15 April 2018[13] with the dismantling of the Commercial Code); finally, the Code of Companies and Associations (Act of 23 March 2019[14]).

3. Code of Companies and Associations – general principles. The Code of Companies and Associations (CCA) integrates the rules relating to companies, associations but also foundations[15]. The CCA aims to "modernise" Belgian law on legal persons by following three main guidelines.

Firstly, a far-reaching simplification is achieved. This is apparent in various respects, including the abolition of the distinction between civil and commercial companies, the reduction in the number of company forms and, *a priori*, the integration of companies, foundations and associations into a single code.

Secondly, the new regulation promotes more suppletive law and thus more flexibility. The CCA tends to strike a balance between flexibility for companies and their members on one side, and protection of third parties and specifically creditors on the other.

Thirdly, the adoption of new rules mainly to deal with European developments and trends, such as the increasing mobility of companies, is encouraged. Given that Belgium had previously opted for the real seat theory (*lex societatis*), European case law led to undesirable effects since "a Belgian company with its real seat in Belgium could not [e]migrate abroad without changing its nationality, whereas a company from a country that applies the incorporation theory could [im]migrate to Belgium while retaining its nationality"[16]. Taking into account this situation, Belgium is changing from the real seat theory to the incorporation theory to determine the *lex societatis.*

4. CCA and cooperative societies. Given the objective underlying the reform (to offer an attractive new legislative product on the market of legal norms: a simplified, flexible and exportable law[17]), the CCA had initially envisaged to abolish the cooperative society. In

[11] Art. 1st, §8, Royal Decree of 8 January 1962.
[12] See Act of 11 August 2017 inserting Book XX "Insolvency of companies" into the Code of Economic Law (…), *M.B.*, 11 September 2017.
[13] See Act of 15 April 2018 reforming business law, *M.B.*, 27 April 2018.
[14] See Act of 23 March 2019 introducing the Belgian Code of Companies and Associations and miscellaneous provisions, *M.B.*, 4 April 2019.
[15] This Code abolishes the Code of Companies and the Act of 27 June 1921.
[16] Doc. parl., Ch. repr., 2018-2019, n° 54-3119/011, p. 12.
[17] The reform of Belgian law on legal persons is in line with the "normative Darwinism" described by A. Supiot: "The legal representation of the world at work (...) is that of a 'market of legislative products' open to the choice of

doing so, the cooperative principles could be enshrined, thanks to increased statutory freedom, in another legal form: the limited liability company (LLC)[18]. The structure of the cooperative society was ultimately retained.

As Tilquin, Delcorde and Bernaerts mentioned in another issue of this Journal, "the main element of the reform of the legal regime of cooperative societies in Belgium is certainly the new definition of these societies"[19]. This definition is inspired by the definition of the European Cooperative Society (Regulation nr.1435/2003) with adjustments to cover the developments experienced by the cooperative movement over the last twenty years, notably the use of cooperatives for projects oriented towards the general interest[20]. The other provisions of Regulation nr. 1435/2003, which derive from the ICA principles (indivisible reserves, research of limited profit and disinterested distribution of net assets, etc.), are not found in the CCA. There is only a reference to the ICA principles in the preparatory works[21] but not in the legal text which only specifies that "[t]he cooperative purpose and values of the cooperative society shall be described in the articles of association and, where appropriate, supplemented by a more detailed explanation in internal rules or a charter"[22].

Before the adoption of an amendment, only a few articles were specific to the legal framework of cooperative societies. For the rest, except for derogations, the legal regime of the cooperative society was similar to the regime of the LLC to which the Code was referring[23]. *In fine*, cooperative societies have their own book containing all the relevant provisions in the CCA. However, for many provisions, the texts relating to the LLC have been copied without taking into account the specific nature of the cooperative[24]. Thus, for example, while the principle of economic democracy "one man, one vote" was promoted (in a suppletive way) in the initial model, the default rule is finally "one share, one vote"[25].

5. CCA and accreditations specific to cooperatives. In the CCA, the accreditation of cooperatives (CNC accreditation; see *supra*, n°2) is preserved[26].

There is even a new accreditation: accreditation as a social enterprise[27]. This accreditation is intended to compensate for the disappearance of social purpose companies in Belgium (see

individuals who are free to place themselves under the law that is most profitable to them" (A. Supiot, L'esprit de Philadelphie, *La justice sociale face au marché total*, Seuil, Paris, 2010, pp. 64 and 66). See also R. Aydogdu, "La Corporate Social Responsibility, le droit par-delà le marché et l'État (partie 1)", *R.P.S.-T.R.V.*, n° 2018/8, pp. 669-704, spec. n° 49, p. 696 and the references in the footnote (174).

[18] It should be noted that, in 1873, before opting for the consecration of a cooperative legal form, some argued that there was nothing to prevent the insertion of cooperative rules into the articles of association of existing forms of commercial companies. See notably J. Guillery, *Commentaire législatif de la loi du 18 mai 1873 sur les sociétés commerciales, Discussions parlementaires, Exposé des motifs, Rapports présentés aux Chambres législatives*, Bruxelles, Bruylant, 1878, n° 124, p. 163 et s.; J. T'Kint and M. Godin, *Les sociétés coopératives*, Bruxelles, Larcier, 1968, pp. 10-11.

[19] T. Tilquin, J.-A. Delcorde and M. Bernaerts, *op. cit.*, p. 120.

[20] See *Doc. parl.*, Chambre, 2018-2019, n° 54-3119/015, p. 106.

[21] See for instance *Doc. parl.*, Chambre, 2018-2019, n° 54-3119/021, p. 65.

[22] Art. 6:1, §4 of the CCA.

[23] See *Doc. parl.*, Chambre, 2018-2019, n° 54-3119/015.

[24] As Aydogdu points out, in various ways the cooperative ideal has been lost in the process, lost in translation (R. Aydogdu, "L'Amendement: Le but lucratif d'une société coopérative; 'Lost in Translation'", *R.P.S.-T.R.V.*, n°2020/3, pp. 342-344, esp. p. 342).

[25] Art. 6:41 of the CCA.

[26] Art. 8:4 of the CCA.

supra, n°2). Indeed, the gap that the variant of the social purpose companies was intended to fill has disappeared: a NPO can carry out an economic activity, and a company can pursue a disinterested goal (see *infra*, n°18). This accreditation "as a social enterprise" is, in contrast to the previous system, only available for cooperative societies.

The two accreditations can be cumulated with a specific name for the cooperative society concerned[28].

The requirements that a cooperative society must meet when requesting an accreditation as a social enterprise are very similar to those for the accredited cooperative society, except for two questions: the principal purpose and the allocation of the liquidation bonus. The principal purpose of an accredited cooperative society must concern its shareholders[29] whereas the main purpose followed by a cooperative society accredited as a social enterprise must be to generate a positive societal impact for the people, the environment or the society in the general interest[30]. For the accredited cooperative society, the articles of association *may* provide that the liquidation bonus shall be "allocated to economic or social activities which it intends to promote"[31]. For the cooperative society accredited as a social enterprise, the liquidation surplus is mandatorily "allocated as closely as possible to its purpose"[32]. This second distinction should not be overlooked from a tax perspective (see *infra*, n°6).

II. Tax law aspects

6. Tax regime applicable to resident legal entities: tax on legal persons or corporate tax. As far as income tax is concerned, a legal entity which has its real seat[33] in Belgium is necessarily subject to either tax on legal persons (TLP) or corporate tax (CT).

In order to determine the income tax applicable, the reasoning to be applied can be divided into at most three steps[34].

> **Step 1:** Does the legal person engage in any exploit or operations of a profit-making nature?
>
> a. if the answer is no, the legal person is subject to the TLP;
>
> b. if the answer is yes, the legal person is subject to the CT (with some exceptions, see step 2);

[27] Art. 8:5 of the CCA.
[28] Art. 8:5, §2 of the CCA.
[29] Art. 8:4, al. 1 of the CCA.
[30] Art. 8:5, §1, 1° of the CCA.
[31] Art. 8:4, al. 4 of the CCA.
[32] Art. 8:5, §1, 3° of the CCA.
[33] Unlike the change concerning the *lex societatis* (for which Belgium has chosen the incorporation theory) the real seat theory remains applicable in tax law.
[34] Art. 2, 179, 181, 182 and 220 of the Income Tax Code.

Step 2: if this is the case (1.b), if the legal person *does not pursue a lucrative purpose*, does it act mainly or exclusively in a privileged field (Art. 181 of the Income Tax Code – for example, professional unions, teaching, family assistance, fairs or exhibitions, etc.)?

a. if the answer is yes, the legal person is subject to the TLP;

b. if the answer is no, the legal person is subject to the CT (with some exceptions, see step 3);

Step 3: if not (2.b), can it be said that the legal person *does not pursue a lucrative purpose carrying out only authorised transactions* (Art. 182 of the Income Tax Code – for example, ancillary economic operations or the absence of industrial or commercial methods)?

a. if so, the TLP will apply.

b. if not, the CT will apply.

The reasoning is at most divided into three stages because only a "legal person does not pursue a lucrative purpose" may have access to all three stages of reasoning. If the legal person pursues a lucrative purpose, the only question that matters is whether or not it engages in exploit or operations of a profit-making nature[35]. A legal person is considered under "legal person does not pursue a lucrative purpose" when it does not seek to grant, directly or indirectly, a material gain, whether immediate or deferred, to its shareholders or partners[36].

According to the administrative commentary, when it appears from an analysis of the articles of association of a company that it has not been incorporated with a view to exercising a lucrative professional activity, and when it appears that in reality it does not engage in operations of a lucrative nature, the company should not be subject to the CT (thus the TLP is applicable). However, when a company distributes dividends, regardless of the amount, or when the faculty of a distribution of profits is merely foreseen, it must be subject to the CT as it is considered that it is then deemed to be engaged in operations of a profit-making nature[37].

In practice, therefore, in order to claim the "legal person does not pursue a lucrative purpose" status, a term in the articles of association prohibiting the distribution of a dividend is required. Furthermore, the liquidation bonus must also be used for a disinterested purpose according to the articles of association[38].

7. Income tax regime - application to cooperative societies. According to Article 6:40 of the CCA, each share of a cooperative participates in the profit *or* the liquidation bonus. The cooperative society therefore, *de lege lata*, necessarily has the status of a *legal person*

[35] Art. 181 and 182, *a contrario*, of the Income Tax Code.
[36] Administrative commentary, n° 179/12.
[37] Administrative commentary, n° 179/18.
[38] Provided these two conditions are met, it is explicitly stated that social purpose companies can be qualified as non-profit legal persons. The same applies to intermunicipal companies according to various administrative decisions.

pursuing a lucrative purpose (see *supra*, n°6). If the cooperative does not have a provision in its articles of association prohibiting the distribution of a dividend, it will automatically be subject to the CT (see *supra*, n°6).

8. Income tax regime - application to cooperative societies accredited as social enterprises. For cooperative societies accredited as social enterprises, both conditions – statutory prohibition of the distribution of a dividend and disinterested allocation of the liquidation bonus – can be, in our opinion, met. Indeed, the liquidation bonus must be allocated, in a way which corresponds as much as possible to its purpose[39]. Also, dividends are limited to 6%[40]. Consequently, a cooperative society accredited as a social enterprise, subject to an *ad hoc* term in its articles of association concerning dividends, could be considered under "legal person does not pursue a lucrative purpose". According to Article 6:40 of the CCA, each share of a cooperative participates in the profit *or* the liquidation bonus. While Article 6:40 is applicable to all cooperative societies, Article 8:5 applies only to cooperative societies accredited as social enterprises. The latter provision, more specifically, should prevail according to the principle *lex specialis derogat legi generali.*

With the exception of the possible "legal person does not pursue a lucrative purpose" status, no specific tax measures are foreseen for the cooperative societies accredited as social enterprises.

9. Tax on legal persons *v.* corporate tax. TLP and CT are very different. They are distinguished by a number of factors: the tax base, the tax rate and the method of levying.

The CT is levied on all net profits (active and passive income; including membership fees, donations and subsidies)[41]. The TLP is calculated on a certain number of income items listed in Articles 221 to 224 of the Income Tax Code. These are mainly certain passive incomes, largely from movable and immovable sources. Revenues from economic activities are therefore not taxed.

Multiple tax rates are applied to the TLP according to each taxable item[42]. It has always been commonly said that these rates are generally lower than the basic CT rate. The 2017 CT reform may lead us to reconsider this observation. Under the pressure of international competition, the Belgian legislator amended the CT system by reducing its rate (while broadening its basis to guarantee the budgetary neutrality of the whole)[43]. Since 1 January 2020, the ordinary rate is 25% (from 33.99% before the reform). A reduced rate of 20% is conditionally reserved for small and medium-sized enterprises (SMEs) up to a first income threshold of €100,000[44].

[39] According to Art. 8:5, §1, 3° of the CCA.
[40] According to Art. 8:5, §1, 2° of the CCA and Royal Decree of 8 January 1962.
[41] Art. 183 of the Income Tax Code.
[42] See Art. 225 and 226 of the Income Tax Code.
[43] See Act of 25 December 2017 reforming the corporate tax, *M.B.*, 29 December 2017.
[44] Art. 215 of the Income Tax Code.

Any withholding tax on CT is deductible and, where applicable, recoverable. In terms of TLP, each taxable item is subject to a separate tax regime with the result that the imputation or even the possible recovery of withholding taxes paid is excluded. Therefore, the way in which the TLP is levied presents a major disadvantage in comparison to the CT.

Given their characteristics, the TLP can sometimes be more burdensome than the CT. In conclusion, it is not possible to determine in absolute terms which of these two taxes is the source of the heavier burden.

10. Specific measures for cooperatives subject to corporate tax. Cooperative refunds are generally treated in the same way as various types of discounts (commercial discounts, credit notes, year-end rebates, etc.) granted by commercial and industrial companies: professional expenses if they are adequately justified. Where the refund is not determined in proportion to personal purchases or sales but in proportion to the participation in the capital, it must be taxed as a component of the company's profit. For *consumer cooperatives* in particular, a nuance must be made between members and non-members for refunds granted *after* the closure of the accounts. All refunds granted to non-members are taxable. On the other hand, refunds to members are only taxable if they do not come from their own purchases[45].

11. Specific measures for accredited cooperatives subject to corporate tax. Four specific measures can be noted for accredited cooperatives (CNC accreditation; see *supra*, n°2) subject to the CT:

1) exoneration of a first tranche of dividends (200 €) distributed to natural persons, whereas distributed dividends are in principle taxable for the distributing company[46];
2) absence of requalification of interest (deductible) as dividends (not deductible so taxable)[47];
3) exemption from withholding tax in case of partial sharing of the social assets or acquisition of own shares[48];
4) extended application of the reduced rate for small cooperatives (several exceptions to the benefit of the reduced rate are not applicable)[49].

12. "**Tax neutrality**" **of the CCA.** A law of 17 March 2019 aims to ensure the "tax neutrality" of the CCA[50]. While various adaptations have been envisaged to take into account, notably, the consecration of the incorporation theory (*lex societatis*) or the

[45] Art. 189 of the Income Tax Code and administrative commentary n°189/6, 189/10 and 189/11. See F. Vanistendael, "Traitement fiscal des sociétés coopératives", *R.G.F.*, 1986, pp. 159-170, esp. pp. 165-166.
[46] Art. 185 of the Income Tax Code.
[47] Art. 18, al. 8, of the Income Tax Code. The justification for the inclusion of this exception in the Code is that these companies, in accordance with the cooperative spirit, traditionally rely on their members rather than on third parties to raise the capital necessary for their functioning and therefore this tax measure hinders an essential source of their financing.
[48] A shareholder of an accredited cooperative is in a special situation: if he wishes to realise his shares, he cannot easily transfer them and realise a capital gain on shares that is in principle tax exempt. Indeed, the shares of such a society are not freely negotiable. A shareholder has no other possibility to dispose of his shares than by resignation or redemption. Such a transaction is considered for tax purposes either as a partial sharing of the social assets or as an acquisition of own shares.
[49] Art. 215, al. 3, 1°, 2°, 4°, of the Income Tax Code.
[50] See Act of 17 March 2019 adapting certain federal tax provisions to the new Code of Companies and Associations, *M.B.*, 10 May 2019.

disappearance of the notion of share capital in most societies, the tie-breaker rules between TLP and CT have been maintained.

III. The connections between tax and non-tax law, key to understanding the rationale behind the TLP/CT system

13. Plan. Unless otherwise specified in the tax law (autonomy), for its application and interpretation, the definitions used in non-tax law must be used when the tax law refers to concepts or institutions imported from non-tax law. By investigating the origin of the current system, which allows for a better understanding, we can highlight the influence of non-tax law on tax law – but more fundamentally the interdependency[51] between these branches of law *in casu*: while the former tax regimes of non-profit associations (or NPOs) provide valuable insights into non-tax law controversies (such as the concepts of commercial profit or ancillary character), the principled influence of non-tax law cannot be overlooked in order to understand the current tax framework. Firstly, the "TLP/CT" system has been implemented to regulate the economic activity of "mixed" NPOs (a); secondly, the automatic CT liability of companies stems from the concept of conventional company to which the cooperative society is assimilated despite its nature (b).

14. (a). Regulation of "mixed" NPOs through the income taxation system in the 1970s. The current "TLP/CT" system was introduced in the mid-1970s essentially to reform the tax treatment of "mixed non-profit associations", i.e., those which engage in an economic activity while allocating the income to the realisation of their disinterested purpose. What appeared problematic in 1976 was the fact that a NPO could act in the economic arena without being subject to the consequences of commerciality, thereby undermining fair competition.

From this concern about the way in which the association should behave in the market, two "overflows" can be counted.

The first is that "legal speciality" (a concept which defines the scope of action of a legal person and, in this case, whether a NPO can act in the market) becomes a primary instrument in the fight against unfair tax competition. According an Act of 27 June 1921, repealed by the CCA, a non-profit association may not engage in commercial activities unless they are ancillary. How is the ancillary character to be interpreted? The controversy was rife. For some authors, in order to be ancillary, the commercial activity had to be quantitatively less important than the main activity, necessary for the realisation of the disinterested purpose and all the profits derived from it had to be allocated to the realisation of this purpose[52]. Other authors defended a more flexible interpretation according to which an activity was ancillary if it was intended to financially support the disinterested purpose; only the condition of

[51] Concerning the interdependence of branches of law, see E. Krings, "Les lacunes en droit fiscal", in C. Perelman (ed.), *Le problème des lacunes en droit*, Brussels, Bruylant, 1968, pp. 463-488, esp. p. 481; G. Vedel, Préface, in P. Bern, *La nature juridique du contentieux de l'imposition*, Paris, L.G.D.J., 1972, p. I.

[52] For authors who follow this trend, see the numerous references cited by M. Coipel, M. Davagle and V. Sepulchre, "A.S.B.L.", Répertoire notarial, "A.S.B.L.", Rép. not. t. XII, *Le droit commercial et économique*, Livre 8, Bruxelles, Larcier, 2017, footnote (5), p. 287 and footnotes (1), (2) and (3) p. 288.

allocation had to be verified[53]. For the former authors, the possibility for a NPO to carry out commercial operations should be as marginal as possible in order to limit as much as possible the harm to fair competition between enterprises[54].

The second overflow consists in the fact that the income tax system becomes an instrument by which the State intends, in a way, to regulate the economic activity of NPOs. A historical analysis of the case law of the Belgian Court of Cassation reveals this: as early as 1921, a NPO engaged in an economic activity could not have its income from activities taxed by a professional tax because of its purpose; the legislator protected these structures from taxation of their income from activities[55]. At the time of the major income tax reform of 1962[56], the legislator affirmed its desire to maintain this approach for NPOs and expressly included it in the legal texts. In 1976[57], however, and as the preparatory work clearly shows, the legislator wanted to make a clean break and give a clear signal: the same tax for the same activities. The income tax system became an instrument for combating unfair competition between NPOs and commercial companies. In order to ensure what is claimed to be "fair competition" between enterprises, the legislator's attention focused on the economic dimension of a NPO – on the activity it carries out – and the (disinterested) purpose remains secondary. From 1976 onwards, we experienced the "sanctuarisation of the activity" in the Belgian income taxation system for legal persons.

15. (b). Concept of company, rationale for its income tax regime. It is clear from various extracts from the administrative commentary (see *supra*, n°6) that the CT is considered a "natural tax" for companies, as they are set up to carry out a profit-making activity. The hypothesis in which the company does not engage in profit-making operations (in which case it should not be subject to the CT) is formally (and theoretically) stipulated. However, when a company distributes dividends, regardless of the amount, or when the faculty of a distribution

[53] See M. Coipel, M. Davagle and V. Sepulchre, *op. cit.*, footnote (5), p. 285. See also the references related to the "liberal thesis", no. 127 *et seq*., p. 294 *et seq*.

[54] For a critique of this approach, see for instance M. Coipel and M. Delvaux, "À quelles conditions une A.S.B.L. peut-elle exercer des activités commerciales à titre principal?", J.D.S.C., 2008, pp. 20-23, esp. p. 22. In their article on the taxation and regulation of the non-profit sector ("Taxing and regulating non-profit organisations", in F. Vanistendael (ed.), Taxation of Charities, EATLP Annual Congress Rotterdam (31 May-2 June 2012, EATLP international tax series, vol. 11, IBFD, June 2015, pp. 3-44) note that M. Bowler Smith and H. Ostik argue that any claim that government policy should be guided by sources of income is wrong (p. 16) and that regulation of the non-profit sector requires, instead, a focus on the sector's primary objective, i.e., maximising its distributive impact. This does not imply a focus on the activities, means or inputs of the sector (p. 21).

[55] See the Act of 29 October 1919 establishing schedular taxes on income and a supplementary tax on overall income, *M.B.*, 24-25 November 1919. The income tax system consisted of three schedular taxes, namely the property tax on income from real estate, the tax on income from movable capital and the professional tax on professional income. The law distinguished between different categories of income subject to professional tax, including the profits of industrial, commercial or agricultural operations of any kind, on one side, and the profits of all lucrative occupations on the other. The tax law did not make any exception for the income of NPOs, nor did the law of 27 June 1921 place them outside the scope of the professional tax. Without a profit motive, however, NPOs did not meet the conditions for taxation in the light of the case law of the Court of Cassation.

[56] See the Act of 20 November 1962 reforming income taxes, M.B., 1 December 1962. The system introduced in 1962 initiated a double shift. Firstly, whereas it was necessary to determine to which tax a given income was subject in the schedular system ("objective" system), it is now necessary to associate a taxpayer with a tax ("subjective" system). In place of the schedular taxes, four income taxes were established: a tax on the global income of the residents of the kingdom, called the personal income tax (or IPP); a tax on the global income of resident companies, called the corporate tax (or CT); a tax on the income of Belgian legal persons other than companies, called the tax on legal persons (or TLP); and a tax on the income of non-residents, called the non-resident tax.

[57] *Act of 3 November 1976 amending the Income Tax Code, M.B., 9 December 1976.*

of profits is merely foreseen, it must be subject to the CT as it is considered that it is then deemed to be engaged in operations of a profit-making nature.

The automatic CT liability of companies derives in fact from the notion of the conventional company[58] and from the non-tax case law developed according to which "the company does not have, like the individual, a double life, that of the professional and that of the private man; it has only one existence entirely devoted to the operation of the business which is the social purpose and this social purpose is, in the final analysis, the realisation of profits"[59].

As Tissot and Culot point out, "the cooperative society was intended to be an alternative structure of economic collaboration to those of the rapidly expanding capitalism. It was to allow, as its name indicates, a more egalitarian and fraternal economic cooperation, by organising a community of means or work in the interest of its members"[60]. Cooperatives have been finally classified as commercial companies and treated as such for tax purposes.

This approach does not fit with the nature of the cooperative. As societies, cooperatives must have the aim of sharing the profits made among their members. At that time, the profit referred only to the gain (direct patrimonial benefit). However, the cooperative society essentially aims to enable its members to make savings (indirect patrimonial benefit). By establishing the cooperative as a society, the legislator has implicitly extended the meaning of the profit motive to indirect patrimonial benefit[61]. Furthermore, the cooperative society differs from the classical society in which the members' own resources are used for the benefit of the society. In a cooperative society, the cooperators are key players in the society from an "economic" point of view, *i.e.*, the transactions concluded with the cooperative are more important than the participation in the capital of the society (principle of dual status)[62].

IV. The connections between tax and non-tax law, a major argument to demonstrate the obsolescence of the TLP/CT system

16. Plan. As we have already mentioned, an Act of 17 March 2019 aims to ensure "tax neutrality" of the CCA. We doubt that a substantial reform of the law on legal persons, such as the CCA, can be neutral with regard to the income taxation system of legal persons. Two reasons, among others, can be referred in this respect: the premises underlying the income taxation system of legal persons in Belgium no longer exist since the Belgian legislator has created the conditions for a level playing field for the various economic players (including

[58] Art. 1st, al. 1st, of the Code of Companies according to which "A company is formed by a contract by which two or more persons put something in common, in order to carry out one or more specific activities and with the aim of obtaining for the members a direct or indirect patrimonial benefit". The particular case of social purpose companies (see *supra*, n° 2.) is provided for in al. 3: "In the cases provided for in this Code, the company deed may stipulate that the company is not formed with the aim of obtaining for the members a direct or indirect patrimonial benefit".

[59] See the opinion preceding a judgment of the Brussels Court of Appeal of 26 December 1931, *J.P.D.F.*, 1932, p. 99.

[60] See H. Culot and N. Tissot, "Le cadre juridique de la société coopérative et les perspectives d'avenir", in J.-A. Delcorde (dir.), *La société coopérative: Nouvelles évolutions*, Bruxelles, Larcier, 2018, pp. 11-45, esp. p. 13.

[61] This "broadening" of the concept of profit was promoted by the doctrine since the beginning of the 1950's but would only be enshrined in the legal texts in 1995.

[62] If the shareholders have another status, such as workers, customers or suppliers, they can be disinterested in this way without providing for a return on capital as such.

NPOs) (a). Moreover, the definition of a society has recently undergone substantial reform and it can no longer be considered that the purpose of a company is necessarily to share profits among its members (b).

17. (a). Economic law overhaul. The context in which the "TLP/CT" system was implemented and which underlay it no longer exists. Belgium has just undergone an overhaul of its economic law in three acts: firstly, the reform of insolvency law; secondly, the reform of business law; and thirdly, the CCA (see *supra*, n°3). This overhaul completes the process of relegating merchant law and merchant to the benefit of economic law and enterprise, a process that began several decades ago under the influence of European competition law[63]. The rules on insolvency law (bankruptcy and judicial reorganisation), market practices and the registration of companies are affected in particular, and NPOs are no longer excluded. In this context, as long as the NPO is subject to the same rules of play, there is nothing to prevent it from playing and therefore from carrying out any economic activity as long as it tends to pursue its purpose. The CCA follows this trend by abolishing the criterion of (authorised) activities to define the "legal speciality" of legal persons (see *supra*, n°5).

18. k (b). Evolution of the concept of a company. In the CCA, the definition of a company states that one of its purposes is to distribute or procure for its members a direct or indirect profit[64]. We are witnessing a conceptual revolution in the definition of the company which, in addition to the distribution of profits, may pursue a disinterested purpose like an association or a foundation. While some authors[65] consider that the new definition of the company could pave the way for the consecration of benefit corporations from any company under Belgian law, it should be noted that a benefit corporation (a hybrid structure established in several States of the United States) must necessarily pursue, in addition to the "normal" purposes, a general social purpose (a purpose to create a general public benefit) whereas *in situ* it is only a faculty.

The new CCA has established a system in which legal persons are distinguished, not on the basis of the activity carried out (the association, the foundation and the company may indiscriminately engage in the same activities), but by means of the purpose pursued (which is reflected, for the association and the foundation, in a constraint of non-distribution of patrimonial benefits, if any, to the members, founders, administrators or any other person except for the disinterested purpose determined by the articles of association); the "sanctuarisation of purpose" is enshrined in the law of legal persons.

[63] See on this subject A. Autenne and N. Thirion, "L'agent économique: Du commerçant à l'entreprise?", *op. cit.*; A. Autenne and N. Thirion, "Le Code de droit économique: Première évaluation critique", *J.T.*, 2014, pp. 706-711; N. Thirion, "Le Code de droit économique: Présentation générale", N. Thirion (ed.), *Le Code de droit économique: Principales innovations*, CUP, vol. 156, Bruxelles, Larcier, 2015, pp. 10-29; N. Thirion *et al.*, *Droit de l'entreprise*, *op. cit.*, pp. 248-255. See also N. Thirion, "Du droit commercial au droit de l'entreprise: Nouveau plaidoyer pour les faiseurs de systèmes", *Revue de la Faculté de droit de l'Université de Liège*, 2006/1-2, pp. 314-324.

[64] Art.1:1 of the CCA.

[65] See A. François and M. Veheyden, « Ceci n'est pas une société ? Premières réflexions relatives au but lucratif à l'aune du Code des sociétés et des associations » in R. Jafferali *et al.* (dir.), *Entre tradition et pragmatisme*, 1e édition, Bruxelles, Larcier, 2021, pp. 1149-1178, esp. n° 11, p. 1156 and footnote (34).

19. Outdated tax law and call for reform. In the light of the above developments, several questions arise: what room is left for a system of taxation designed to regulate the unfair commercial practices of non-profit organisations? What room is left for a Belgian tax system that considers that the society is necessarily set up with a view to sharing profits among its members? What room is there for an income taxation system that focuses on the activity carried out rather than the purpose pursued (see *supra*, n° 14 *v.* n° 18), without any connection to the evolution of the law of legal persons and, more broadly, of all economic law?

A wide-ranging reflection aimed at reforming the income taxation system is greatly needed. This process has become essential since the introduction of the CCA.

V. Connections between tax and non-tax law, data to bear in mind to improve the system

"In a world managed as a set of quantifiable resources, equality cannot be thought of as anything other than undifferentiation, and difference as discrimination." [66]

20. Discourse of supra- and international institutions in favour of cooperatives and social entrepreneurship. If the obsolescence of the current Belgian tax system is an obvious fact, giving a specific orientation of what it should be in the future is certainly a value judgment, depending on a political choice. However, we observe that several supranational institutions promote cooperatives or cooperatives as social enterprises. The European Union and the Organisation for Economic Co-operation and Development (or OECD) share the objective of building more inclusive economies and societies. Social enterprises, by combining the creation of economic value with the achievement of social objectives, are expected to play a key role in achieving this goal and should therefore be encouraged, including through national schemes.

21. The role of law and, in particular, tax law in promoting social entrepreneurship. For cooperatives, as for social enterprises, the establishment of an appropriate legal framework is considered essential for their development - and thus their promotion[67]. In its Communication of 23 February 2004, the European Commission mentioned that the introduction of a special tax treatment for cooperatives could be appropriate to take into account the restrictions and constraints cooperatives face[68]. Therefore, in order to promote their development and sustainability, social enterprises should not be taxed in the same way as commercial

[66] Free translation of "Dans un monde géré comme un ensemble de ressources quantifiables, l'égalité ne peut en effet être pensée autrement que comme une indifférenciation, et la différence comme une discrimination", A. Supiot, *L'esprit de Philadelphie, La justice sociale face au marché total*, Seuil, Paris, 2010, p. 99.

[67] See notably European Commission/OECD, *Synthèse sur l'entrepreneuriat social. L'activité entrepreneuriale en Europe*, 2013, p. 8; Commission européenne, *Économie sociale et entrepreneuriat social - Guide de l'Europe sociale*, vol. 4, 2013, p. 95.

[68] Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions on the promotion of co-operative societies in Europe of 23 February 2004 (COM/2004/0018 final), n° 3.2.6.

enterprises, as such a tax burden could, in the long run, threaten their viability[69]. The establishment of an attractive tax policy for social entrepreneurship is thus one of the essential components of an appropriate legal framework, according to supranational institutions. An appropriate tax framework is not a reality in Belgium. A social enterprise under Belgian law is necessarily subject to either TLP or CT (see *supra*, n° 6).

22. Need to focus on direct taxation for institutional reasons. In response to the call from these authorities, given the significant harmonisation of indirect taxation at the European level, the income taxation system for social enterprises should be targeted, since in principle a Member State of the European Union is free to define its income taxation system. In order to implement this appropriate framework, giving a prominent place to the taxpayer's purpose (and, in particular, to the allocation of income) is a possible way forward[70]. Such an evolution would require a real paradigm shift: it is no longer the realisation of profits that should determine the taxation regime but the allocation of these profits. Moreover, such a system would be in line with the reform introduced by the CCA, in a way "reconciling" tax and non-tax law.

23. Freedom for Member States of the European Union to spread the tax burden as they see fit, but exercise this competence in accordance with Union law (including State Aid rules): specific tax treatment admissible for specific enterprises. Although the Belgian legislator has, in principle, a great deal of freedom in designing its income tax system, it must nevertheless act in a way that is consistent with European Union law[71]. This consistency is verified in particular by checking that new tax aid is compatible with the proper functioning of the internal market. Only selective aid can be considered problematic and it appears, in this respect, that a measure is selective when it can be perceived as discriminatory[72]. Discrimination arises in situations which entail either a difference in treatment between comparable situations or an identity of treatment between essentially different situations[73].

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[69] See notably OECD, *Favoriser le développement des entreprises sociales: Recueil de bonnes pratiques*, 2017. Concerning social enterprises, we note in particular the Social Business Initiative of the European Commission of 25 October 2011 (COM (2011) 682 final).

[70] Given that social enterprises are distinguished less by the activity they carry out than by their purpose, this is an option that could, in our view, be favoured.

[71] See CJEU, 4 October 1991, C-246/89, *Commission/Royaume-Uni*, p. I-*04585*, point 12; CJEU, 14 February 1995, C-279/93, *Finanzamt Köln-Altstadt c. Roland Schumacker*, p. I-225, point 21; T.P.I.C.E., 27 January 1998, T-67/94, *Ladbroke Racing Ltd c. Commission*, *rec.*, p. II-1, point 54; CJEU, 13 December 2005, C-446/03, *Marks & Spencer*, *rec.*, p. I-10837, point 29.

[72] See notably P. Rossi, "The *Paint Graphos* case: A comparability approach to fiscal aid", in D. Weber and G. Maisto (eds.), *EU income tax law: Issues for the years ahead*, Amsterdam, IBFD, 2013, pp. 123-137, esp. p. 128: "The State aid nature of a tax preference is therefore established when different tax rules are applied to different companies within the same tax system, similarly to a tax discrimination at the base of a potential infringement of the Treaty fundamental freedoms"; R. Szudoczky, "Selectivity, derogations, comparison: How to put together the pieces of the puzzle in the State aid review of national tax measures", in D. Weber and G. Maisto (eds.), *op. cit.*, pp. 163-196, esp. p. 167; opinion of Advocate General Wathelet delivered on 28 July 2016 for Joined Cases C-20/15 and C-21/15, European Commission *v.* World Duty Free Group, formerly Autogrill España SA (C-20/15 P), Banco Santander SA, Santusa Holding SL (C-21/15P), note (58): "the concept of selectivity is comparable to that of discrimination".

[73] See CJEU, 17 July 1963, *République italienne c. Commission*, 13/63, *rec.*, 1963, p. 337 (see esp. p. 360). See also CJEU, 27 September 1979, *Eridania*, 230/78, *rec.*, 1979, p. 2749 (points 18 and 19); P. Rossi, "The *Paint Graphos* case: A comparability approach to fiscal aid", in D. Weber and G. Maisto (eds.), *EU income tax law: Issues for the years ahead*, Amsterdam, IBFD, 2013, pp. 123-137, esp. p. 129: "under Union Law, the prohibition of discrimination has a substantive meaning and does not only require equal treatment to be complied with but also that no inequality is caused in practice by treating in the same way situations that are different".

It seems essential to highlight the specificity of the "cooperative" or, where relevant, "social enterprise" taxpayer in relation to other taxpayers in order to implement a specific tax framework.

On the occasion of the *Paint Graphos* case[74], the Court of Justice of the European Union decided that a differentiated (and possibly more favourable) tax treatment of Italian cooperatives could be compatible with State Aid rules. This differentiated treatment would not constitute preferential treatment, but rather the recognition of the structural diversity of cooperatives compared to other companies. It should be noted that, in its judgment, the Court highlighted the specificity of cooperative societies, *i.e.*, their particular operating principles, based on Regulation nr. 1435/2003 on the Statute for a European Cooperative Society and the **Communication from the Commission on the promotion of co-operative societies in Europe** of 2004[75].

However, in the final analysis, it is up to the (national) referring court to verify, according to the criteria set out by the Court, whether the cooperative societies in question (producers' and workers' cooperatives) are in fact in a comparable situation to that of other operators in the form of profit-making legal entities. The establishment of a binding legal framework appears to be essential to guarantee the credibility of cooperatives/social enterprises. Moreover, the identification and guarantee of their specificity would clearly condition the validity of an appropriate fiscal framework in the light of the European State Aid rules[76].

Conclusion

24. The particular nature of the cooperative society has never been properly reflected in Belgian law. The cooperative society has always been considered the same as any "classical" company in Belgian law. The CCA does not constitute a revolution despite some cosmetic changes.

A cooperative society is subject to either CT or TLP under Belgian law. These two taxes differ in many ways (tax base, tax rate and levying method). Quite logically at the end, the cooperative specificity is not taken into account for tax purposes: the cooperative society is above all a society; a society is considered as entirely dedicated to the realisation and sharing of profits. In contradiction with the system of determination of the applicable tax ("TLP/CT") which is based primarily on the activities that are carried out, CT automatically applies if it is statutorily possible to distribute profits. There are few measures which only accredited cooperatives can benefit from (see *supra*, n°11).

[74] CJEU, 8 September 2011, C-78/08 - C-80/08, *Paint Graphos e.a.*, *rec.*, p. I-7611.

[75] See A. Fici, "A European statute for social and solidarity-based enterprise", research paper requested by the European Parliament's Committee on Legal Affairs and commissioned, overseen and published by the Policy Department for Citizens' Rights and Constitutional Affairs, February 2017, footnote (26), p. 14; A. Fici, "Recognition and legal forms of social enterprise in Europe: A critical analysis from a comparative law perspective", *Euricse Working Papers*, n° 2015/82, pp. 11-12 ; A. Fici, La sociedad cooperativa europea: Cuestiones y perspectivas, in 25 CIRIEC-España, *Revista Jurídica de Economía Social y Cooperativa*, 69 ff. and, in particular, 79 ff. (2014).

[76] A. Fici, "Recognition and legal forms of social enterprise in Europe: A critical analysis from a comparative law perspective", *op. cit.*, p. 12: "The Italian example of the law on social cooperatives sufficiently demonstrates the importance of specific legislation on social enterprise for the latter's promotion and development, especially when substantive rules are coupled with policy measures, especially of a fiscal nature")

The genealogy of the connections between tax law and non-tax law shows, among other things, the great influence of the law of legal persons on the income taxation system: the "TLP/CT" system has been implemented to regulate the economic activity of "mixed" NPOs; secondly, the automatic CT liability of companies stems from the concept of a conventional company to which the cooperative society is assimilated despite its nature.

The Act of 17 March 2019 aims to ensure the tax neutrality of the CCA. However, the context in which the "TLP/CT" system was created and on which it is based no longer exists: the three-stage overhaul of economic law completes the process of relegating merchant law and merchant to the benefit of economic law and enterprise, which began several decades ago under the influence of European competition law. In this context, we note in particular the creation of a level playing field for all economic players and the opportunity for any Belgian company to become a benefit corporation. Given the connections between tax law and non-tax law *in casu*, to ensure the global coherence of the legal system, is tax neutrality really a possible option? Is it possible to ensure the stability of a building by removing its foundations?

According to the discourse of the international institutions, cooperatives and cooperatives under the broader "umbrella" of social enterprises should not be taxed in the same way as commercial enterprises, as such a tax burden could, in the long term, threaten their viability. If the Belgian legislator wanted to respond favourably to the call from international institutions, it would obviously have to consider these economic actors differently; for example, by giving a prominent place to the taxpayer's purpose (and, in particular, to the allocation of income). Such an evolution would require a real paradigm shift: it is no longer the realisation of profits that should determine the taxation regime but the allocation of these profits.

In order to implement such a fiscal framework, and whatever option is retained, it appears necessary to identify, first of all, what makes cooperatives/social enterprises specific. Only then can their credibility be guaranteed and only then can an attractive specific tax policy be accepted. Could the legal frameworks offered by the CCA be used? Given the guidelines that have been followed, it is doubtful.

More fundamentally, from the perspective of fostering cooperatives or social enterprises, is it relevant to think about legal frameworks and the tax system separately? A study on recent developments in the social economy in the European Union has highlighted a circular phenomenon that should not be overlooked: as mentioned above (see *supra*, n° 23), if we want to put in place specific public policies for social enterprises (including cooperatives), we must first identify the target of the measures to be taken and thus define social entrepreneurship[77]. On the other hand, if the framework only serves institutional recognition by means of statutes or legal frameworks, the progress in terms of promoting social

[77] CIRIEC, "Recent evolutions of the social economy in the European Union", study commissioned by the European Economic and Social Committee (EESC), 2017, p. 38 *et seq*.; this paper is available through the following link: https://www.eesc.europa.eu/sites/default/files/files/qe-04-17-876-en-n.pdf).

entrepreneurship (or cooperatives) may appear marginal and this may weaken the legal framing process[78]. In other words, if it does not seem possible to envisage a viable targeted public policy without a framework, it seems just as unwise to create frameworks without thinking about the public policies that should mobilise them. Like their history, the fates of tax law and the law of legal persons appear to be linked.

[78] *Ibid.*, p. 51.

TRANSCENDENCE OF COOPERATIVES IN SUSTAINABLE SOCIO-ECONOMIC DEVELOPMENT IN THE BASQUE COUNTRY

Waleska Sigüenza[1][2]

Abstract

The main reference of the Social Economy (SE) is the cooperative enterprise. In the Basque Country (BC), cooperatives have always represented a significant percentage of SE entities. In addition, the BC is among the highest-ranked territories in the world in terms of industrial entrepreneurial development in SE. Traditionally, Basque cooperatives have been concerned with meeting the needs of their members and with their active participation, taking into account the community around them. The values and principles governing these companies have been the economic driving force of the BC even in times of economic crisis. These values and principles are key instruments for working together to achieve the purposes of several Sustainable Development Goals (SDGs). Proof of this are the cooperative principles that, for more than half a century have guided Mondragon Corporation Cooperative (MCC), a world benchmark of the Basque Cooperative Movement (BCM). This research aims to analyse the features of the BCM and its impact on the sustainable socio-economic development in the BC from the perspective of the 2030 UN Agenda for Sustainable Development (UN2030 Agenda).

1. Introduction

A cooperative is a legal form of enterprise characterised by its social and personal values and principles. Unlike other legal forms, cooperatives are not solely driven by profit maximisation; and, whilst it is true that, as with any enterprise operating according to the rules of a capitalist society, cooperatives' viability is necessary to guarantee their survival, they also satisfy other social and personal aims.

According to Ban Ki-moon, Secretary General of the United Nations in 2012, 'Co-operatives are a reminder to the international community that it is possible to pursue both economic viability and social responsibility' (International Co-operative Alliance [ICA], 2012). The ICA General Assembly in Kigali in 2019 approved its new strategic plan called 'A People Centred Path for a Second Cooperative Decade 2020–2030', which recognised that 'the cooperative model is a concrete and fully tested way of meeting people's economic, social and cultural needs through democratic empowerment. Although an estimated 12 percent of

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[2] Funded by the University of the Basque Country GIU 18/147: 'La residencia fiscal ante la diversidad de poderes tributarios desde la perspectiva del País Vasco.'

the world population are members of a cooperative, most are not aware of the power and potential of the cooperative movement, nor how it could transform their lives. Each of us in the international cooperative movement has a serious responsibility and a role in making the cooperative model work in the interest of the economic, social and environmental sustainability of humanity and our common planet.'

For its part, the ICA at its centenary congress (Manchester 1995), with the declaration on cooperatives in the 21st century and the (ICA) Statement on the Cooperative Identity, established the definition of the cooperative society, its values, and principles. In this Statement, the ICA established that these societies 'share internationally agreed principles and act together to build a better world through cooperation'. This is precisely what UN2030 Agenda is currently asking of any kind of public or private entity.

Later, in the UN General Assembly, Transforming Our World: UN2030 Agenda,[3] 17 challenging goals were laid out. In the International Symposium on Cooperatives and the Sustainable Development Goals: Focus on Africa (Berlin 2014), a joint initiative of the ICA and the International Labour Organisation (ILO), the relevance of cooperatives for economic, social, and environmental sustainability was recognised. Simel Esim, Manager of the ILO's Cooperative Branch, stated that at the ILO the 'values and principles governing cooperative enterprises respond to the pressing issues of economic development, environmental protection and social equity in a globalized world'.

This international reality is even more evident in the BC. As stated in the '2º Informe de Seguimiento I. Agenda Euskadi Basque Country 2030', the Basque SE is a world benchmark in worker cooperativism.[4] At the European Economic and Social Committee (EESC) held in Brussels in 2018, data on worker cooperatives in the BC were presented. Cooperative societies represented 66% of the sector, while in Europe the percentage was 19%. The volume of BCM employment is 59% and 26% in Europe. In addition, the transforming potential of the SE and its contribution to the construction of a sustainable, integrated, and cohesive Europe was also recalled.[5]

This research aims to analyse the features of the BCM and its impact on the sustainable socio-economic development of the BC from the perspective of the 2030 Agenda for Sustainable Development (UN2030 Agenda). To achieve this goal, we first introduce and justify the relevance of the topic at hand. Then, in the second section, we document the importance of the BCM in the economy of the region and its influence on the national economy. In the third section, we look at the economic viability that cooperatives must achieve in order to survive, before considering their greater resilience in times of crisis. Then, in the fourth section, we justify the decisive role played by cooperatives in the achievement

[3] UN General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1, UN General Assembly: Geneva, Switzerland, 2015.
[4] Available at: https://www.euskadi.eus/agenda-2030/seguimiento-2018/
[5] In April 2018, Social Economy Europe, in collaboration with the European Network of Cities and Regions for the Social Economy, organised at the EESC a roundtable on regional policies for the SE in Europe, under the title 'A new generation of public policies for the Social Economy'. Representatives of the European Parliament Intergroup and the European Commission's Working Group on SE attended the event. The then Director of SE of the Basque Government, Jokin Diaz, highlighted the importance of the SE in the BC as a world reference.

of the SDGs, illustrating the case of BCM with the contributions made by the MCC and four other cooperatives not directly linked to this corporation. Finally, we draw a conclusion to the study.

2. Cooperative enterprises in the BC

In this section, we outline the birth and evolution of the BCM, showing the transcendence of this type of entity in the Basque Economy (BE). The literature identifies the BCM with its ancestral traditions, especially with the way it organises work in primitive communities. The cooperative values and principles, including those laid out by the ICA in its Statement on the Cooperative Identity, were already present in these communities. Among others, voluntary and open association, economic participation of members, cooperation between cooperatives, and the feeling of community, have been identified in different communal organisations and workers' self-management of Basque peoples.

The historian OLABARRI GORTAZAR (1985), always closely linked to the Basque world and focused until the late 1980s on labour relations and BCM, saw realities such as the organised use of communal land, fishermen' unions, and neighbourhood unions as true expressions of the cooperative and community spirit. Following his work, several authors locate the origin of the BCM in the so-called 'auzolana', which refers to voluntary work done for the benefit of the local community. Other factors such as industrial culture, political tradition, religion (especially in credit cooperatives), and the unique characteristics of Basque society are also considered to have had an influence. The first consumer cooperatives were established in the BC at the end of 1800 and the first Basque industrial cooperative was founded in 1892. This type of cooperative transformed the entire environment in which they were located and created a legitimately cooperative world around them (DE LA FUENTE COSGAYA, 2020, p. 136). The same author takes up the categorisation of 'late, dynamic, versatile and multifaceted' cooperativism offered by ALTUNA GABILONDO (2008, p. 91), but qualifies that 'because of the Franco dictatorship, there has never again been a workers' cooperativism like that one. Its social function was not only to generate employment but also to provide surpluses to the workers' organisations of the time' (*id.*, p. 137).

The Mondragon Cooperative Experience, a leader in the BCM has followed this model. The new cooperative movement distanced itself from political ideals, with the intellectual capital and values of its founder, José María Arizmendiarrieta, guiding it towards principles such as religion, training, community orientation in rural work transferred to the industrial scope, and Basque identity. Its first initiatives were developed in the educational, industrial, and financial areas. In 1943, Arizmendiarrieta founded the Professional School, which has become today's University of Mondragon. In terms of industry and production, Arizmendiarrieta, three of the seven heads of factories in Union Cerrajera (Luis Usatorre, Alfonso Gorroñogoitia, and José María Ormaechea), and two former students of the Professional School (Jesús Larrañaga and Javier Ortubay) purchased, in 1955, a company that manufactured gasoline burners in Vitoria. They called it Ulgor, using the initials of their surnames, and created the first cooperative of its kind. A year later, they moved the

cooperative to Mondragon where it was later known as Fagor Electrodomesticos. In 1958, a system of social provision was created in response to the order of the Ministry of Labour that excludes members belonging to cooperatives from the General Social Security System, while the foundation of a credit cooperative, Caja Laboral Popular, enabled access to financing for cooperatives.

The historical context at that time was one of the most traumatic in the modern history of Spain and BC. Authors such as ALTUNA and URTEAGA (2018, p. 141) as well as ORTEGA and URIARTE (2015, p. 4) note that it was in this time of extreme poverty and social division that the BCM was conceived. They believe that its purpose was to cover the emerging needs of post-war society. In the same vein, BARANDIARAN and LEZAUN (2017, p. 280) describe 1940's Spain as 'a country traumatized by the sequels of a terrible civil war, living in poverty under a harsh dictatorship, and forcibly isolated from the rest of the world. Political associations and trade unions were banned (except for the state-sanctioned "vertical syndicate"), and civil society was subjected to extensive police surveillance. In the Basque Provinces, General Franco's regime adopted an even more coercive profile, with an active policy of repression against any expression of Basque identity and autonomous social organization.' This situation particularly affected the social and entrepreneurial movement that Arizmendiarrieta had started. As MOLINA and MIGUEZ (2008, p. 291) explain, 'Arizmendiarrieta's pastoral work fell into the political category of dissent from the dictatorship. This dissent was not founded on cultural or social resistance of a Marxist or Basque nationalist nature, but rather on a deconstruction of the political culture of General Franco's military dictatorship, of its ideological myths and principles. It was also a confrontation with Franco's mobilizing institutions, such as the single party (Falange) and Catholic Action itself, which was criticized for its politicization. Arizmendiarrieta was proposing a civic project built on a sort of catholic values, with values such as equality, freedom, fraternity and reconciliation, which were contrary to the official values. He used a communication strategy that bordered on the illegal: local public opinion.'

Despite these challenges, the BCM continued to make progress and, in 1964, the Ularco industrial group was formed, bringing together different industrial cooperatives created under the umbrella of the Mondragon Cooperative Experience. From then onwards all co-operatives 'had statutes inspired by Ulgor, with three guiding principles: work, savings, and democracy. An increasing sense of efficiency and productivity in each day's work was seen as a means of encouraging workers to save as much as possible in order to capitalize and reinvest in the company. This in turn led to the creation of new jobs and the rise of other co-operatives and institutions dedicated to social welfare in the local community under a social-Catholic morality' (MOLINA and MIGUEZ, 2008, p. 297).

However, it was not until 1987 that the first BC Cooperative Congress agreed on the basic principles of Mondragon Cooperative Experience.[6] These principles 'assume and bring

[6] ORMAETXEA, J. M. (1994), in BARANDIARAN and LEZAUN (2017, p. 281 and 282): ten 'basic principles' guiding the Mondragon Cooperative Experience: (1) Free Membership (Libre Adhesión): there are no barriers to the membership for those who want to be part of the Mondragón experience, provided they respect its basic principles. (2) Democratic organisation: equality of worker–members (socios cooperativistas) expressed in the election of the

together in their proclamation the Universal Co-operative Principles updated by the International Cooperative Alliance, the experience accumulated during the 50 years of co-operative history and the open and dynamic nature of these Principles, subject to the evolution of objective circumstances and to the enriching contributions of the co-operators of the future' (ELIO, 2004, p. 346). In the aforementioned cooperative values and principles updated by the ICA, we can see that the cooperative principles that gave rise to the birth and consolidation of the BCM are still present in our cooperative entities, thus maintaining their social commitment.[7]

The BC Cooperatives Law,[8] in its explanatory memorandum, highlights the value of cooperatives within the SE, arguing that 'the social economy, understood under the dictates of Law 5/2011, of 29 March, on Social Economy and the pronouncements of the various institutions of the European Union – both Parliament and Council, Commission and Economic and Social Council – encompasses companies and entities that are defined or in which a series of principles and values concur that are rooted in the historical principles of cooperativism.'

Like numerous other authors, we can affirm that the BMC is one of the main generators of wealth and employment in the economy of BC. Both the literature and existing data support the fact that this type of SE represents an important economic engine in our society. The

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cooperative's representative bodies (one socio, one vote). (3) Sovereignty of labour: labour (trabajo) is the transformative factor in society and human beings and is, therefore, the basis for the distribution of wealth. (4) The instrumental and subordinated character of capital: capital is an instrument and should be subordinated to labour. (5) Self-management: worker–members should be provided with opportunities and mechanisms to participate in the management of the firm. (6) Pay solidarity: a fair and equitable return for labour. (7) Inter-cooperation: a commitment to cooperation among different cooperative firms. (8) Social transformation: a commitment to transform society by pursuing a future of liberty, justice, and solidarity. (9) Universalism: the Mondragón experience is part of the broader search for peace, justice, and development of the international cooperative movement. (10) Education: a commitment to dedicate the necessary human and economic resources to cooperative education.

[7] See International Cooperative Alliance website, www.ica.coop. Cooperative values: Cooperatives are based on the values of self-help, self-responsibility, democracy, equality, equity, and solidarity. In the tradition of their founders, cooperative members believe in the ethical values of honesty, openness, social responsibility, and caring for others. Cooperative Principles: The cooperative principles are guidelines by which cooperatives put their values into practice: (1) Voluntary and Open: Membership Cooperatives are voluntary organisations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination. (2) Democratic Member Control: Cooperatives are democratic organisations controlled by their members, who actively participate in setting their policies and making decisions. Men and women serving as elected representatives are accountable to the membership. In primary cooperatives members have equal voting rights (one member, one vote) and cooperatives at other levels are also organised democratically. (3) Member Economic Participation Members contribute equitably to, and democratically control, the capital of their cooperative. At least part of that capital is usually the common property of the cooperative. Members usually receive limited compensation, if any, on capital subscribed as a condition of membership. Members allocate surpluses for any or all of the following purposes: developing their cooperative, possibly by setting up reserves, part of which at least would be indivisible; benefiting members in proportion to their transactions with the cooperative; supporting other activities approved by the membership. (4) Autonomy and Independence: Cooperatives are autonomous, self-help organisations controlled by their members. If they enter into agreements with other organisations, including governments, or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintain their cooperative autonomy. (5) Education, Training, and Information: Cooperatives provide education and training for their members, elected representatives, managers, and employees so they can contribute effectively to the development of their cooperatives. They inform the general public – particularly young people and opinion leaders – about the nature and benefits of co-operation. (6) Cooperation among Cooperatives: Cooperatives serve their members most effectively and strengthen the cooperative movement by working together through local, national, regional, and international structures. (7) Concern for Community Cooperatives work for the sustainable development of their communities through policies approved by their members.

[8] Ley 11/2019, de 20 de diciembre, de Cooperativas de Euskadi publicada en el Boletín Oficial del País Vasco Nº 247 del 30 de diciembre de 2019

latest Basque SE report, corresponding to the 2016–2018 biennium, included the data summarised in Table 1. The first column contains the most significant data on the so-called Classic Forms of the Social Economy (CFSE), which includes cooperative societies, limited labour companies, and public limited labour companies. The second column shows the contribution of cooperatives to the total results of the CFSE.[9]

Table 1. Contributions of the CFSE to the Basque economy

CFSE TOTAL	COOPERATIVES
• Recovery of 75% of the jobs destroyed since the beginning of the financial crisis in 2008 (recovery of 52% in the Basque labour market as a whole). • 60,609 jobs, increasing the relative weight of the Basque employed population (6.5%).	• 53,390 jobs. More than 88% of Basque SE employment. • Increase of 3.507 jobs. The 98% of net employment generated in the Basque SE. • Cooperative employment growth of 7% (1.2% rest of Basque SE).
• Basque SE turnover close to €8.5 billion. • Profits of €416 million (pre-crisis levels) • Growth in Gross Value Added (GVA) > €3 billion	• 91% of Basque SE turnover • 87% of total Basque SE profit • 90% of GVA generated on the Basque SE

Source: Own elaboration based on the report 'Social Economy Statistics 2018 and Advance 2019' by the Basque Government Department of Employment and Justice

At the national level, we can also cite data that reflect the importance of cooperativism in general and BCM in particular. The report '*Análisis del impacto socioeconómico de los valores y principios de la Economía Social en España* (Confederación Empresarial Española de la Economía Social [CEPES], 2020)' highlights the significant weight of the SE in Spanish private business companies, where six out of every 100 organisations belong to the SE. It identifies significant differences by regions and explains that in the case of the BC (where it represents 7.6% of the productive fabric) *'for historical, cultural and institutional reasons, the development of the social economy has been more deeply rooted'.*[10]

According to the information provided by the Ministry of Labour, Migration and Social Security, the cooperatives in the BC had an average size of 36.9 workers per cooperative in 2018, topping the national ranking, whose average was 16.2. The BC is also the fourth region in terms of the number of cooperative enterprises and is the leading community at national

[9] Available at: https://www.euskadi.eus/gobierno-vasco/-/documentacion/2018/informe-de-la-estadistica-de-la-economia-social-vasca-2018/

[10] Available at: https://www.cepes.es/publicaciones

level if we measure its weight concerning the number of workers employed in CFSE, with an increase of 6.7%, compared to the national average of 3.6%.[11]

3. Viability of cooperative enterprises

For cooperatives to add value to a society, it is essential they themselves survive economically in that society. The market will not allow them to survive simply because they are carrying out socio-economic development work. Like all other agents, they are required to be viable, as without viability it is impossible for them to sustain themselves and thus improve the surrounding economic environment. In this section, therefore, we analyse how, in the case of cooperatives, fulfilling basic principles and values does not impede their survival. This last aspect will be analysed in greater depth in section 4.

As we noted in the introduction, cooperatives are characterised by their social and personal values and principles, relegating profit maximisation to second place on their list of priorities. Proof of this is the definition of this type of company approved by the ICA (Manchester 1995): 'a cooperative is an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise.'[12] However, the survival of any business depends on its viability and, 'of course, as with any other type of business, if a cooperative is being badly managed or has serious weaknesses in its business strategy, a recession will find this out and it may fail' (BIRCHALL and KETILSON, 2009, p. 9). Referring to the BCM, ALTUNA GABILONDO (2008, p. 72) recalls that 'Arizmendiarrieta always stressed the importance of the economic variable: the cooperative experience had to prove its viability. What was at stake was to demonstrate the coming of age of the working class, as well as its maturity for self-government and self-organisation. Economic efficiency and effectiveness in business management were decisive challenges.'

Experience has shown the effective viability of cooperatives even in times of crisis. Many international studies, sometimes related to BCM, report specific cases in which cooperative entrepreneurship has been a success or situations in which the idiosyncrasies of cooperatives have enabled them to overcome crises more easily. In the study of International Centre of Research and Information on the Public, Social and Cooperative Economy (CIRIEC-International), 'Recent Evolutions in the Social Economy in the European Union', Alain Coheur (Co-Spokesperson of the SE Category [EESC]) emphasised that 'the social economy's potential for growth at a time of economic and social crisis has been highlighted on many occasions. Indeed, the social economy is a model of resilience, and continues to develop while other economic sectors are struggling' (MONZÓN and CHAVES AVILA, 2017, p. 4).

[11] Available at: https://www.cesegab.com/es-es/Publicaciones/Memoria-Socioecon%C3%B3mica
[12] Available at: https://www.ica.coop/en/cooperatives/cooperative-identity

BIRCHALL and KETILSON (2009, pp. 5–7) reflect upon the history of cooperatives, showing clear examples in which cooperative enterprises have been more resilient in the face of crises. They highlight multiple cases in which the cooperative movement has contributed to meeting the needs of the societies hardest hit by crises and, at the same time, how, once cooperatives have been established, they have served as an example of resilience in times of crisis.

They claim, 'Cooperatives can lessen the impact of the recession by the mere fact that they survive and continue to carry out business. There is evidence that cooperatives in all sectors survive better than their competitors.' They explain this phenomenon by looking at the existence of general comparative advantages to cooperatives derived from the nature of cooperatives as member-owned businesses and particular comparative advantages to cooperatives derived from specific types of cooperatives. Focusing on the general advantages, which are derived from membership, the authors explain that 'cooperatives are uniquely member-owned, member-controlled and exist to provide benefits to members as opposed to profit and this has an impact on business decisions. When the purposes of the business are aligned with those of members who are both investors and consumers of the cooperative, the results are loyalty, commitment, shared knowledge, member participation, underpinned by strong economic incentives' (*id.,* p. 12–13).

The article focuses on the banking crisis and reminds us that the cooperative model is not a 'magic formula for success. However, it is interesting to see just how strongly cooperative banks, savings and credit cooperatives and credit unions are performing during the current banking crisis, and how little help they have needed from governments, in contrast to their investor-owned competitors who have had to be bailed out with staggeringly large amounts of public funding' (*id*., p. 9).

ARANA LANDIN (2010, p. 86) argues that the above-mentioned study sufficiently proves the greater resilience of cooperatives compared to other legal forms, thus demonstrating the solid foundations on which cooperatives are built.

MARTÍNEZ CHARTERINA (2015, p. 31), meanwhile, recognises that 'the crisis affects these social economy organisations just like other companies,' but explains that 'as they are companies whose organisational model includes values that condition the way they operate, which follows certain operating principles [...], they respond to the crisis with greater degrees of resilience and flexibility than conventional companies.'

In the case of BC, according to data published by the Basque Government (Department of Employment and Justice), the Basque SE has responded better to the crisis than the general economy of the regions. In cooperatives, the loss of employment has been lower and, as we have seen in the previous section, by the end of 2018 it had recovered a high percentage of the jobs lost since the start of the financial crisis.

4. The cooperative movement and sustainability

In the previous section, we discussed the necessity and reality of the viability of cooperatives. The special feature of these enterprises is that they are viable without the need to damage the sustainability of the economy and society. In other words, they are viable and sustainable because their basic principles respect the sustainable development of the planet. In the words of ARANA LANDIN (2010, p. 86), cooperatives are guided by ethical values and in 'the performance of ethical intelligence they contribute to sustainable development'. Indeed, according to the seventh cooperative principle approved by the ICA, the respect for the sustainable development of their communities is one of the guidelines by which cooperatives must put their values into practice.

The International Cooperation and Development, European Commission (2018, p. 16) recognised that cooperatives 'have become instrumental partners in reaching the most vulnerable and marginalised people. The promotion and defence of a space where these development actors can operate safely is critical for achieving sustainable development.'

The ILO, as it proclaims on its website,[13] promotes the cooperative business model to create and maintain sustainable enterprises, offering jobs that not only provide income but also pave the way for broader social and economic advancement, empowering individuals, their families, and communities. The ILO's work in cooperative development is based on the firm conviction that the promotion of the social and solidarity economy (SSE), which consists of cooperatives, mutual benefit societies, associations, foundations, and social enterprises, is an effective way to promote social justice and social inclusion for all members of society.

Furthermore, we cannot forget that cooperatives are the main agent of the SS and that their important contributions to sustainability are already documented. According to the information on the CEPES website, SE enterprises and organisations are seriously committed to the UN2030 Agenda, seeking to build a better future for generations to come, generate economic growth compatible with the health of the planet, ensure a more equitable distribution of wealth, and offer better life opportunities to all people. The benefit of the SE can be seen in the link between its development cooperation interventions and the SDGs. Specifically, it contributes to achieving 16 SDGs and 63 of the 169 goals of the UN2030 Agenda.

According to the Social enterprises and their ecosystems in Europe. Comparative synthesis report (BORZAGA et al., 2020), cooperative social enterprises are a clear example of entrepreneurial sustainability and Spain is one of the countries that has played a fundamental role in supporting the growth of social enterprises and second-/third-level organisations. In this way, 'cooperative movements and, sometimes, second-level associations have been key to the legitimisation of a new type of cooperative, with a declared social aim. Moreover, they have successfully lobbied for the introduction of enabling policies by participating in the drafting of new legislation and policies focussed on social enterprises' (*id*. p. 50). Spain has introduced legislation designed specifically for social enterprises to further their

[13] Available at: https://www.ilo.org

development. Cooperative regulations have been adjusted and the legal recognition of the Social Initiative Cooperative has enabled the definition of the aims, features, and fields of activity of social enterprises.

In the complementary document prepared for Spain, four autonomous communities account for almost 80% of the total number of Spanish CIS (647): Catalonia with 144 CIS (22.26%), the BC with 141 (21.79%), Andalusia with 132 CIS (20.40%), and Madrid with 96 CIS (14.84%). In the other regions, other types of social enterprises such as special employment centres or employment integration enterprises are more common. As the report itself indicates, 'the delegation of powers to regional governments affects the status and potential activities of social enterprises. The different regional governments expand the historical delegation of competences in the case of cooperatives and employment fields to other formulas related to social enterprises and can regulate and promote this figure in different ways in each region' (DÍAZ, MARCUELLO and NOGALES (2020, p. 50). The four regions mentioned apply modern regulations regarding cooperatives that conform to the reality on the ground. In BC, regulations on entrepreneurial promotion cooperatives are noteworthy.

Cooperatives were recognised as playing an essential role in the achievement of the SDGs even before the adoption of the SDGs. Indeed, in 2012, the resolution of the United Nations General Assembly (Rio+20) underlined the potential role of cooperatives in the realisation of sustainable development. Nevertheless, 'the voices of cooperatives and the cooperative movement are not being heard clearly and their involvement in the process of developing SDGs has not reached its full potential,' because they were slow to take an active part in the debate on the content of the SDGs (WANYAMA, 2016, p. 5). This author believes that 'one possible reason for the invisibility of the cooperative option in the debate is a lack of understanding of the actual and potential contribution of cooperatives to sustainable development, partly due to the disparate nature of literature on this subject.'

Moreover, the UN Inter-Agency Task Force on Social and Solidarity Economy (UNTFSSE) published a position paper in response to concerns that thus far insufficient attention to the role of SSE has been paid in the process of designing a post-2015 development agenda and SDG. UNTFSSE was established to raise the profile of the SSE in international knowledge and policy circles. They believe that SSE holds considerable promise for addressing the economic, social, and environmental integrated approaches of sustainable development. The UNTFSSE position paper describes the role of SSE in eight selected issue areas, each of which are central to the challenge of socially sustainable development. In all these areas, different forms of cooperatives produce goods and provide services that respond to unmet needs, mobilising unused resources, engaging in collective provisioning, and managing common-pool resources.[14]

[14] Social and Solidarity Economy and the Challenge of Sustainable Development (2014) UNTFSSE position paper. Selected issue areas: i) The transition from the informal economy to decent work ii) Greening the economy and society, exchange iii) Local economic development, iv) Sustainable cities and human settlements, v) Women's well-being and empowerment, vi) Food security and smallholder empowerment, vii) Universal health coverage, viii) Transformative finance.

In the present day, this situation has changed because numerous studies support the idea that 'as value-based and principle-driven organizations, cooperative enterprises are by nature a sustainable and participatory form of business. They place emphasis on job security and improved working conditions, pay competitive wages, promote additional income through profit sharing and distribution of dividends, and support community facilities and services such as health clinics and schools. Cooperatives foster democratic knowledge and practices and social inclusion. They have also shown resilience in the face of the economic and financial crises' (id., p. 4).

Reports from various international, national, and regional organisations[15] as well as from academic literature recognise the fundamental role of cooperatives and offer support to them, noting the contributions they can make to the achievement of each SDG and providing examples of situations where cooperatives are already contributing to sustainable development.

The Opinion of EESC on 'The External Dimension of the Social Economy' (2017, p. 3) emphasises that cooperatives are crucial for the implementation of the SDGs. The Committee highlights the leadership of cooperatives in 'agricultural production, finance and microfinance, the supply of clean water, housing, labour market integration of people with disabilities, the reduction of informal work through collective entrepreneurship initiatives in the social economy, youth employment and women's rights, which is playing an increasingly important part in the productive activity of cooperatives and mutual undertakings'.

EESC is strongly committed to supporting and promoting SE in Europe and has published three successive studies on this subject since 2008. CIRIEC-International carried out all these studies and, in the last of the studies, highlights 'values and principles of the cooperative movement and the social economy, such as links with the local area, inter-cooperation, or solidarity, are decisive pillars for guaranteeing sustainable development processes in their triple dimension: environmental, economic and social' (MONZÓN and CHAVES AVILA, 2017, p. 31). Moreover, the study states that cooperatives, and SE, have been pioneers in the implementation of corporate social responsibility since it is an integral part of their values and operational standards (*id,* p. 32).

The ICA, and the cooperatives which the ICA unites, represents, and serves, were engaged in sustainable development work even before the adoption of the UN2030 Agenda. For the Alliance to achieve the SDGs is a transversal strategic priority because they 'have the merit of providing us with the first-ever comprehensive conceptual framework on development with precise goals and indicators on which all the states have agreed upon'.[16]

Proof of this comes in the form of the campaign Coops for 2030 or the publications developed in partnership with cooperative development agencies. Coops for 2030 is a campaign for cooperatives to learn more about SDGs, 'helping cooperative enterprises

[15] International organisations: e.g. EESS, CIRIEC-International, ICA or Committee for the Promotion and Advancement of Cooperatives (COPAC). National organisations: e.g. in Spain, CEPES or Confederación Española de Cooperativas de Trabajo Asociado (COCETA). Regional organisations: e.g. in the BC, Confederación de Cooperativas de Euskadi (KONFEKOOP) or Consejo Superior de Cooperativas de Euskadi (CSCE-EKGK).
[16] ICA's cooperative mission. Available at: https://www.ica.coop/en/our-work/cooperative-mission

respond to the UN's call to action and collecting information about cooperative contributions to the 2030 Agenda, in order to better position cooperatives as partners throughout the implementation process'.[17]

Among the resources to learn more about sustainable development and sustainability reporting, the ICA published in 2017 the 'Co-ops for 2030: A movement achieving sustainable development for all' report to highlight and summarise the contributions of cooperative enterprises to SDGs, recognising the values of cooperatives and their inter-cooperation to build a better world. The aim of this report is to remind policymakers of the importance of cooperatives as partners and stakeholders in sustainable development initiatives.

One year later, the ICA published the 'Global Policy & Advocacy guide', exploring 'the important contribution that cooperatives make to our global economy and society and shows how these businesses, focused on their core purpose of serving their members, improve the lives of people around the world' (ICA and MUTUO, 2018, p. 3).

COPAC has produced a complete report, 'Transforming our world: A cooperative 2030 series', to raise awareness of the significant contributions of cooperative enterprises towards achieving the UN2030 Agenda in a sustainable, inclusive, and responsible way, and encourage continued support for their efforts. The study entails 17 briefs, one for each SDG.

Table 2 outlines the contributions of cooperatives to the SDGs based on the studies presented above.

Table 2: Contributions of the cooperative movement to SDGs

 SDG 1 NO POVERTY	• Cooperatives exist in all regions of the world and all sectors of the economy; there are many examples of how they contribute to the goal of eradicating poverty. • The cooperative model was invented as a poverty-fighting tool (SDG 1 is in the very DNA of cooperatives). • Cooperatives play a vital role in meeting the poverty reduction and sustainable development targets in extensive regions of Africa, Asia, and America. • Cooperatives provide self-help strategies for people to create their own opportunities and to pool their resources for greater impact.
 SDG 2	• Agricultural cooperatives are key to reducing hunger and poverty. • Cooperatives help small agricultural producers overcome the many challenges they face as individuals while preserving their autonomy. • Through a cooperative, producers can improve their productivity,

[17] Campaign Coops for 2030 Available at: https://www.ica.coop/en/our-work/coops-for-2030

ZERO HUNGER	strengthen their position in the value chain, build more sustainable livelihoods for their families and their communities, and produce better food for all. • Savings and credit cooperatives are also important means to drive rural investment and development and help end hunger, offering low-interest loans to agriculture and livestock producers, helping them to access the capital necessary to grow, raise, process, transport, and market their products.
 SDG 3 GOOD HEALTH AND WELL-BEING	• Health cooperatives are important sources of preventative and curative care around the world, responding to the needs of their members, and are a source of affordable care for millions of households around the world. • Their flexibility encourages innovation in design and experimentation with new organisational structures while making them particularly resilient to economic and social crises.
 SDG 4 QUALITY EDUCATION	• Education, training, and information are among the seven cooperative principles adopted by the ICA. • Many cooperative schools and universities around the world provide a people-focused approach to learning. • Cooperatives also provide essential lifelong learning opportunities for their members, whether they relate to professional development, leadership training, or literacy.
 SDG 5 GENDER EQUALITY	• Key aspects of the cooperative identity which help make them drivers of gender equality and women's empowerment: o Voluntary and open membership = anyone can join a cooperative without fear of discrimination. o Democratically governed by their members = members have an equal voice in decision-making processes. • The cooperative form of enterprise facilitates women's participation in local and national economies, increasing access to education, employment, and work, enabling economic democracy and agency, and boosting leadership and management experience. • The establishment of women's cooperatives is on the rise, particularly among domestic workers, who are often marginalised women in vulnerable economic and social situations.
 SDG 6	• Cooperatives can offer a model for people in a community to pool their resources and find solutions for improving water and sanitation, particularly in areas where other public and private entities are unable

	or unwilling to invest in providing such services.
 SDG 7 AFFORDABLE AND CLEAN ENERGY	• Cooperatives can allow communities to transition to renewable energy and sell that energy to increase local wealth. • People-owned renewable energy cooperatives have seen great success in Europe in recent years, and the U.S. has a long history of rural electric cooperatives. • Cooperatives are driven by concern for community, their seventh founding principle, so clean and renewable energy sources are a priority for many cooperatives.
 SDG 8 DECENT WORK AND ECONOMIC GROWTH	• Cooperatives play a significant role in employment creation (direct and indirect) and income generation. • Cooperatives secure the livelihoods of 272 million people in the world (International Organisation of Industrial, Artisanal and Service Producers' Cooperatives [CICOPA]). • Cooperatives are people-centered = sources of decent work. • Cooperatives play a key role in empowering the most vulnerable groups, particularly women, young people, and people with disabilities. • Cooperatives are a valuable tool for reducing the high rates of informal work (50% of all work in the world). • Cooperatives often place more emphasis than their corporate counterparts on employee pay and benefits, offerings of education and training opportunities for workers, and community investment.
 SDG 9 INDUSTRY, INNOVATION, AND INFRASTRUCTURE	• Cooperatives are a valuable partner to achieve SDG 9, given their deep roots in local communities and understanding of people's needs. • As member-owned, community-based enterprises, cooperatives can help people to pool their resources to make investments in needed infrastructure (e.g. power generators, electricity supply grids, irrigation facilities) or to improve members' ability to access existing infrastructure. • In terms of industrialisation, cooperatives of small-scale producers have been instrumental in improving their members' access to affordable finance to purchase production inputs promoting their investment in manufacturing and value-adding activities and enhancing their bargaining power and branding in the marketing process. • Regarding innovation, cooperatives play a key role in making new technologies available to producers in rural areas and workers in the informal economy.

 SDG 10 REDUCED INEQUALITIES	• Cooperative enterprises drive equality in various ways: ○ Open and voluntary membership = anyone, regardless of their background or socioeconomic status, can join if they can commit to the responsibility of being a member. ○ Active engagement of members in cooperatives' governance and operations = increase people's representation and voice and inclusive business practices.
 SDG 11	• The founding principle of concern for community = long-term vision for environmentally sound investments, such as energy efficiency, safeand sustainable building materials, and disaster resilience.
 SDG 12 RESPONSIBLE CONSUMPTION AND PRODUCTION	• Because the identity of cooperatives is based on ethics and values, they are committed to sustainably using natural resources and promoting sustainable practices to the community. • Cooperatives prioritise the needs of their members and their communities over the maximisation of profit. Thus, they are willing to invest in environmentally smart practices and raise awareness among their members while users and stakeholders do the same. • They early adopt reports of sustainability, with many cooperatives tracking and making available data on their environmental impacts, meeting the commitment of the movement to prioritise information about environmental and social responsibility.
 SDG 13 CLIMATE ACTION	• Guided by long-term goals, cooperatives can foster the buy-in for the necessary sacrifices to address climate change. • Organised farmers can achieve better and more environmentally and socially sustainable results together. • Collective action can contribute to change in practices and policies, linking local solutions to national and global goals and challenges such as the SDGs and climate change.
 SDGS 14 LIFE BELOW WATER	• Fishery cooperatives have important roles to play in facilitating information exchanges, improving communities' negotiating power with market intermediaries, building partnerships, networks, and linkages to other organisations, and fostering the sharing of traditional and indigenous knowledge. • Fishery cooperatives and other professional and informal organisations can facilitate their members' involvement in policy- and decision-making processes relevant to small-scale fishing communities, empowering fishers and fish workers. • Fishery cooperatives train their members to avoid overfishing and

	adopt sustainable practices.
 SDGS 15 LIFE ON LAND	• As enterprises based on values and principles: o Cooperatives offer a forum for community members to find solutions for environmental change, such as managing the land resources they use responsibly or diversifying their economic activities to embrace green economic ventures. o Forestry cooperatives harvest wood in a way that protects and replenishes the area being used, educates the community, and promotes the love of forest ecosystems.
 SDG 16 PEACE, JUSTICE, AND STRONG INSTITUTIONS	• Cooperatives are sources of positive social capital that foster a sense of community, empowerment, and inclusion: o They build mutual understanding and contribute to conflict eradication and promotion of peace while shaping inclusive societies. o Cooperatives are democracy workshops: Through active member participation and 'one member, one vote' governance, they help people to develop their skills as fair decision-makers and to become leaders. o Cooperatives are spaces without discrimination, creating an environment conducive for people to strengthen their interpersonal and intergroup relationships.
 SDG 17 PARTNERSHIPS FOR THE GOALS	• *The global cooperative movement is a vast network with shared goals, working together to strengthen the overall movement, fulfilling the sixth founding principle of cooperation among cooperatives.* • *The seventh cooperative principle 'concern for community' drives cooperatives to work for the sustainable development of their communities through actions approved by their members.* • *Cooperatives are working with governments, civil society, and the UN system to achieve the SDGs and to develop harmonious policies and practices around cooperatives*

Source: Own elaboration based on the reports: The Opinion of EESC on 'The External Dimension of the Social Economy' (2017), 'Recent Evolutions in the Social Economy in the European Union' (MONZÓN and CHAVES AVILA, 2017), 'Co-ops for 2030: A movement achieving sustainable development for all' (ICA, 2017), 'Global Policy & Advocacy guide' (ICA and MUTUO, 2018) and 'Transforming our world: A cooperative 2030 series' (COOPAC, 2020).

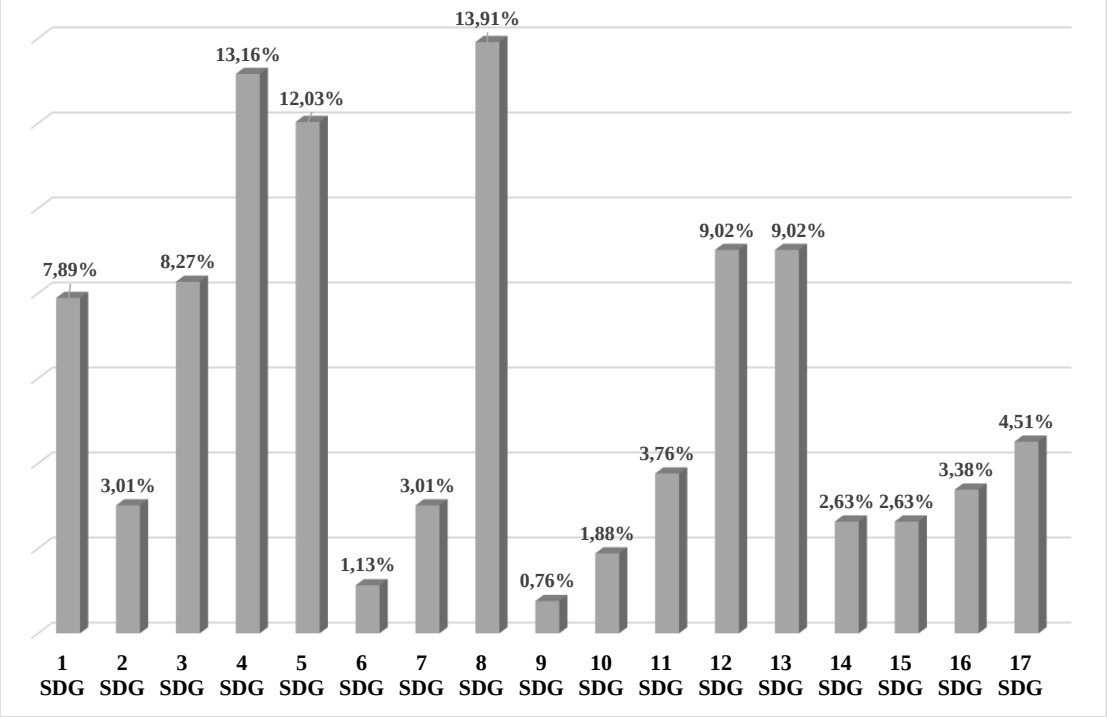
Although there are still unsolved issues (PINEDA OFRENEO, 2019), we can find different studies providing evidence of the contributions of cooperatives to the SDGs. For instance, BATTAGLIA, GRAGNANI, and ANNESI (2020) prove that cooperatives can contribute to sustainability by analysing the annual sustainability reports of the largest Italian cooperatives.

This reality is more apparent on the local level, constituting an important link between the international community and the local one. GUTBERLET (2021) presents the experiences of a National Waste Pickers' movement in Brazil, proving that these recycling cooperatives, supported by public policies and inclusive governance, can tackle several of the SDGs. THIPAKORN (2019) describes successful cross-border cooperation between Japanese and Thai agricultural cooperatives, based on cooperative principles. ARANA LANDIN (2020) recommends empowering sustainable small-scale fishing through SE policies to achieve SDG 14. The author identifies this opportunity because small-scale fishing is a sector that tends to be firmly rooted in local communities, with its traditions and values coinciding with those of the SE. Moreover, fishery cooperatives could provide access for small-scale artisanal fishers to marine resources and markets. MARTÍNEZ-LEON et al. (2020) make use of a sample of 114 Spanish cooperative firms to analyse the predominant leadership styles and gender differences in Spanish cooperatives. Their results shed light on women's leadership styles in cooperatives and verify that 'the greater presence of women in cooperatives than in other organizations improves their socio-professional position and economic income, consequently, reducing poverty (SDG 1). Findings indicate that the special characteristics of cooperatives contribute to a more egalitarian development of leadership styles where female managers need to improve the perception of their role among male management teams' (*id.*, p. 18).

At the national level, CEPES stands out for its work in encouraging, assisting, defending, and fostering the SE and the movements and sectors that it comprises in Spain. In 2019, it published the report 'La contribución de la Economía Social española a los ODS. 4º INFORME sobre la experiencia de las empresas españolas de Economía Social en la Cooperación al Desarrollo 2017–2019', which gathered cooperation projects of its members. As CEPES declares on its website, 'social economy organisations linked to CEPES are specialized in cooperation projects aimed at creating jobs and generating inclusive economic growth at local level. They support social economy enterprises launched by vulnerable groups (peasants, small agricultural producers, among others) and women in order to increase economic resources, improve their socio-cultural environment and their capacity for social mobilization' (CEPES, 2019, p. 9).[18] Figure 1 shows graphically the percentage of activities and collaborative projects of the CEPES associative network that contribute to each SDG.

[18] Available at: https://www.cepes.es/principal/cepes_development_cooperation&lng=en

Figure 1: Percentage of cooperation projects that contributed to achieving each SDG.



Source: Own elaboration based on the report 'La contribución de la Economía Social española a los ODS. 4º INFORME sobre la experiencia de las empresas españolas de Economía Social en la Cooperación al Desarrollo 2017–2019' (CEPES, 2019).

Basque cooperatives promote many of these projects, confirming, once again, the specific influence of the BCM in the decisive sustainable development work carried out by the cooperative companies. In the work reviewed to date, we find examples of commitments to the SDGs by different cooperatives at a global and national level. As we have already mentioned, we have identified significant Basque initiatives among them. In this study, we have sought to recover some of these examples and add to them to take a complete picture of the BCM's firm commitment to the UN Agenda 2030. First, we identify the contributions of the cooperatives of the MCC to each of the SDGs. Hereafter, we present several examples of the BCM representative of the cooperative and sustainable development efforts made by the other Basque cooperatives.

5. Mondragon Cooperative Experience

In the present day, MCC[19] is the leading business group in the BC and one of the largest corporations in Spain. It operates across the world, with 141 production plants in 37 countries, commercial business in 53, and sales in more than 150. MCC divides its

[19] Available at: https://www.mondragon-corporation.com/en/

organisation into four areas: Finance, Industry, Retail, and Knowledge. It currently consists of 96 separate, self-governing cooperatives, more than 81,000 people, and 14 R&D centres.

Its mission is based on decent, quality employment, health and safety at work, education, sustainable consumption, innovation as the lever for a digital and eco-friendly transition, and support for social and community infrastructures and initiatives. In this mission, its cooperative principles are, among others, inter-cooperation, grassroots management, corporate social responsibility, innovation, democratic organisation, education, and social transformation.

In 2020 it was included in *Fortune* magazine's 'Change the World' list, being ranked eleventh worldwide. According to *Fortune* magazine, one of the indications of MCG's success is that 'as the world's largest federation of worker-owned cooperatives, it has grown in part because it doesn't disproportionately enrich top brass. No top executive makes more than six times the salary of the lowest-paid worker in his or her cooperative (and all earn far less than $1 million annually).'[20] Moreover, MCC meets every target area of the Agenda 2030. Below, we summarise these contributions, as reported by the group for 2019.

NO POVERTY

- Foster social projects in both developed and developing countries.
- **Mundukide Foundation** improves the lives of 80.000 people in Africa and Latin America.
- **Ulma Foundation** allocates 0.7% of its profits to cooperation projects in developing countries.
- €26.9 million of resources are intended for social content activities.

ZERO HUNGER

- Humanitarian support for vulnerable groups.
- **Eroski** and its customers make substantial donations so that almost 10,000 people have had their annual dietary needs catered to.
- **Ausolan** develops protocols for the donation of surplus food in central kitchens. In 2019 this amounted to approximately 30,000 kg of food.

[20] Available at: https://fortune.com/packages/october-2020/

GOOD HEALTH AND WELL-BEING

- Foster activities and projects to ensure healthy lives and promote well-being for those of all ages.
- **LagunAro** provides healthcare and social welfare for 28,204 active members, 73,172 healthcare beneficiaries, and 14,544 senior citizens.
- **Ulma Foundation** works with entities involved in health welfare, senior citizen care, and work-life balance.
- **Ausolan** designs meals that are safe, nutritious, healthy, sustainable, and tasty. They work at schools, companies, hospitals, and nursing homes, catering to the needs of each person.

QUALITY EDUCATION

- MCG is a benchmark in advanced educational models and is a pioneer in dual training programmes.
- Pre-university training centres: **Arizmendi Ikastola, Lea Artibai Ikastetxea, Politeknika Ikastegia Txorierri**
- **Mondragon University**
- Technology centres: **Lortek, Ikerlan, Leartiker, IDEKO**
- **Mondragon Foundation** promotes education and socio-cooperative and professional training, as well as the research and development mandated to raise their level of technology.
- **ULMA Foundation** supports the SE through education and socio-cooperative and professional training, and the dissemination of the precepts of cooperativism.
- **Azaro Fundazioa** disseminates a culture of entrepreneurship and innovation while promoting cooperative values.
- **Gizabidea** encourages culture and education, creating its educational infrastructure and system, to transform people and society in general. **Gizabidea** is the outcome of the joint efforts of the cooperatives and in particular **Fagor Group**, which has assigned part of its earnings to research and education.

GENDER EQUALITY

- Almost half of the people working for MCG are women. 26.8% of management committees and 29.1% of boards of directors are women
- 95% of **Ausolan**'s staff are women and its board of directors is made up of 5 women and 2

men.

AFFORDABLE AND CLEAN ENERGY

- MCG delivers international turnkey projects in electrical engineering and automation for wastewater treatment plants.
- KREAN S. Coop. synergise its actions with the Basque Energy Agency (Basque Government) on the construction of a solar energy park, providing clean energy to BC. This solar energy park has a set of 66,000 latest-generation solar panels, which can produce approximately 40,000 MWh per year (electrical energy equivalent to the electricity consumption of 15,000 families in a year) and avoid the emission of around 14,600 tonnes of CO_2.

DECENT WORK AND ECONOMIC GROWTH

- MCG is the largest employer in the BC and among the top ten nationwide.
- 55% of workers with a certified occupational health and safety management system.
- Laboral Kutxa, their cooperative bank, promotes territorial development.
- **Azaro Fundazioa** participates in the creation of new innovative businesses in the Basque district of Lea-Artibai.

INDUSTRY, INNOVATION, AND INFRASTRUCTURE

- MGC has an innovative business ecosystem, R&D centres, and a university employing over 2,000 people.
- 90% of sales with a certified quality management system.

REDUCED INEQUALITIES

- The MCC business model generates equity, quality of life, and equal opportunities with:
  - A more supportive remuneration package.
  - Redistribution of results.
  - Divisional restructuring. Corporate funds (contributed €37.9 million in 2019).
- **ULMA Foundation** promotes equality and social and labour inclusion for underserved communities.

SUSTAINABLE CITIES AND COMMUNITIES

- MGC creates cities that are more sustainable and inclusive, improves citizens' quality of life, creates jobs and wealth, and offers equal growth opportunities.
- **SmartEnCity, a project** that aims to develop a systemic approach to transforming European cities into sustainable, smart, and resource-efficient urban environments, developing strategies to reduce energy demand and maximise renewable energy supply.
- Lagun Aro Insurances (Social Perspective) performs important work in society and in its three operating areas: the promotion of popular sport, cultural events, and the launch of projects for improving the quality of life of the victims of road accidents.
- MGC encourages the use of Euskera among its cooperatives.

RESPONSIBLE CONSUMPTION AND PRODUCTION

- Health and sustainability are the pillars of our consumer model, which is firmly committed to local products. Over 50% of our suppliers are small, local producers.
- **Eroski**'s remit is the promotion and protection of consumers and, in particular, education and information on consumer affairs:
  - Its programme 'Food and Healthy Habits Education' trains more than 15% of primary school children in the state.
  - 38,019 tonnes of waste recycled or recovered according to the principles of the circular economy.
  - 2,479 small local producers in its supplier network.
- **Ulma Foundation** Agroecology, food sovereignty, sustainable transport, energy, general environmental stewardship.
- **Ausolan**'s project promotes local products in order to boost the sustainability of the entire value chain.

CLIMATE ACTION

- MCG aspires to a carbon-free economy.
- 90% of its sales have quality management certificates and 75% have certified environmental management systems.

LIFE BELOW WATER

- MCG supports the Sustainable Fisheries project sponsored by the WWF.

LIFE ON LAND

- MCC is involved in projects for recovering local wildlife, forestry management, and the sustainable farming of local produce.

PEACE, JUSTICE, AND STRONG INSTITUTIONS

- The cooperative model fosters transparency and grassroots involvement in ownership, management, and results.

PARTNERSHIPS FOR THE GOALS

- MCC is the outcome of intercooperation. It has entered into agreements with numerous international networks and alliances for increasing its scope for social transformation.
  - Knowledge exchange and external exchange forums.
  - Global Partnership for Effective Development Cooperation. MCC is a member of the Business Leaders Caucus.

6. Other examples of BCM

BEROHI S. COOP.

Non-profit cooperative of public utility and social initiative dedicated to textile recovery. Founded in 2000 by Rezikleta, S. Coop., and Cáritas Bizkaia. It provides services for the collection, handling, processing, and sale of second-hand textile products and accessories.

BEROHI S. COOP.'S CONTRIBUTIONS **SDGs**

- Innovative model, proposing an integral solution in the field of recovered textiles.
- Socio-occupational insertion and training of people being socially excluded or at risk of social exclusion.
- Environmental protection, minimising waste.
- Promoting development cooperation projects in other countries.

BARRENETXE S. COOP.[21]

[21] Available at: https://barrenetxe.com/

Professional farmers' cooperative founded in 1980. It dedicates itself to the production of the traditional vegetable of the BC. They have market gardens distributed between the coast and the interior of Bizkaia (Lea-Artibai and Uribe-Kosta).

BARRENETXE S. COOP.'S CONTRIBUTIONS	SDGs

- Proximity to and versatility in the market.
- Commitment to the taste and quality of authentic local products.
- Environmentally friendly production. Cultivation of old autochthonous varieties and continuous production throughout the year, growing in soil or other substrates, both outdoors and in greenhouses.
- Traditional farmers, but also pioneers. They apply innovative techniques suitable for the sustainability of the rural environment.
- They use natural resources and production mechanisms that facilitate the medium-term development of more sustainable agriculture.
- Identification of production processes that allows them to guarantee traceability and food safety.
- They have all products certified in sustainable production systems such as Integrated Production and Global Gap.Compromiso con el sabor y la calidad de los auténticos productos.

KOOPERA SERVICIOS AMBIENTALES, S. COOP. I. S.

Social initiative cooperative dedicated to the integral management of resources. Its social objective is the support and socio-labour insertion of unemployed people being socially excluded or at risk of social exclusion, with special difficulties in accessing the labour market. Its objective is social and ecological efficiency. It provides waste collection, management, and recycling services.

KOOPERA SERVICIOS AMBIENTALES, S.COOP.I.S.'S CONTRIBUTIONS	SDGs

- Social initiative cooperative dedicated to the integral management of resources.
- They promote the social integration of people and groups suffering from any kind of social exclusion.
- The company's staff participates in an insertion itinerary, receiving personalised advice and support.
- Development of activities for the defence of the environment.
- The economic benefits obtained are dedicated to:
  - Environmental and solidarity purposes.

- Creation of employment for groups at risk of exclusion.
- Training for the professionalisation of groups at risk of exclusion.

GRUPO SERVICIOS SOCIALES INTEGRADOS S. COOP.[22]

A company created in 1986 by 35 women who, based on their values, chose the legal form of a cooperative. The company integrates social initiatives and public utility companies, made up of professionals and managers. Its two main areas of work are care for people in situations of dependency in the home and care for people in situations of social vulnerability.

GRUPO SERVICIOS SOCIALES INTEGRADOS S. COOP.'S CONTRIBUTIONS	SDGs
• Responds comprehensively and innovatively to the social needs of people in a situation of social vulnerability and dependence in the BC. • Collaborates with the ageing ecosystem in tackling the challenge of longevity. • Integration of innovative aspects such as e-health or new technologies at the service of people (Home Care Lab innovation division). • Knowledge management for carers to acquire digital skills through training specialities linked to ICT and integrated care. (Socio-health Living Lab and Training Centre). • Active participation in European socio-technological innovation projects. • Support and mentoring of social entrepreneurship projects in the social and healthcare sector (SOCEM HUB Division). • Establishment of alliances to improve their services and, therefore, improve the quality of life of the people they serve.	

7. Conclusions

This research aims to analyse the evolution of the BCM and its impact on the sustainable socio-economic development of the BC, from the perspective of the UN2030 Agenda.

To contextualise and justify the objective of the study, we have identified the 17 SDGs that guide cooperatives. Based on the principles and values laid out in these goals, cooperatives are born out of a spirit of collaboration and respect for the environment. Therefore, confirming the existing literature, we have been able to verify that cooperatives are in an exceptional position to collaborate in the achievement of the SDGs. In fact, they have played this role since their creation in the 19th century.

[22] Available at: www.grupossi.es

Additionally, we have corroborated the findings of studies that have for many years been proclaiming the significant value of the BCM. We have supplemented this information with the latest available data, confirming the significance of the BCM in the economy of the region and its influence on the national economy both historically and in the current era.

From the information gathered, we can conclude that the unique characteristics of cooperatives are not a hazard to their viability. On the contrary, the awareness and level-headedness with which the members manage these enterprises are the key to their success, making them more resilient in times of crisis.

Finally, the business experiences presented are a true reflection of the environmental responsibility of the cooperatives, existing in each of the decisions they take, as well as in their firm commitment to the well-being of their workers and society. After analysing the progress of the BCM, we conclude that the Basque cooperatives have been able to adapt and internalise global objectives to their immediate environment. At the same time, they have also understood the scope of the common good pursued by the SDGs and have established the necessary interrelationships to collaborate at a global level.

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CASE NOTES ON RECENT JUDGEMENTS BY INDIAN COURTS IN CLARIFYING THE NATURE OF CERTAIN ASPECTS OF COOPERATION THROUGH THE PERSPECTIVE OF TAXATION.

1. NATIONAL COOPERATIVE DEVELOPMENT CORPORATION V. COMMISSIONER OF INCOME TAX CIVIL APPEAL NOS. 5105-5107 OF 2009
2. K. 2058, SARAVANAMPATTI PRIMARY AGRICULTURAL CO-OPERATIVE CREDIT SOCIETY LTD. V. ITO (2020) 426 ITR 251 / 187 DTR 185/ 313 CTR 459 MADRAS HIGH COURT
3. INCOME TAX OFFICER VS. VENKATESH PREMISES COOPERATIVE SOCIETY LTD. CIVIL APPEAL NO. 2706 OF 2018, SUPREME COURT OF INDIA

P. Santosh Kumar[1]

Introduction:

This paper will present thematic summaries of two recent judgements of the Supreme Court of India, and one judgement of the Madras High Court at Chennai, which concern cooperatives and the law on taxation in India. The judgements have been selected based significance the courts have accorded to the character of cooperative societies and organizations promoting them, as can be said to have been recognized within international public-policy[2] applicable to cooperatives and intended to safeguard the unique identity of the cooperative enterprise form, which comprises of cooperative values and principles, and the basis for a definition for its legal form.

The judicial system in India is the result of a long historical development in which many factors have played their part. Courts in the present system can be classified into three broad categories: higher judiciary, lower judiciary, and tribunals that are dedicated to various areas such as human rights, taxation, debt recovery, telecommunication, competition, companies, cooperative societies, etc. The higher judiciary consists of the Supreme Court and the High Courts that are established under or regulated by the Constitution. It is pertinent to note that several High Courts were functioning before the Constitution of India was adopted and that, the jurisdiction, powers and authority of the High Courts that pre-date the Constitution and as conferred by relevant enactments continue to be exercised today and have not been abrogated by the Constitution of India. The High Courts of Bombay, Madras, Calcutta and Allahabad were created by "Letters Patent" which is a document issued under the seal of the Sovereign under the Indian High Courts Act, 1861. Though the Supreme Court of India is entirely the

[1] Director of Legislation, International Co-operative Alliance; Staff/secretary, ICA Cooperative Law Committee

[2] The term 'international public policy' has been used to refer to all those instruments of international law that countries have given upon each other chiefly through the resolutions of the General Assembly of the United Nations and through International Labour Standards.

creation of the Constituion of India, 1950, it is not incorrect to state that India is perhaps the first country in the world to have a Supreme Court of Judicature (Calcutta) which was established by the Regulating Act, 1773.

The following flow chart is aimed to explain the redressal of disputes concerning taxation in India.

Taxpayer (Assessee) - - *Files Returns* --> **Assessing Officer** -- *Taxpayer files appeal on rejection of return* --> **Commissioner of Income Tax** (Appeals) --> **Income Tax Appellate Tribunal** ---- *substantial question of law* --> **High Court** and --> **Supreme Court of India**

Case Notes:

1. National Cooperative Development Corporation v. Commissioner of Income Tax[3]

The first case note is on case in which the Supreme Court of India decided a 44-year-old dispute between National Cooperative Development Corporation (NCDC) and the Commissioner of Income Tax (CIT) on the taxability of funds received by the Union Government, surplus funds and interest arising out of it. This judgement did not opine on the nature of cooperative societies. It did, however, settle a long-standing dispute concerning revenue expenditure and capital expenditure concerning an organization instituted statutorily to promote and develop cooperatives.

The court made a reference to the Swedish legal system and in it, tax-transparency as its hallmark trait and that the law requires public disclosure of ex-ante tax administration such as advance rulings. It is pertinent to note here that the Constitution (Ninety Seventh Amendment) Act, 2011 gave cooperatives the status of local self-government and inserted inter-alia, Article 243ZO. (1) to empower the Legislature of a State to provide for access by every member of a cooperative society to the books, information and accounts of the cooperative society kept in regular transaction of its business with such member. The newly acquired status of cooperatives of being akin to Associations and Unions[4] made it come under the purview of the Right to Information Act, 2005.

The NCDC (assessee) is established under the National Cooperative Development Corporation Act, 1962 (NCDC Act). It functions under section 9 to facilitate financial aid, start-up funds, loans, grants and subsidies to cooperative societies in India. NCDC is funded by way of grants and loans forwarded to it by the Union Government under the NCDC Act

[3] Civil Appeal Nos. 5105-5107 of 2009/[2020] 47 ITR 288 (SC) [11-09-2020]

[4] Article 19. Protection of certain rights regarding freedom of speech, etc.—(1) All citizens shall have the right
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions [2][or co-operative societies];
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; [and][4]
(g) to practise any profession, or to carry on any occupation, trade or business.

section 12[5], and, to maintain such monies with the NCDC fund created under section 13 (1) [6], the assessee invests surplus funds in fixed-deposits or term-deposits, which generate income. The issue that arose was whether the interest earned on the funds and disbursed as loans and non-returnable aid to national and state cooperative societies and federations, was eligible for a tax-deduction. The Assessing Officer of the Income Tax department rendered the opinion that non-returnable grants were capital expense and not a revenue expenditure, and thus not allowed for deduction. The matter was appealed and the Commissioner (Appeals) decided that the grants made by the assessee out of the interest generated by the fixed/term deposits were within the scope of its activities and were of a capital nature. They resulted in the acquisition of assets but not directly by the assessee. The Commissioner concluded that the assessee's expenditure, as it was related to its main business of extending loans and grants, was allowable for deduction- under section 37[7] of the Income Tax Act.

The matter was taken to a second appeal, where this time, the Income Tax Appellate Tribunal set aside the order delivered by the Commissioner (Appeals) and held that the assessee received grants and other monies in a single fund under section 12 of the NCDC Act. That could not be treated as income and disbursements made from such a fund could be treated as revenue expenditure. The matter was further appealed at the High Court at Delhi where the court held that the central purpose and business of the assessee was receiving grants from the Government of India and rorwarding them to cooperatives as loans. The interest earned from such loans fell under Chapter IV of the Income Tax Act as the profits and gains of business, being part of its normal business activity. The court said further that in order to claim for deductions as an item of revenue expense, the assessee had to first establish that its grants to state and national cooperatives, given from funds accumulated through interest earned on surpluses, were expenditure, and concluded that since the loans extended by the assessee did not irretrievably leave its 'hands', they could not be claimed as an expenditure. The law on taxation in India is quite straightforward in determining the taxation status of the assessee.

[5] Section 12 (NCDC Act, 1962). Grants by the Central Government to Corporation.—The Central Government shall, after due appropriation made by Parliament by law in this behalf, pay to the Corporation— (a) by way of grant each year, such sum of money as is required by the Corporation for giving subsidies to State Governments and for meeting its administrative expenses; *** (b) by way of loan, such sum of money on such terms and conditions as the Central Government may determine; [and] [(c) such additional grants, if any, for the purposes of this Act.]

[6] Section 13 (NCDC Act, 1962). Corporation to maintain fund.—(1) The Corporation shall maintain a fund called the National Co-operative Development Fund (hereinafter referred to as the Fund) to which shall be credited-(a) all moneys and other securities transferred to it under clause (a) of sub-section (2) of section 24; (b) the grants and other sums of money by way of loans paid to the Corporation by the Central Government under section 12; [(bb) all moneys received under section 12B; (bbb) all moneys received for services rendered;] [(ba) all moneys borrowed under section 12A;] (c) such additional grants, if any, as the Central Government may make to the Corporation for the purposes of this Act; and (d) such sums of money as may, from time to time, be realised out of repayment of loans made from the Fund or from interest on loans or dividends [or other realisations] on investments made from the Fund.

[7] Section 37 of the Income Tax Act, 1961: in the case of an assessee, being an individual or a Hindu undivided family, any income chargeable under the head ―Capital gains‖ arising from the transfer of agricultural land, where— (i) such land is situate in any area referred to in item (a) or item (b) of sub-clause (iii) of clause (14) of section 2; (ii) such land, during the period of two years immediately preceding the date of transfer, was being used for agricultural purposes by such Hindu undivided family or individual or a parent of his; (iii) such transfer is by way of compulsory acquisition under any law, or a transfer the consideration for which is determined or approved by the Central Government or the Reserve Bank of India; (iv) such income has arisen from the compensation or consideration for such transfer received by such assessee on or after the 1st day of April, 2004. Explanation. —For the purposes of this clause, the expression ―compensation or consideration‖ includes the compensation or consideration enhanced or further enhanced by any court, Tribunal or other authority

(A)The Funds received from the Government of India are treated as capital receipts and are not tax-chargeable; (B) With respect to interest, gain on such grants is taxable.

The matter reached the Supreme Court in the 1970s where the Appellant argued that the Delhi High Court had erroneously discussed the issue as it was one of the loans as opposed to grants which was the subject matter of the reference. The Revenue Department contended that since the interest income was merged with the common fund, the monies lost their revenue character and became capital receipt and, that grants to national cooperatives were not in the course of trade and business of the assessee but an 'application of income' and therefore were not an expenditure of a capital nature. The Supreme Court stated that section 56[8] of the Income Tax Act describing income from other sources, was in the nature of a 'residuary clause' which was to say that income of every kind which is not to be excluded from total income under the Income Tax Act is chargeable under this head if it is not chargeable under section 14[9] heads A to E. The Court further stated "Tax transparency has been a hallmark trait of the Swedish legal system. Swedish law requires public disclosure of ex ante tax administration such as advance rulings. Both the taxpayer as well as the Swedish Tax Agency can request an advance tax ruling, these rulings are published without information identifying the taxpayer that requested them. The Skatterättsnämnden, or the Council for Advance Tax Rulings is the Swedish Government agency which is vested with this power. The advance ruling system has played a crucial role in Sweden's position as a country with one of the highest tax compliance rates in the world. 19. The aim of any properly framed advance ruling system ought to be a dialogue between taxpayers and revenue authorities to fulfil the mutually beneficial purpose for taxpayers and revenue authorities of bolstering tax compliance and boosting tax morale. This mechanism should not become another stage in the litigation process."

The Court allowed disbursement of irretrievable grants as a deductible expense since such grants were made out of monies earned as interest taxed and as business income and the assessee was able to demonstrate a link of such grants with the interest income. In other words, the Court ruled that the interest was used by the assessee to make further grant aid to cooperatives and that, the interest was revenue in nature and the grants were deductible against the taxable interest income. On the question of whether the merging of Government grants and interest income led to the money losing its nature as revenue, the Court held that as the interest income was already subject to tax as business income, the assessee could deduct grants given out of this interest income for tax purposes. The Supreme Court upheld the view of the Commissioner (Appeals)'s order that the grants made by the assessee fell within their authorised activities inter-linked with the main activity of advancing loans on interest to cooperative societies, and was thus deductible while computing business income.

[8] Section 56 of the Income Tax Act, 1961. Income from other sources.—(1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head ―Income from other sources‖, if it is not chargeable to income-tax under any of the heads specified in chapter IV, items A to E. (2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head ―Income from other sources

[9] Section 14 of the Income Tax Act provides for the Computation of Total Income; Heads A – E cover income from Salaries, House property, Profits and gains of business of profession and Capital gains

2. K.2058, Saravanampatti Primary Agricultural Cooperative Credit Society v. Income Tax Officer, Non-Corp. Ward-2(5), Coimbatore[10]

This case dealt with section 80P[11] of the Income Tax Act, 1961 that provides for the deductions in respect of the income of cooperative societies. 9 Writ Petitions were filed by 9 Primary Agricultural Cooperative Credit Societies. The matters were taken up together as the issues arising were common. The petitioners had filed income returns claiming exemption under section 80P of the Income Tax Act.

The Assessing Officer (respondent) called for explanations of the assessee/petitioner in regard to investments, advances and loans in determining the deductions under the Act. The respondent opined that the income arising from deposits/investment of funds in banks was not deductible and liable to be taxed under section 56 of the Income Tax Act. The Assessing Officer relied on Totgars Cooperative Sale Society Ltd. Vs. Income Tax Officer[12].

The petitioners argued the Totgars case was different as Totgars was a sales society whereas they were Primary Agricultural Cooperative Credit Society and that, the funds that were deposited and gave rise to the interest were not surplus funds but a mandatory statutory reserve. In the case of Commissioner of Income Tax v. Nawanshahar Central Cooperative Bank Ltd.[13], the Supreme Court observed that the nature of the statutory reserve which the petitioners in the case instant argued was not surplus funds, and that the orders rejecting the claim for special deduction of interest on the statutory reserve were not valid.

The Assessing Authority rejected the submissions of the petitioner stating that a statutory reserve can be considered surplus reserve. The High Court at Madras in this case stated that the assessee societies were registered under a legislation that mandated cooperatives to place a portion of their funds as a statutory reserve with a district cooperative bank, and that this reserve formed an essential feature of the operations of cooperatives and any interest generated therefrom would be operational income entitled to deduction under section 80P of the Income Tax Act.

The Court held "as regards to the claim of the assessees for exemption by application of the principle of mutuality and its rejection, there were cases of other identically placed agricultural cooperative marketing societies that the Department had carried or intended to carry to the Supreme Court". Since the questions of law in this regard were still at large, the assessees had to file a statutory appeal before the Commissioner of Income Tax (Appeals). The matter is pending for further decision.

[10] 2020 [426] ITR 251 (Madras) [31-01-2020]

[11] 80P. Deduction in respect of income of co-operative societies.—(1) Where, in the case of an assessee being a co-operative society, the gross total income includes any income referred to in sub- section (2), there shall be deducted, in accordance with and subject to the provisions of this section, the sums specified in sub-section (2), in computing the total income of the assessee.

[12] [2010] 322 ITR 283

[13] [2007] 289 ITR 6

3. Income Tax Officer Vs. Venkatesh Premises Cooperative Society Ltd. Civil Appeal No. 2706 Of 2018, Supreme Court of India

This case led to one of the landmark judgements concerning the principle of mutuality and the charge of income tax based on the receipts by cooperatives from its members. In this case, a housing society was collected non-occupancy charges, transfer charges and others, and the question arose whether these charges were exempt from income tax.

The dispute of the tax authorities revolved around a notification dated 09.08.2001, issued under section 79A of the Maharashtra Cooperative Societies Act, 1960[14] and its applicability on such societies. Relying on the notification, the revenue department contended that, as cooperative housing societies received service charges/ maintenance charges in excess of 10 per cent of the non-occupancy charges which was beyond the law, the principle of mutuality failed in such cases and that the receipts were in the nature of business, having an element of commerciality and hence, principle of mutuality does not apply.

The Assessing Officer held that non-occupancy charged levied by a cooperative from its members to the extent it was over 10% of the service charges stood excluded from the principle of mutuality and was taxable.

The Commissioner of Income Tax (Appeals) upheld this observation and further held that the transfer fee paid by the transferee member was liable to tax as the transferee did not have the status of a member at the time of such payment and, therefore, the principles of mutuality did not apply.

The High Court at Bombay, while dismissing the appeal of the tax department, ruled that the receipts of the societies were not in the nature of business income, generating profits/surplus and therefore, not taxable.

[14] Section 79A - 2 [Government's power] to give directions in the public interest, etc.
(1) 3 [If the State Government, on receipt of a report from the Registrar or otherwise,is satisfied] that in the public interest or for the purposes of securing proper implementation of co-operative production and other development programmes approved or undertaken by Government, or to secure the proper management of the business of the society generally, or for preventing the affairs of the society being conducted in a manner detrimental to the interests of the members or of the depositors or the creditors thereof, it is necessary to issue directions to any class of societies generally or to any society or societies in particular, 4 [the State Government may issue] directions to them from time to time, and all societies or the societies concerned, as the case may be, shall be bound to comply with such directions.(2) 5 [The State Government may] modify or cancel any directions issued under subsection (1),and in modifying or cancelling such directions may impose such conditions as 6 [it may deem fit.] 7 [(3) Where the Registrar is satisfied that any person was responsible for complying with any directions or modified directions issued to a society under sub-sections (1) and (2) and he has failed without any good reason or justification, to comply with the directions, the Registrar may by order-- (a) if the person is a member of the committee of the society, remove the member from the committee and appoint any other person as member of the committee for the remainder of the term of his office and declare him to be disqualified to be such member for a period of six years from the date of the order:
(b) if the person is an employee of the society,direct the committee to remove such person from employment of the society forthwith, and if any member or members of the committee,without any good reason or justification, fail to comply with this order,remove the members, appoint other persons as members and declare them disqualified as provided in clause (a) above:
Provided that, before making any order under this sub-section, the Registrar shall give a reasonable opportunity of being heard to the person or persons concerned and consult the federal society is affiliated. Any order made by the Registrar under this section shall be final.

The matter reached the Supreme Court of India which held that the Doctrine of Mutuality was based on common law principles and was premised on the theory that a person cannot make a profit from himself and an amount received from oneself was therefore not an income and thus not taxable.

It further held that the surplus in the common fund of cooperative societies did not constitute income and was to meet sudden eventualities, and that the common feature of mutual organizations in general was **that** the participants did not have property rights to their share in the common fund, nor can they sell their share and cessation from membership**, which** would result in the loss of right to participate without receiving a financial benefit from the cessation of such membership.

Conclusion

There is no specific conclusion that is being offered but for the fact that there is a sound legal basis for equitable treatment for cooperatives as far as income and income tax are concerned. Two of the three cases noted in this article bring out this specific legal basis as being that concerning 'exchange' or 'interaction' among members as income or not. The higher judiciary in India has clarified the position as "not". The specific developments in India and the legal reasoning the judgements have offered to clarify the existing understanding on cooperatives, could potentially encourage lawyers from jurisdictions other than India, to deduce further, the prevailing legal basis for according equitable and, where warranted, differential tax treatment to cooperatives especially for the financial results of transactions among members as well as reserve funds that are instituted within cooperatives for the direct benefit of members and their communities of operation.

THE TAX TREATMENT OF COOPERATIVES IN KOREA: A LACK OF CONSIDERATION OF COOPERATIVES' STRUCTURAL CHARACTERISTICS AND SUGGESTIONS FOR IMPROVEMENT

Kim Yong Jin[1]

Abstract

This Article comprehensively analyzes the history of cooperative legislation and tax policies for cooperatives in Korea, including the current legal situation caused by legislators' misconceptions. Korean tax law divides cooperatives into two categories: non-profit corporations which are entitled to tax benefits and for-profit corporations which are not. Due to this dichotomy, general cooperatives, which account for the largest number of Korean cooperatives, fall into the latter category and are not entitled to any related tax benefits. This problem results in the double taxation on the surplus of general cooperatives. The Article regards this double taxation as a core problem for cooperative legislation and suggests legal measures to solve this problem systematically. The tax laws applied to cooperatives are complexly connected to cooperative laws, which is why they constantly affect one another. Therefore, this Article presents not only a proposal for a tax law amendment but also a reform of the legal framework of cooperatives, based on the analysis of the interconnection between them. To overcome double taxation of the cooperative's surplus, this Article proposes a series of possible changes to the tax law, based on the recognition that the cooperative's income ultimately belongs to its members. As a prerequisite for this revision, the Article demonstrates that it is essential to systematize the legal rules governing patronage dividends and to clarify the legal concept of "use" of cooperatives.

KEY WORDS: Cooperative Law, Tax Treatment of Cooperatives, Cooperative Surplus, Patronage Dividends, Cooperative Identity, South Korea

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I. Introduction

The importance of the role of legal framework in stable growth of cooperatives has been increasingly emphasized internationally. In 2001, the United Nations established the "Guidelines Aimed at Creating a Supportive Environment for the Development of Cooperatives", accentuating the need for a cooperative legislation that reflects the characteristics of cooperatives.[1] In addition, the International Labour Organization (ILO) adopted the "Promotion of Cooperatives Recommendation" in 2002, which advised that "governments should provide a supportive policy and legal framework consistent with the nature and function of cooperatives and guided by the cooperative values and principles" so that cooperatives can fulfill their social roles.[2] How to determine the tax incentives for cooperatives was one of the most important issues in the cooperative policies of each country. The implementation of "cooperative-friendly taxation," which reduces several types of taxes on cooperatives, is already prevalent in many countries, especially in Western Europe and North America.[3]

The United Nations declared 2012 as the "International Year of Cooperatives," highlighting the contribution of cooperatives to socio-economic development.[4] In line with this action, South Korea enacted the Framework Act on Cooperatives[5] the same year. The enactment was the first meaningful national response to the ILO's request, and it is considered to have contributed significantly to the growth of cooperatives. Since the enactment of this Act, more than 20,000 cooperatives have been established in South Korea.[6] Despite this monumental legislation and the rapid growth of cooperatives, there has been no serious debate among legislators about tax benefits for cooperatives until now. This is because a tax system reform for cooperatives requires the correction of a long-standing misconception from the root. The Korean tax support systems that apply to business organizations, such as the income deduction and the dividend income tax exemption, are designed solely to promote investment in small stock companies and venture companies.[7] Even a social enterprise established in the form of a stock company receives more tax benefits than cooperatives in South Korea.

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[1] United Nations, G.A. Res. A/56/114, (Dec. 19, 2001), https://digitallibrary.un.org/record/454944 (last visited Mar. 26, 2021).
[2] International Labour Organization [ILO], Res. 193, *Promotion of Cooperatives Recommendation* (Jun, 20. 2002), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R193 (last visited Mar. 26, 2021).
[3] Nina Aguiar, *Taxation of Cooperatives: General Guideline and Problems*, iCoop Haeoeyeongudonghyang, 2 (2019).
[4] United Nations, *2012 International Year of Cooperatives*, https://www.un.org/en/events/coopsyear/. (last visited Mar. 26, 2021).
[5] Hyeopdongjohap gibonbeob [Framework Act on Cooperatives] art. 2 (S. Kor.) [hereinafter Framework Act on Cooperatives]. English translation of current Korean laws in this Article adopts the translation by the Korea Legislation Research Institute, *see* Statutes of Korea in English, http://elaw.klri.re.kr/eng_service/main.do (last visited Mar. 26, 2021).
[6] Korea Social Enterprise Promotion Agency, *Status of Cooperative Establishment* [hereinafter *Status of Cooperative Establishment*], *available at* https://www.coop.go.kr/COOP/2 (last visited Mar. 26, 2021).
[7] Park Sung Ook & Shin Chung Hyu, *A Study on Tax Support for Social Economic Activation*, 19 Journal of Taxation and Accounting, no.5, 81, 94-95 (2018).

This study examines the problems of the current tax laws concerning cooperatives and proposes a suggestion for legal reforms to be in accordance with cooperative identity. Chapter II of this Article discusses the history and the current status of legislation concerning cooperatives and their current tax treatment. Cooperative legislation in South Korea was formed after the military regime took over the country, and this historical background explains the effects and problems associated with the legal framework for cooperatives. Chapter III analyzes how the tax treatment of cooperatives in Korea can be improved, focusing on dividend income, which is one of the most controversial issues related to cooperative policy. The analysis demonstrates that it is not the cooperative itself but the members to which the cooperative's income should ultimately be attributed. To systematically reorganize dividend regulations, the current legal system, which determines a cooperative as a profit or a non-profit corporation only according to its legal basis, needs to be redesigned. This Article presents a legal method for this reform. Chapter IV explains that the reform should focus on understanding the cooperative's principle of mutuality as a premise in order to improve the regulations on patronage dividends. The essential rules for strengthening mutuality, such as membership qualification criteria and restrictions of non-members' use, cannot function well under the Korean cooperative legislation. In the long-term, fundamental legislative reform is necessary, including the creation of legal categories for various types of cooperatives and the revision of rules about the relationship between the Framework Acton Cooperatives and other cooperative laws.

II. Cooperative Legislation and Taxation Policy in Korea

A. Overview of the History of Cooperative Laws in Korea

After World War II, Korea was in the middle of the Cold War, and the Korean Peninsula was divided into South Korea and North Korea. The period of military dictatorship began in South Korea in the 1960s. Under the fierce competition between South and North Korea, the military dictatorship designed South Korea's cooperative legal system in a way that could contribute to the nation's industrial policy.[8] Since the government was only interested in creating cooperative legislation that could meet the country's industrial needs,[9] it was difficult to conduct a serious discussion about cooperative's core characteristics and identities in the legislative process.

The state-enacted cooperative laws hindered independent cooperative movements, and the government's intention continued to strongly influence cooperative operators.[10] In particular, the "Act on the Temporary Measures for the Appointment of Agricultural Cooperative Executives" stipulated that the approval of the secretary of the Ministry of Agriculture was

[8] *See* Kim Hyung Mi, *1919, The 1st year of the Korean Cooperative Movement*, *in* 100 YEARS OF THE KOREAN COOPERATIVE MOVEMENT I 20, 20-27 (2019).
[9] *See* KIM YONG JIN, KIM HYUNG MI, CHOI EUN JU, SHIN CHANG SUB, LEE TAE YOUNG & KIM JAE WON, SYSTEMIZATION OF KOREAN COOPERATIVE LEGISLATION FOR REALIZATION OF SOCIAL VALUES 17 (2020).
[10] *See* Kim Ki Tae, *Movement of Reformation of the Agricultural Cooperative*, *in* 100 YEARS OF THE KOREAN COOPERATIVE MOVEMENT II 15, 16 (2019).

required to appoint the representative of the agricultural cooperative.[11] This Act was enacted by the military regime in February 1962, right after their successful coup d'état had occurred in May 1961. Park Chung Hee, the military regime leader, became the president of South Korea in 1963, and the Agricultural Cooperatives Act was revised in the same year. Article 149 of the revised act clearly stipulated that the President of the National Agricultural Cooperative Federation should be appointed by the President of South Korea.[12] As the designated federation president could appoint local cooperative presidents, all cooperatives across the country came under the influence of the military regime, and the identity of agricultural cooperatives was decisively damaged.[13] The situation was similar in the Fisheries Cooperative Act,[14] the Forestry Cooperative Act, [15] and the Livestock Industry Cooperative Act,[16] all enacted under the military regime.[17] These kinds of government interventions in the cooperative operation, which should be democratic in its own construction, is unjustifiable.

Since then, the government has shifted to a system in which the state operates cooperatives as a policy body supporting the country's economic growth. The agricultural cooperative was a prime example of this.[18] The agricultural cooperatives, which were dominated by the military regime, received huge support from the government, established a nationwide network very quickly, and took charge of national policy projects such as agricultural financing and producing public grain, etc.[19] Independent cooperative activists, who could not agree with the government's cooperative policy, were forced to start from the bottom because they had a lack of local and human resources.[20] The government's goal was to turn cooperatives into government agencies that serve the public interest, and the government also aimed at preventing the emergence of independent cooperative movements.[21] After South Korea's 1987 democratization, much of the President and the government's authority over cooperatives were handed over to cooperatives. However, it was not easy to change the long-lasting practice of cooperatives acting as a sort of sub-governmental institution.

Because of this historical background, the National Assembly, under the government's influence during the military dictatorship period, could not deeply consider cooperative identity until democratization. Cooperatives were just a subordinate state institution to them. Agricultural

[11] Nonguphyeopdongjohapimoneimmyeongehgwanhanimsijochibeop [Act on the Temporary Measures for the Appointment of Agricultural Cooperative Executives], Act. No. 1025, February. 12, 1962, art. 2 (S. Kor.).
[12] Nonguphyeopdongjohapbeob [Agricultural Cooperatives Act], Act. No. 1584, December. 16, 1963, art. 149 (S. Kor.).
[13] Kim Ki Tae, *supra* note 10, at 16.
[14] *See* Susanuphyeopdongjohapbeob [Fishery Cooperatives Act], Act. No. 1013, January. 20, 1962, art. 128 para. 1, 2 (S. Kor.).
[15] *See* Sanlimjohapbeob [Forestry Cooperatives Act], Act. No. 3231, January. 4, 1980, art. 61, para. 2 (S. Kor.).
[16] *See* Chucksanuphyeopdongjohapbeob [Livestock Cooperatives Act], Act. No. 3276, December. 15, 1980, art. 119 (S. Kor.).
[17] The military regime continued until the Constitution was amended by the democratization movement in 1987.
[18] Lee Kyung Ran, *Origin of the Korean Modern Cooperative Movement and Living Cooperative Association*, Critical Review of History, The Institute for Korean Historical Studies 40, 54 (2013).
[19] Ko Hyun Seok, *the Beginning of Comprehensive Agricultural Cooperative and Transformation to a Government's Suborganization*, 52 Cooperative Network, Korean Society for Cooperative Studies, 53, 57 (2010).
[20] Lee Kyung Ran, *supra* note 18, at 40, 54.
[21] Ko Hyun Seok, *supra* note 19, at 53, 59.

cooperatives functioned as tools for implementing agricultural policies, and fishery cooperatives functioned as tools for implementing fishery policies, under the anachronistic legal framework. That was the role of cooperatives during this period. As cooperatives developed in close alignment with government policies, they received various institutional benefits, including tax benefits.[22] This was not intended to support cooperatives but rather to facilitate national policy. Since cooperatives were under the government's influence anyway, it was not difficult for the government to consider them as a kind of non-profit corporation and give them the same tax benefits. The government's policy of treating cooperatives as non-profit corporations and giving them many benefits has made them reluctant to create new forms of cooperatives that the government cannot predict.

Currently, nine Korean laws deal with cooperatives: the Framework Act of Cooperatives, the Agricultural Cooperatives Act,[23] the Consumer Cooperatives Act,[24] the Fishery Cooperatives Act,[25] the Forestry Cooperatives Act,[26] the Tobacco Producer Cooperatives Act,[27] the Small and Medium Enterprise Cooperatives Act,[28] the Credit Union Act,[29] and the Community Credit Cooperatives Act.[30] all the acts except for the Framework Act on Cooperatives is referred to as a "special cooperative law" because the Framework Act on Cooperatives was enacted to function as a general law. All the special cooperative laws except for the Consumer Cooperatives Act were enacted before the military regime lost its power in 1987. After democratization, The Consumer Cooperatives Act was enacted in 1999, and the Framework Act on Cooperatives was enacted in 2012 after all eight special cooperative laws were established.[31] The new act was expected to be a norm for stipulating the basic principles for the establishment and operation of cooperatives and reform of the state of legislative inadequacies that had continued for more than a half century.[32]

[22] Kim Ki Tae, *supra* note 10, at 15, 19.

[23] Nonguphyeopdongjohapbeob [Agricultural Cooperatives Act] (S. Kor.) [hereinafter Agricultural Cooperatives Act]

[24] Sobijasanghwalhyeopdongjohapbeob [Consumer Cooperatives Act] (S. Kor.) [hereinafter Consumer Cooperatives Act]

[25] Susanuphyeopdongjohapbeob [Fishery Cooperatives Act] (S. Kor.) [hereinafter Fishery Cooperatives Act]

[26] Sanlimjohapbeob [Forestry Cooperatives Act] (S. Kor.) [hereinafter Forestry Cooperatives Act]

[27] Yeopyeonchohyeopdongjohapbeob [Tobacco Producers Cooperatives Act] (S. Kor.) [hereinafter Tobacco Producers Cooperatives Act]

[28] Jungsogiuphyeopdongjohapbeob [Small and Medium Enterprise Cooperatives Act] (S. Kor.) [hereinafter Small and Medium Enterprise Cooperatives Act]

[29] Sinyonghyeopdongjohapbeob [Credit Unions Act] (S. Kor.) [hereinafter Credit Unions Act]

[30] Saemaeulgeumgobeob [Community Credit Cooperatives Act] (S. Kor.) [hereinafter Community Credit Cooperatives Act]

[31] the Bill of the Framework Act on Cooperatives, Bill. No. 1814332, December. 12, 2011, 3-4.

[32] *Id*. However, there is an obvious limitation to playing this role because the Framework Act on Cooperatives does not apply to the cooperatives established under the special cooperative laws. *See* Framework Act on Cooperatives, art. 13 para. 1.

B. Dichotomous Approach to Cooperatives in Korean Tax Law

The Korean tax system has a strict dichotomy that divides all legal organizations into two types, "for-profit" and "non-profit" corporations.[33] The majority opinion among civil law scholars in Korea on this division is that it should be based on whether the corporation distributes its profits[34] to its members or not.[35] Korean tax laws also apply this standard for classifying for-profit and non-profit corporations, with some exceptions. Under this simple classification, cooperatives that pay dividends to their members must all be treated as for-profit corporations. However, the tax law divides cooperatives into for-profit and non-profit corporations according to the base laws by which the cooperatives were established. Cooperatives established under special cooperative laws, such as agricultural cooperatives, fishery cooperatives, and consumer cooperatives, are classified as non-profit corporations by the Enforcement Decree of the Corporate Tax Act.[36] Cooperatives established based on the Framework Act on Cooperatives enacted in 2012 are divided into "social cooperatives" and "general cooperatives,"[37] and only social cooperatives are considered non-profit corporations by tax law,[38] while general cooperatives established under the Act are considered for-profit organizations. However, since this dichotomous approach does not properly reflect the organizational characteristics of cooperatives, it has received much criticism in South Korea.[39]

Korea's tax policy based on this classification will be a critical issue for corporations belonging to "for-profit," and the general cooperative is the representative example. All general cooperatives' transactions, regardless of whether they are transactions with members, are regulated the same as commercial corporations' transactions by Korean tax laws.[40] These

[33] *See* Beobinsebeob [Corporate Tax Act] art. 2, para. 1, 2 (S. Kor.) [hereinafter Corporate Tax Act].

[34] As will be mentioned below, since the cooperative is established for the promotion of interests of its members, the surplus should ultimately belong to the members. Therefore, it is not proper to refer to the surplus as 'profits.' On the other hand, because there is no difference between the profits of cooperatives from transactions with non-members and the profits of stock companies, this Article will distinguish these 'profits' from 'surpluses.' Similarly, distributing the cooperative's surplus to its members is technically a kind of 'refund,' which is distinctly different from a 'dividend' in a stock company. However, Korea's current cooperative laws and tax laws already use the term 'dividend,' and the term 'refund' is used only when a withdrawing member takes back her/his shares from the cooperative. As this Article is based on the analysis of the current laws, the term 'dividend' will be used to minimize confusion about terminology.

[35] *See* SONG HO YOUNG, BEOBINLON [THE THEORY OF LEGAL ENTITY] (ed. 2) 64 (2015).

[36] Cooperatives established under the Agricultural Cooperatives Act, Fishery Cooperatives Act, Forestry Cooperatives Act, Tobacco Producers Cooperatives Act, Small and Medium Enterprise Cooperatives Act, Consumer Cooperatives Act, Credit Unions Act, Community Credit Cooperatives Act are regarded as non-profit corporations by Beobinsebeob Sihaengryeong [Enforcement Decree of the Corporate Tax Act] art. 1 para. 2 (S. Kor.) [hereinafter Enforcement Decree of the Corporate Tax Act], and these cooperatives are subject to reduction in the corporate tax rate. *See* Josetukryejehanbeob [Restriction of Special Taxation Act] art. 72 (S. Kor.) [hereinafter Restriction of Special Taxation Act].

[37] The term "cooperative" in the Act means a business organization that intends to enhance its partners' rights and interests, thereby contributing to local communities by being engaged in the cooperative purchasing, production, sales, and provision of goods or services, and the term "social cooperative" means a cooperative that carries out business activities related to the enhancement of rights, interests, and welfare of local residents or provides social services or jobs to disadvantaged people, that is not run for profit, *see* Framework Act on Cooperatives, art. 2.

[38] *See* Framework Act on Cooperatives, art. 4 para. 2 (S. Kor.).

[39] *See* NATIONAL ASSEMBLY SOCIAL ECONOMIC SOLIDARITY FORUM & THE ICOOP COOPERATIVE RESEARCH INSTITUTE, THE WAY OF TAX REFORM TO STRENGTHEN COOPERATIVES' IDENTITY (2020).

[40] General cooperatives are called "general" cooperatives only because they do not mainly carry out public service, thus simply classifying them as for-profit companies does not meet the legislative purpose of the Framework Act of Cooperatives.

regulations on cooperatives do not conform to the trend of international cooperative law, which strictly distinguishes between transactions with members and non-members, patronage dividends and other dividends.[41] Currently, even if dividends are paid to members according to the usage ratio, Korean tax laws do not recognize them as deductible expenses. Also, the surplus earned by cooperative transactions with members are taxed unexceptionally.

While only 923 local cooperatives were established under the Agricultural Cooperative Act,[42] which are based on the oldest cooperative law in South Korea, the number of cooperatives established under the Framework Act of Cooperatives, enacted in 2012, has already exceeded 20,000 as of March 2021.[43] Among these cooperatives based on the Framework Act on Cooperatives, "general cooperatives" accounted for the majority with approximately 85 percent.[44] Considering the explosive increase of general cooperatives, it is a very serious problem that general cooperatives are simply classified as for-profit companies by the tax laws.

The problems arising from Korean legislators' lack of understanding of the cooperative's characteristics cannot be easily solved because the biggest cooperatives in Korea, such as agricultural cooperatives, are already benefiting as "non-profit" organizations, and they are not dissatisfied with the treatment they receive. That's why the remnants of the military dictatorship in Korea still remain in the cooperative legislation to this day. This dichotomous tax policy also has a negative impact on cooperatives that are treated as non-profit corporations. The tax benefits for "non-profit" cooperatives are already determined at the time they are established according to the underlying laws, so it does not matter how the cooperative operates after it is established. Even if it loses its character as a cooperative, there are almost no changes in tax benefits. For this reason, the Korean tax policy cannot function as an appropriate guideline for the operation of cooperatives. This can be a major obstacle for cooperatives seeking to grow on the basis of their cooperative identity.

C. Tax Benefits for Cooperatives under Current Tax Laws

As explained below, in the case of "general partnerships" or "limited partnerships," dividend income for members is not taxed at the corporate level due to special taxation for partnerships under Korean tax law,[45] but no type of cooperative is subject to this benefit. Instead, Cooperatives are simply divided into non-profit or for-profit cooperatives, and their

[41] *See* GEMMA FAJARDO, ANTONIO FICI, HAGEN HENRŸ, DAVID HIEZ, DEOLINDA MEIRA, HANS-H. MUENKER & IAN SNAITH, THE PRINCIPLES OF EUROPEAN COOPERATIVE LAWS: PRINCIPLES, COMMENTARIES AND NATIONAL REPORTS 43 (2017). The Principles of European Cooperative Law was drafted by a team of European legal scholars to regulate the common core of European cooperative law. Their study is based on both existing cooperative laws in Europe and the EU regulation on the *societas cooperativa europaea*.

[42] *See* Nonghyup [The National Agricultural Cooperative Federation], *Organization Detail*, https://www.nonghyup.com/introduce/organization/organization.do (last visited Mar. 26, 2021).

[43] *See Status of Cooperative Establishment*, *supra* note 6.

[44] *Id.*

[45] *See* Restriction of Special Taxation Act, art. 100-5.

tax treatment is also divided into two parts. Since general cooperatives are treated as for-profit companies such as stock companies and are not specially treated under the tax law, most of their incomes are taxable regardless of their source. On the other hand, various tax incentives are stipulated in tax laws for cooperatives considered non-profit corporations.

In principle, a non-profit corporation is not obligated to pay corporate tax under the Corporate Tax Act if it does not engage in the profitable businesses enumerated in this act. If a non-profit corporation has accumulated some money for expenditures on its own "proper purpose business," it shall be included in the deductible expenses for calculating the amount of income for the relevant business year within the range permitted by the Act.[46] The term "proper purpose business" in the Act means the business directly operated by the non-profit corporation to achieve its purpose as provided by the corporation's statutes or regulations, other than the "profit-making business" prescribed by this Act.[47] The specific scope of the "profit-making business"[48] is determined according to whether it is enumerated in the Enforcement Decree of the Corporate Tax Act regardless of the contents of the bylaws. To receive tax benefits for expenses incurred in proper purpose business, the accounting of the non-profit corporations' "profit-making business" should be demarcated from those of the "proper purpose business."

However, the Restriction of Special Taxation Act does not require cooperatives to separate accounting for profitable business and non-profit business. Instead, some kinds of cooperatives are subject to lower tax rates than commercial companies. Corporate tax in South Korea is levied from 10 to 25 percent in general,[49] whereas a relatively low tax rate of 9 to 12 percent is applied to cooperatives established under the special cooperative laws, and tax adjustment also can be simplified for them.[50] Cooperatives subject to the above special exceptions are allowed to give up these tax benefits on their own.[51] In the case of waiver, general rules for non-profit corporations apply.

There are more tax regulations only beneficial to cooperatives established under the special cooperative laws: a low tax rate on the interest income of money deposited by members,[52] exemption from the acquisition tax on real estate acquired for direct use in the cooperative's business,[53] exemption from the property tax on real estate currently used for its

[46] Corporate Tax Act, art. 29.
[47] Enforcement Decree of the Corporate Tax Act, art. 56, para. 5.
[48] Sixteen businesses are regulated as the profit-making businesses subject to the corporate income tax, such as social welfare services. *See id*. art. 3, para. 1.
[49] *See* Corporate Tax Act, art. 29.
[50] *See* Restriction of Special Taxation Act, art. 72. Because of this benefit, some studies see this preferential treatment as a compromise measure that properly takes into account both the profit and non-profit elements of cooperatives. *See* Lee Jong Je, *the Contents of Special Taxation concerning Corporate Tax on Incorporated Associations and its Reform*, *in* THE WAY OF TAX REFORM TO STRENGTHEN COOPERATIVES' IDENTITY, *supra* note 39, at 91-92. But considering that the Corporate Tax Act already acknowledged these cooperatives as non-profit corporations, it is explicit that there is a contradiction in this Act.
[51] *See* Restriction of Special Taxation Act, art. 72 para. 1 proviso.
[52] *See id.* art. 89-3
[53] *See* Jibangsetukryejehanbeob [the Restriction of Special Local Taxation Act] art. 14, 14-2, 87 (S. Kor.).

own business,[54] and exemption from the acquisition tax on the merger of cooperatives.[55] Nevertheless, all the benefits prescribed by the tax law cannot be applied to general cooperatives.

According to the Restriction of Special Taxation Act, no income tax shall be levied on dividend income distributed by a financial institution whose members comprise farmers, fishermen, or other individuals with a mutual tie to its members based on the records of its business use.[56] But this is only for members who have invested in "financial institutions" operated by the cooperatives designated in this article,[57] and this special rule does not apply to general cooperatives at all because it is strictly prohibited for general cooperatives to operate financial businesses.[58]

III. Proposals for Tax Reform for Cooperatives in Korea

A. Establishing the Legal Meaning of the Cooperative's Surplus

1. Considering Substance over Form

The most fundamental problem with Korean cooperative taxation policy is that of double taxation. As corporate tax is levied on a cooperative's income, it is necessary to discuss whether income tax or corporate tax should again be imposed when the cooperative distributes its surplus to its members. Finding out whether the surplus belongs to a cooperative or a member is essential for the realization of "the substance over form principle." This principle is a doctrine that when the form and substance of the taxation object do not coincide when applying the tax law provisions, taxation should be based on the substance, not the form,[59] explicitly reflected in Korean tax law.[60] In the case of a trustor who transfers real estate to another person according to his intention and is in a position to be able to control and dispose of the real estate in the trust, the Supreme Court ruled that the "trustor" should pay the tax rather than the trustee.[61] In another case, the Supreme Court also decided that the transfer income tax on land acquired by a housing association with money collected from its members should be paid by the members who benefit

[54] *Id.*
[55] *See id.* art. 57-2.
[56] *See id.* art. 88-5.
[57] The designated cooperatives are agricultural cooperatives, fisheries cooperatives, forestry cooperatives, credit cooperatives, and the community credit cooperatives. General cooperatives and social cooperatives under the Framework Act of Cooperatives are not included. *See* Josetukryejehanbeob Sihaengryeong [the Enforcement Decree of the Restrictionof Special Taxation Act] art. 82-5 (S. Kor.) [hereinafter Enforcement Decree of the Restriction of Special Taxation Act].
[58] *See* Framework Act on Cooperatives, art. 45 para. 3. This clause has also been criticized for unreasonably limiting the scope of the cooperative's business.
[59] Choi Seong Keun, *A Proposal to Establish the Theories and the Provisions on Substance over Form Taxation Principle*, 19 Seoul Tax Law Review, no.2, 119, 122 (2013).
[60] *See* Kuksegibonbeob [Framework Act on National Taxes] art. 14-1 (S. Kor.). This article provides that "if any ownership of an income, profit, property, act or transaction which is subject to taxation, is just nominal, and there is other person to whom such income, etc., belongs, the other person shall be liable to pay taxes and tax-related Acts shall apply, accordingly."
[61] Daebeobwon [S. Ct.], Oct. 10, 1997, 96Nu6387 (S. Kor.). In this case, since housing association had no legal entity, it was different from cooperatives established under cooperative laws.

from the transaction, not the association.[62] These are the representative precedents to which the substance over form principle applied.

Historically, the substance over form principle was judicially developed to make it easier for the government to impose taxes on a transaction's substance, regardless of its form.[63] However, simultaneously, the principle also functions as a weapon for taxpayers to reject taxation inconsistent with a transaction's substance.[64] From the latter point of view, the principle should be a norm that restricts the government's taxation powers within a reasonable range fitting with reality. The doctrine in this sense differs in function from the principle used as the standard for the interpretation of tax laws,[65] which means that the substance over form principle also should be a guidance for better regulation.[66]

The Constitutional Court of Korea has cited the doctrine from this perspective in its decisions on unconstitutional tax regulations. The court ruled that it was a violation of the substance over form principle for the government to uniformly impose a gift tax on title trusts if there were no tax avoidance purposes involved.[67] In another case, a tax office did not refund the tobacco consumption tax to a tobacco seller, who had returned the products to the supplier, which was legitimate according to the Local Tax Act at the time. The Constitutional Court decided that no actual consumption had taken place by retrieving cigarettes from sellers in the market, thus the provisions that allow the refund of tobacco taxes only with extremely few exceptions[68] did not accord with the substance of the transaction, which is why the provisions were unconstitutional.[69] The court also declared that imposing both the land excess profit tax and the transfer income tax on the same income source was unconstitutional because the provision violated the substance over form principle.[70] Given the above precedents, we can see that the Constitutional Court used the substance over form principle as a constitutional standard. According to this view of the Constitutional Court, this doctrine should be taken not only as a rule for interpreting tax laws, but also as a legislative guideline for national tax policy.

This legal reasoning of the Constitutional Court is based on "tax egalitarianism," which is implied in the principle of equality stipulated in Article 11 of Korea's

[62] Daebeobwon [S. Ct.], May. 29, 1999, 97Nu13863 (S. Kor.)
[63] *See* Victor D. Rosen, *Substance over Form – A Taxpayer's Weapon*, 22 Major Tax Plan, 689, 690 (1970).
[64] *Id.* at 689.
[65] *See* Cho Young Sik, *Constitutional Review of Substance over Form Principle*, 21 Constitutional Law Review, Constitutional Court of Korea, 525, 535 (2010).
[66] HARRY BREMMERS, SUBSTANCE OVER FORM: A PRINCIPLE FOR EUROPEAN FOOD INFORMATION REGULATION?: REGULATING AND MANAGING FOOD SAFETY IN THE EU, 195, 213 (2018).
[67] Hunbeobjaepanso [Const. Ct.] July. 21, 1989, 89Heonma38 (S. Kor.).
[68] At the time, the local tax law stipulated that the tobacco consumption tax was refunded only when cigarettes were retrieved due to the problem with packaging or poor quality.
[69] Hunbeobjaepanso [Const. Ct.], Apr. 26, 2001, 2000Heonba59 (S. Kor.)
[70] Hunbeobjaepanso [Const. Ct.], July. 29, 1994, 92Heonba49 (S. Kor.)

Constitution.[71] Tax egalitarianism, along with tax legalism (the principle of no taxation without law), is a fundamental principle of tax law based on the Constitution, and is applied not only to the imposition of taxes but also to the reduction of them.[72] In the opinion of the Constitutional Court, all taxation must be fair and equal depending on the individual's ability to pay a tax and it does not allow any discrimination against or preferential treatment of a specific taxpayer without a reasonable reason.[73] As long as the substance over form principle is understood as a derivative principle of tax egalitarianism based on the Constitution, the doctrine has constitutional effect. Thus, it naturally functions as the guiding principle of legislation.[74] If tax is levied beyond this individual capacity, it violates tax egalitarianism, a constitutional norm.[75] Therefore, when tax offices and legislators look at a cooperative's income, they need to pay attention to its "substance." If a cooperative's income is subject to corporate tax even though it has no substance as "income" from the cooperative's point of view, these tax laws are likely to be determined unconstitutional and in violation of the substance over form principle. For fair taxation, legislators must analyze the substance of cooperatives' income, and this analysis will be the first step in realizing tax egalitarianism.

2. Partnership Taxation in Korea

In addition to cooperatives, there are various partnership types in South Korea. The Commercial Act regulates five company categories which all allocate their profits to members: a partnership company, limited partnership company, limited liability company, stock company, and limited company. [76] In particular, human-based companies, such as a partnership company, limited partnership company, and limited liability company, have many structural similarities to cooperatives. These companies are organizationally the same as cooperatives in that they make decisions according to the one-person, one-vote rule,[77] the transfer of shares is strictly limited,[78] and their members can claim a share refund when they leave the company.[79] Thus, it is required to first look at the tax policy regarding these companies' income in order to accurately grasp the "substance" of the cooperative's income.

The Korean tax law already has special provisions for partnerships. According to the Restriction of Special Taxation Act, corporations established by two or more persons to share profits or losses from joint business operations are considered "partnerships," and they are

[71] Article 11 of the Constitution stipulates that "all citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status." *See* DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 11 (S. Kor.).
[72] SUNG NAK IN, HEONBUBHAK [CONSTITUTIONAL LAW] 485 (ED.20) (2020).
[73] Hunbeobjaepanso [Const. Ct.], June. 26, 1996, 93Heonba2 (S. Kor.)
[74] Cho Young Sik, *supra* note 65, at 525, 533.
[75] *Id.*
[76] *See* Sangbeob [Commercial Act] art. 178~267(partnership company), art. 268~287(limited partnership company), art. 287-2~287-45(limited liability company), art. 288~542(stock company), art. 543~613(limited company) (S. Kor.) [hereinafter Commercial Act].
[77] *See id.* art. 200, 201, 204, 269, 287-12, 287-16, 287-19.
[78] *See id.* art. 197, 276, 287-8.
[79] *See id.* art. 222, 269, 287-24.

not subject to corporate tax.[80] This regulation solved the double taxation problem by taxing only at the member level, not at the partnership level.[81] The introduction of this regulation in 2009 broke the formula that "corporate tax must be levied on organizations with a legal entity."[82] A "partnership company" and a "limited partnership company" established under the Commercial Act, an "association" established under the Civil Act, a "partnership firm" and an "undisclosed association" established under the Commercial Act are included in the scope of this "partnership."[83] This special provision reflects the public opinion at the time that Korean legislators should improve tax policy on partnerships by referring to the foreign partnership taxation system such as that of the United States, Germany, etc.[84] The legal form of partnership company and limited partnership company in Korea was designed with reference to German corporate law (Gesellschaftsrecht). Moreover, both general partnership (*offene Handelsgesellschaft*) and limited partnership (*Kommanditgesellschaft*) in Germany are only taxed when they attribute their profits to each partner.[85] These regulations became the basis of the Korean partnership taxation system.

Even when the above tax provision was introduced, there was no room for cooperatives since cooperatives established under special cooperative laws were already considered non-profit corporations by tax laws. Likewise, under the Framework Act on Cooperatives, social cooperatives are also regarded as non-profit corporations, and distribution to members is prohibited, so the provision of the partnership could not be applied. On the other hand, since general cooperatives under the same act can allocate dividends to their members, it is theoretically possible to apply this special provision for partnerships to general cooperatives. Nonetheless, they were not considered in the provision as well because the Framework Act on Cooperatives was enacted after the provision's introduction in 2009.

The Framework Act on Cooperatives considers that the characteristics of "limited liability company" under the Commercial Act is the closest to the nature of general cooperative; hence, it stipulates that the Commercial Act provisions regarding limited liability companies shall apply *mutatis mutandis* to general cooperatives and federations of general cooperatives.[86] However, unfortunately, the articles for a limited liability company in the Commercial Act were also enacted in 2011, after the introduction of the tax provision for

[80] *See* Restriction of Special Taxation Act, art. 100-14, 100-15.
[81] Chang Hyeon Jeen, *A Review of Taxation System of Partnership on the Human-based Company*, Tax and Law, Law Research Institute in University of Seoul 121, 131 (2019).
[82] *Id.*
[83] *See* Restriction of Special Taxation Act, art. 100-15. However, unlike the partnership company or limited partnership company, the association, partnership firm and undisclosed association are organizations without a legal personality. *See* Minbeob [Civil Act] art. 703~724 (S. Kor.) [hereinafter Civil Act], Commercial Act, art. 78~86, 86-2~86-9.
[84] At that time, there was a regulation requiring the amount of dividends to be deducted from income for a partnership company and a limited partnership company operated in knowledge-based industries, but the target industries were extremely limited to "knowledge-based industries". *See* Josetukryejehanbeob [the Restriction of Special Taxation Act], Act. No. 17759, August. 3, 2007, art. 104-11 (S. Kor.).
[85] Kim Yu Chan, *Taxation of Partnerships in Germany with an Emphasis on the Tax Treatment of Transactions between Partner and Partnership*, 8 Tax Research, Korea Tax Research Forum, no.2, 166, 173 (2008).
[86] Framework Act on Cooperatives, art. 14 para. 1.

partnerships, and that is why the limited liability company is also excluded from the tax benefit. Although it is necessary to rediscuss whether to apply the provision to general cooperatives and limited liability companies, the special article for partnerships has not been revised since 2010.

Both general cooperatives and limited liability companies are rather human-based than capital-based corporations. They are managed by the one-person, one-vote rule,[87] limiting the transfer of shares,[88] and their members have the right to claim a refund of shares when they withdraw from the corporation.[89] In this respect, they are not fundamentally different from a partnership company or a limited partnership company. Therefore, it cannot be considered fair taxation to exclude a general cooperative or a limited liability company from applying the special provisions for the partnership.[90]

3. Attribution of Cooperative Surplus

Compared to a "partnership company" or a "limited partnership company," a cooperative has a stronger reason that its income must be attributed to members. When allocating surpluses to its members, a cooperative must pay dividends according to the usage ratio, not the capital ratio. This is called "patronage dividend," which originated from the nineteenth-century Rochdale Cooperative rules[91] and now forms a portion of the seven cooperative principles established by the International Cooperative Association (ICA).[92] In contrast, for ordinary human-based companies such as partnership companies and limited partnership companies, there is no legal obligation to pay dividends according to the usage ratio; that is the key difference. The third ICA principle emphasizes that members must democratically control cooperatives'

[87] *See* Commercial Act, art. 287-12, 287-16, 287-19, Framework Act on Cooperatives, art. 23 para. 1.
[88] *See* Commercial Act, art. 287-8, Framework Act on Cooperatives, art. 24 para. 3.
[89] *See* Commercial Act, art. 287-24, Framework Act on Cooperatives, art. 26 para. 1.
[90] There is an opinion against the application of special rules to cooperatives or limited liability companies because their members have "limited" liability, unlike other partnerships. *See* SHIM TAE SUP & KIM WAN SOUK, METHODS FOR REVISION OF TAX SUPPORT SYSTEM RELATED TO COOPERATIVES, MINISTRY OF STRATEGY AND FINANCE 71-72 (2012). However, in the case of law firms or accounting firms, the members can benefit from this special provision even if they have limited liability. *See* Enforcement Decree of the Restriction of Special Taxation Act, art. 100-15 para. 1. The opinion claims that law firms and accounting firms are different from cooperatives because they provide "human-based services," but there is no comment on what is the "human-based service" and why the tax incentives for "human-based service" should be different. Furthermore, considering the existence of a "limited liability member" in a limited partnership company, the fact that members of cooperatives or limited liability companies have "limited" liability cannot justify that cooperatives and limited liability companies are not subject to the benefit. It is the same in Germany that a limited partnership (KG: Kommanditgesellschaft) is composed of members with limited liability (Komplementaere) and members with unlimited liability (Kommanditisten). *See* Handelsgesetzbuch [the Commercial Code], December. 22, 2020, art. 161 para. 1 (Germany).
[91] The pioneers of the Rochdale opposed the accumulation of surplus from transactions with members as the cooperative's capital and designed a method of distributing them proportionately to those who made them. Their first agreement was to distribute the surplus remaining after paying expenses of management and interest on capital investment to members in proportion to their transactions on a quarterly basis. *See* GEORGE JACOB HOLYOAKE, SELF-HELP BY THE PEOPLE: THE HISTORY OF THE ROCHDALE PIONEERS 47 (10th ed., 1893).
[92] The 3rd principle of ICA's Cooperative Principles is "member economic participation", which stipulates that "members allocate surpluses for any or all of the following purposes: developing their cooperative, possibly by setting up reserves, part of which at least would be indivisible; benefiting members in proportion to their transactions with the cooperative; and supporting other activities approved by the membership." International Cooperative Alliance, *Cooperative Identity, Values & Principles*, https://www.ica.coop/en/cooperatives/cooperative-identity (last visited Mar. 26, 2021).

capital and stipulates that the dividends provided by cooperatives to members should be proportional to the amount of their transactions.[93] Like any other principle, this can be found in the "Regulations for Cooperative Societies Unanimously Adopted at the 3rd Cooperative Congress Held in London in 1832 and Chaired by Robert Owen,"[94] which was the predecessor of modern cooperative principles. The regulation explains that a trading organization, established to accumulate revenue simply to receive future dividends, should not be recognized as a cooperative.[95]

Unlike the stockholders of a stock company, members of a cooperative are both owners and users of the cooperative's business, creating surpluses through their dealing or use of the cooperative's business. For example, a consumer cooperative's members directly contribute to sales by purchasing goods or services sold by the cooperative. Members of a worker cooperative promote their own interests by working for production of goods or services of the cooperative. A producer cooperative's members make surpluses by participating in their joint business for the goods they produce. Members of cooperatives, who are consumers, workers, or producers, promote the collective interest of them depending on how much they "use" the cooperative's business regardless of their investment size. A cooperative's surplus occurs when the price of the goods or services sold to members is higher than the expected cost. These surpluses can be viewed as a kind of an error because they are caused by incorrect estimates of the costs or reflect conservatively set prices to cover market risks that would be identified at the end of the fiscal year.[96] The rule for correcting these errors is the patronage dividends.

Patronage dividend system is not only a criterion for determining the amount to be allocated to members but also the core rule that enables the establishment of cooperatives' fundamental characteristics. In order for a cooperative to function properly, it shall organize its members according to the cooperative's purpose and implement projects that meet the needs of its members. Voting rights should be given to cooperative members, so they can control its composition and business scope. However, from a legal perspective, this rule is not sufficient. If members receive the cooperative's dividend proportional to the size of the invested capital, the surplus gained through the cooperative's business will be distributed to members who have invested large amounts of capital. This will expose those who have invested little capital to a prolonged risk. As those who have dividend rights also have voting rights, there is always a possibility that the cooperative's overall decision-making will be transformed into the pursuit of

[93] *Id*.

[94] *See* International Cooperative Alliance, Guidance Notes to the Cooperative Principles 29 (2017), https://www.ica.coop/sites/default/files/publication-files/ica-guidance-notes-en-310629900.pdf (last visited Mar. 26, 2021).

[95] The regulation declared that "in order to ensure without any possibility of failure the successful consummation of these desirable objectives, it is the unanimous decision of the delegates here assembled that the capital accumulated by such associations should be rendered indivisible, and any trading societies formed for the accumulation of profits, with a view to them merely making a dividend thereof at some future period, cannot be recognised by this Congress as identified with the cooperative world, nor admitted into this great social family which is now rapidly advancing to a state of independent and equalised community". *See id.*

[96] Nina Aguiar, *supra* note 3, at 5.

high profits. Consequentially, persons who cannot contribute significant capital will lose the incentive to join the cooperative, threatening the cooperative's very existence. This tendency would undermine the long tradition of cooperative movements to control the influence of capital. Therefore, the systematization of patronage dividends should be the basis of the legal protection of cooperative identity. Korean legislators need to pay attention to the fact that major European countries, such as France, Italy, and Spain all deduct patronage dividends.[97]

Currently, the Korean tax laws and the Framework Act on Cooperatives do not conform to the nature of the patronage dividends and the characteristic of cooperatives. The Framework Act on Cooperatives stipulates that cooperatives "may" distribute surpluses to their members as prescribed by the bylaws after making up for losses and accumulating legal reserves and voluntary reserves,[98] which means that the Act does not mandate surplus distribution to members. Under the current law, when a cooperative distributes surpluses, the dividends of earnings from the use of the cooperative's business shall not be less than fifty percent of the total amount of dividends,[99] but if the cooperative decides not to allocate itself to its members, the principle of patronage dividends will not work at all. Furthermore, the Framework Act on Cooperatives entrusts important decisions that are closely related to the cooperative identity to the cooperatives' discretion and there is no legal method to assess what kind of dividends can be qualified as patronage dividends, thus, it is difficult for the tax office to set the criteria for the patronage dividends. To accurately reflect the nature of cooperatives in tax laws, cooperative legislation, including the Framework Act on Cooperatives, must be fundamentally revised.

B. Systematizing the Cooperative's Patronage Dividends

1. Removing Double Taxation on Patronage Dividends

The tax law and the cooperative law must be equipped to treat patronage dividends in order to protect the identity of cooperatives. No matter how hard cooperatives try to stabilize their own patronage dividend system, Korean tax law does not consider such efforts at all. Even if the ratio of patronage dividends reaches 100 percent of their surplus, it is counted

[97] Numerous Korean studies on the cooperative tax system criticized Korean tax deduction system through comparative legal analysis. *See,* for example, SON WON IK, SONG EUN JOO & HONG SUNG YOUL, A STUDY ON THE COOPERATIVES TAXATION, CENTER FOR TAX LAW AND ADMINISTRATION, KOREA INSTITUE OF PUBLIC FINANCE 58-89 (2013), Kim Wan Souk & Shim Tae Sup, *Suggestions for Tax Reform of Cooperatives in Korea*, 12 Tax Research, no.2, 7, 21-29 (2012), Jung Soon Moon, *A Study on the Improvement of the Cooperative System*, 19 Seoul National University Public Interest and Human Rights L. Rev., 233, 279-280 (2020), Park Kyeong Hwan & Jung Rae Yong, *A Study of Cooperative Taxation*, 21 Hongik L. Rev., no.2, 513, 526-531 (2020), SHIM TAE SUP & KIM WAN SOUK, *supra* note 90, at 29-62, Lee Byeong Dae, Kim Wan Seok & Suh Hi Youl, *A Study on Income Taxation System of Cooperatives and Copartners*, 15 Tax Research, no.2, 39, 52, 57-58 (2015), Lee Han Woo, *Suggestions for the Taxation Issues of the Transactions Between a Cooperative and Its Members*, 27 Ehwa Law Journal, no.2, 369, 387-389 (2014), Moon Sung Hwan & Im Young Je, *The Research on Characteristics of Accounting Standard and the Problems of Profit and Loss Taxation System of Community Credit Cooperatives*, 76 Korea International Accounting Review, 83, 98-99 (2017). Countries mentioned in these studies are France, Italy, Spain, United Kingdom, Germany, the Netherlands, United States, Japan, Canada, Finland. Norway. The studies underline that all of these countries recognize cooperative's patronage dividends as deductible expenses.

[98] Framework Act on Cooperatives, art. 50 para. 1, 2.

[99] *Id.* art. 51 para. 3.

just as the cooperative's income. When a cooperative's income is distributed to its members, taxes are levied on both the cooperative and the members. This legislation has come under criticism for distorting not only the principle of patronage dividends, but also the identity of cooperatives.[100] As seen above, the tax laws provide some reductions for cooperatives, but this is rigidly limited to cooperatives established under special cooperative laws such as agricultural cooperatives and fishery cooperatives. Even when these reductions are possible, only the tax rate is partially reduced without careful consideration of the doctrine of the patronage dividend.[101] This is not a reflection of the cooperative identity but just a reward for cooperatives that had cooperated with government-led industries.

In order to normalize the patronage dividend system in Korean cooperative legislation, the tax law must first be amended so that no tax is imposed on the amount that cooperatives distribute to members according to the usage ratio. Specifically, to solve this double taxation problem, a cooperative established under the Framework Act on Cooperatives should be added to the special taxation provision for partnerships under the Restriction of Special Taxation Act to prevent corporate tax at the cooperative level,[102] or a method to treat the amount of patronage dividends as deductible expenses should be considered.[103] The former method will be more advantageous for cooperatives in that no tax is imposed at the corporate level regardless of the standard of allocation. However, the latter method is more suitable for cooperatives as they need to sort out the patronage dividends and equity dividends to promote their operations following cooperative principles.

Surely, it is not appropriate that all of the cooperatives' dividends are subject to tax benefits. There is no reason for treating profits obtained from operations for non-members differently from those of general commercial companies, nor should this be the case for profits obtained from transactions outside the cooperative's proper business scope.[104] Expenses paid as interest on members' contributions should also not be included as deductible accounts because dividends based on share investment are not returns to the surplus creator.

[100] *See*, for example, Park Kyeong Hwan & Jung Rae Yong, *supra* note 97, at 534-535, Kim Wan Souk & Shim Tae Sup, *supra* note 97, at 31-36, SHIM TAE SUP & KIM WAN SOUK, *supra* note 90, at 66-69, Lee Byeong Dae et al., *supra* note 97, at 59-61, Jung Soon Moon, *supra* note 97, at 279-280, Lee Han Woo, *supra* note 97, at 387-389. Yu Jong Oh, *The nature of cooperative member transactions and the direction of tax reform*, *in* THE WAY OF TAX REFORM TO STRENGTHEN COOPERATIVES' IDENTITY, *supra* note 39, 31, at 41-42, Lee Jong Je, *supra* note 50, at 95.

[101] *See* Restriction of Special Taxation Act, art. 72, 88-5.

[102] Although this method is the easiest way to get rid of the current unfair treatment of cooperatives under the tax law in Korea, no studies have been found to suggest this view. Instead, most of the research focuses on treating dividends as deductible expenses. *See infra* note 103.

[103] *See* Kim Wan Souk & Shim Tae Sup, supra note 97, at 33, Jung Soon Moon, *supra* note 97, at 279-280, Park Kyeong Hwan & Jung Rae Yong, *supra* note 97, at 534-535, SHIM TAE SUP & KIM WAN SOUK, *supra* note 90, at 66.

[104] Even for these transactions, it would be possible to cut taxes for policy reasons. *See* Nina Aguiar, *supra* note 3, at 6-8.

2. Distinguishing between Member Transaction and Non-member Transaction

Since the patronage dividend system is designed for cooperatives' surplus to be attributed to their source, the surplus from member transactions must be differentiated from those of non-members. If the cooperative distributes surplus made from transactions with non-members to members, who are not directly related to the surplus, the patronage dividend system loses its original purpose. To differentiate the treatment of surpluses from member transactions and profits from non-member transactions, it is essential to record them separately. For proper operation of a patronage dividend, an accounting system that can accurately demarcate between transactions with members and non-members has to be established. The Principles of European Cooperative Law also ruled that cooperatives shall record transactions with non-members in a separate account.[105]

In Korea, the Framework Act on Cooperatives and most special cooperative laws do not stipulate that non-member transactions shall be recorded apart from member transactions. Although some cooperative laws have provisions that non-member transactions are not permitted if members' use is impeded,[106] there is no provision to reflect this distinction in accounting. Accounting rules in Korean cooperative legislation only require a demarcation between credit and non-credit businesses.[107] The large cooperatives in Korea, usually established under special cooperative laws, were criticized for gradually neglecting their original purpose as their credit business had been over-expanded.[108] To prevent this tendency, regulations have emerged that require a distinction between accounting for credit business and all other businesses. However, what matters is not whether it is a credit business but whether it is a non-member transaction.

It is hard to establish the separate accounting system for member and non-member transactions. For example, although it is possible for consumer cooperatives to distinguish between sales to members and non-members, demarcating the extent of expenses incurred on each transaction would be a quite difficult task. If departments of the cooperative are not completely divided, it is laborious to separate these transactional expenses accurately. But, in non-profit corporation accounting procedures in Korea, the expenditures on the "purpose business" and the "profitable business" have been classified. Moreover, there is already a separate accounting obligation for a "credit business" and the "other business" in cooperative legislation, and several foreign cooperative legislations also distinguish between member and

[105] "When cooperatives carry out non-member cooperative transactions they shall keep a separate account of such transaction", *see* GEMMA FAJARDO ET AL., *supra* note 41, at 48.

[106] *See*, for example, the Agricultural Cooperatives Act, art. 58 para. 1, Fishery Cooperatives Act, art. 61 para. 1, Forestry Cooperatives Act, art. 51 para. 1, Small and Medium Enterprise Cooperatives Act, art. 35 para. 3, Consumer Cooperatives Act, art. 4 para. 1, Credit Unions Act, art. 40 para. 1, and the Community Credit Cooperatives Act, art. 30. However, these regulations only declare the principle to prohibit the use of non-members, and do not effectively control the use of non-members due to the lack of specific regulations.

[107] *See*, for example, the Agricultural Cooperatives Act, art. 63 para. 2, Fishery Cooperatives Act, art. 66 para. 2.

[108] Cooperatives established under special laws have been criticized for not concentrating on the original business and overly focusing on profitable credit businesses. And this criticism has led to a reorganization of the governance structure that divides the business organization of agricultural cooperatives and fisheries cooperatives into financial and economic business sectors since the 2010s.

non-member transactions in accounting, such as Spanish cooperative law[109] and French cooperative law,[110] etc. Hence, it would not be legally impossible to stipulate a separate accounting obligation for member and non-member transactions in cooperative laws.

Among the cooperative laws in Korea, only the Consumer Cooperative Act includes a provision regulating that member and non-member transactions shall be separately recorded in accounting. Despite the fact that this provision also has limitations in that it applies only to health and medical services, it can be a great legislative example that stipulates classified accounting duties. Following the Consumer Cooperative Act, other cooperative-related laws, including the Framework Act on Cooperatives, should fix their legislative flaws in the demarcation of both transactions so that the cooperatives' mutuality and contributions to the community are clearly visible in their financial statements.

3. The Necessity of Stipulating Dividend Obligations

If cooperative laws or bylaws stipulate the obligation to return surpluses periodically, surpluses must be recorded as "liabilities," which is not taxable.[111] Examples of this approach have been found in countries with a common-law tradition, such as the United States[112] and Canada.[113] On the other hand, in Europe, where cooperative laws are generally more influenced by ideological principles than practical considerations, there are no legislative examples of such obligation.[114]

The cooperative can use the surplus in its own way if the obligation is not specified in law, which makes it difficult to assess it as a liability to its members. In this case, the surplus will be legally valued as the cooperative's income, not its liability. If the cooperative's surplus is deemed as its income, it is logically impossible to exclude it from taxation. Here, there may be objections that even if the surplus is not immediately distributed to members and is reserved internally, this eventually constitutes a share portion that must be returned to a member when she or he withdraws, so it consequentially becomes the member's asset. The problem, however, is that the current cooperative laws stipulate that when a member withdraws from membership, the member share should be refunded and calculated in proportion to her or his capital, not patronage.[115] Even for a stock company, the residual

[109] *See* Ley 27/1999, de 16 de julio, de Cooperativas [Cooperatives Law], art. 57(3) (Spain) [hereinafter Law 27/1999] https://www.boe.es/buscar/doc.php?id=BOE-A-1999-15681 (last visited Mar. 26, 2021).
[110] *See* Loi n° 47-1775 du 10 septembre 1947 portant statut de la cooperation [Law 47-1775 of September 10, 1947 on the statute of cooperation, hereinafter the 1947 Law], art. 19b (France), https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000684004/ (last visited Mar. 26, 2021).
[111] *See* Nina Aguiar, *supra* note 3, at 5.
[112] The special rules for patronage dividend apply "under an obligation of such organization to pay such amount, which obligation existed before the organization received the amount so paid." 26 U.S.C. §1388(a)(2).
[113] Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.), sec. 136(2) (Canada). This section requires that "the statute by or under which it was incorporated, its charter, articles of association or by-laws or its contracts with its members or its members and customers held out the prospect that payments would be made to them in proportion to patronage."
[114] *See* Nina Aguiar, *supra* note 3, at 5.
[115] Framework Act on Cooperatives, art. 4 para. 2.

property is ultimately distributed to the shareholders upon dissolution after it pays off its debt, which is why this objection is not valid.

Therefore, a cooperative's bylaws or cooperative laws are required to specify the obligation to return its surplus periodically or authorize cooperatives to accumulate the surplus according to the patronage proportion of each member. Current Korean laws already have rules regarding patronage dividends,[116] like other European and North American countries, but the provisions are not mandatory, and there is no other provision that legally requires dividends to be returned to members. In order for the cooperative's surplus to be evaluated as a liability to its members, the relevant regulations in Korean cooperative laws should be amended to be mandatory.

4. Revision of the Articles for Repudiation of Wrongful Calculation

Where the tax office deems that a corporate tax burden has been unjustly reduced through the "wrongful calculation" of the amount of corporate income from transactions with "a specially related party," taxpayers shall calculate their income regardless of the "wrongful calculation."[117] This is a rule to prevent corporate tax evasion. The term "specially related party" means a person who has an economic relationship with a corporation, or a relationship prescribed by presidential decree. The decree includes the persons exercising actual influence over the management of the relevant corporation, for example, exercising the right to appoint or dismiss executive officers or determining the course of business and investors in the corporation.[118] In addition, the decree enumerates examples of wrongful calculations, such as a case in which money, other assets, or services are lent or provided gratuitously or at an interest rate, tariff, or rent lower than the market price, or received at an interest rate, tariff, or rental rate higher than the market price.[119]

Maximizing the members' interests by minimizing the cooperative's surplus is the ultimate goal of a cooperative's business. Consumer cooperatives achieve this purpose by providing their members with products at the lowest price, producer cooperatives by purchasing their goods or services at the highest price, and workers' cooperatives by providing the highest wages to their members. However, in Korea, transactions between cooperatives and members are deemed "wrongful calculation" by the Corporate Tax Act. When he members of consumer cooperatives receive goods or services from the cooperative at a price lower than the market price, or when producer cooperatives receive goods or services from their members at a price higher than the market price, that price must be

[116] When a general cooperative distributes a surplus, the dividends of earnings from the use of the cooperative's business shall not be less than 50 percent of the total amount of dividends. *See* Framework Act on Cooperatives, art. 51 para. 3.
[117] Corporate Tax Act, art. 52 para. 1.
[118] *Id.*
[119] *Id.* art. 88 para. 1, para. 6, para. 7.

adjusted to the market price through the denial of the wrongful calculation, making business for members practically impossible.[120]

The Basic General Rules of the Restriction of Special Taxation Act enacted by the National Tax Service stipulate that wrongful calculation provisions do not apply to cooperatives established under the special cooperative laws designated by the Act. However, this rule is only an internal guideline of the administrative agency without legal effect.[121] Even if the Basic General Rules are applied, cooperatives established by the Framework Act on Cooperatives, which is the most common type of cooperative in Korea, are still subject to rules of the "wrongful calculation."[122] Although the tax office is not actively applying the rule of wrongful calculation because these cooperatives' business in Korea is not large yet, this rule is a potentially dangerous regulation that can lead to threats to the whole Korean cooperative system.[123] Therefore, it is necessary to establish exceptional provisions for cooperatives as soon as possible, reflecting their business structures and characteristics.[124]

C. Abrogation of the Dichotomous Division of Cooperatives

1. Repeal of the Regulation that Regards Cooperatives as Non-profit Corporations

Although there is no strict standard for the distinction between for-profit and non-profit corporations in any articles in Civil Act or related legislative data, it is the dominant opinion of Korean civil law and commercial law academia to classify corporations into for-profit and non-profit corporations depending on whether a corporation pays dividends to its members.[125] This trend is considered to be due to the influence of German and Swiss civil law.[126] From this perspective, a for-profit corporation can pay dividends, whereas a non-profit corporation should not. This view deeply influenced the cooperative legal framework as well. Social cooperatives established under the Framework Act on Cooperatives are not permitted to distribute surpluses to their members[127] since they are considered to be non-profit corporations. On the contrary, general cooperatives based on the same act, deemed as for-profit corporations, are allowed to pay dividends to members.

Korean tax laws adopt this dichotomous classification in principle but makes some exceptions for cooperatives operated under government influence.[128] According to the

[120] *See* Lee Han Woo, *supra* note 97, *at* 385.
[121] *See* Daebeobwon [S. Ct.], Sept. 8, 1992, 91Nu13670 (S. Kor.). The Judgment of this case ruled that The Basic General Rules of the Restriction of Special Taxation Act enacted by the National Tax Service has no legal effect because it is just an internal guideline of the administrative agency.
[122] *See* Lee Byeong Dae et al., *supra* note 97, at 52, 62-63.
[123] *See id.* at 62.
[124] *See* Lee Han Woo, *supra* note 97, *at* 392-393. This study argued that cooperatives should be excluded from the application of the article of "wrongful calculation" if over 90 percent of users are their members and over 90 percent of dividends are patronage dividends.
[125] Kim Chin Woo, *The Demarcation between For-profit and Non-profit Corporation*, 36 The Journal of Property Law, no. 3, The Korean Society of Property Law, 1, 2 (2019).
[126] *See* SONG HO YOUNG, *supra* note 35, at 63.
[127] Framework Act on Cooperatives, art. 64 para. 2.
[128] Corporate Tax Act, art. 2, para. 2.

Corporate Tax Act, cooperatives formed under special cooperative laws are regarded as non-profit corporations, even though they can distribute dividends to their members, unlike social cooperatives based on the Framework Act on Cooperatives. It is contradictory legislation in that it considers cooperatives established under the special laws, which can distribute their surpluses to the members, as non-profit corporations, and grants various tax incentives to them. Besides, it excludes general cooperatives established under the Framework Cooperative Act from the category of non-profit corporations.

Korean legislators must provide an appropriate answer to "why cooperatives formed under the special laws should be treated as non-profit corporations even though they are paying dividends," and "why general cooperatives are not included in non-profit corporations even though they are not different from cooperatives established under the special cooperative laws." For the answer, legislation from an entirely new perspective, different from the existing legal system, is essential, and the current simple dichotomy-based legal system must be abrogated first for such improvement.

Since a cooperative is an organization oriented toward members' interests, it is inherently aimed at zero-cost management, so the purpose of establishing a cooperative cannot be regarded the same as that for establishing a for-profit company.[129] In particular, as mentioned above, dividends to members must be calculated according to the usage ratio, and allocating dividends to investors is strictly limited, so cooperatives' distribution of dividends should not be the reason for treating a cooperative as a for-profit corporation.[130] Moreover, it is fundamentally different from a for-profit company in that anyone who meets the requirements of the cooperative's bylaws can join the cooperative and use its business. Because the cooperative's surplus comes from users, and anyone in the community can become its user, the cooperative also has the character of a public interest corporation existing for the community.

Still, it is not reasonable to regard a cooperative strictly as a non-profit corporation. One of the most important reasons for dividing a for-profit corporation and a non-profit corporation in Korea is to regulate the process of obtaining legal entity status differently.[131] While the establishment of a for-profit corporation is completed with registration, a non-profit corporation must go through a much stricter procedure, such as obtaining permission from the competent authority in addition to the registration. When the competent authority grants permission for the establishment, essential factors for evaluation include non-distribution of profits to members, the corporation's purpose specified in the bylaws, and the business scope to achieve such purpose.[132] The distinction between for-profit and non-profit is also related to the dissolution procedure as

[129] *See* KIM YONG JIN ET AL., *supra* note 9, at 24-29.
[130] *See* Shim In Sook, *Introducing Cooperatives as a Type of Enterprise: Focusing on the Governance Structure of General Cooperatives under the Framework Act on Cooperatives of Korea*, 68 Advanced Commercial Law Review, Ministry of Justice of Korea 33, 35-36 (2014), Jung Soon Moon, *supra* note 97, at 258 (2020).
[131] *See* SONG HO YOUNG, *supra* note 35, at 63.
[132] See For example, SEOUL METROPOLITAN GOVERNMENT, STANDARDS FOR APPLICATION DOCUMENTS AND PERMITS OF NON-PROFIT CORPORATIONS IN SEOUL, https://news.seoul.go.kr/gov/archives/78472 (last visited Mar. 26, 2021).

well.[133] If a non-profit corporation conducts business other than its intended purpose, the competent authority may revoke its permission without a court's judgment,[134] whereas the judgment is essential in the case of a for-profit corporation's dissolution.[135] Since cooperatives can be established by various groups such as consumers, workers, and business operators, their business types are very diverse, and it is almost impossible for the competent authority to form a consistent standard to judge its establishment and dissolution. The autonomy of cooperatives should be guaranteed as much as possible, which is also requested by the Framework Act on Cooperatives[136] and the ICA's principles.[137] Therefore, the procedures for "non-profit" corporation's establishment and dissolution is not suitable for cooperatives.

The tax laws and the cooperative laws should reform dichotomous rules and redesign the legal system to recognize cooperatives as another type of corporation based on "mutuality," not as for-profit or non-profit corporations.[138] And the methodology of simply dividing tax-paying corporations into two categories and then treating them as completely equal within the same group should now be repealed. The operation of a member business and a non-member business must be treated separately, and procedures governing the patronage dividends and the capital dividend must also be different. Besides, it is necessary to distinguish between transactions for cooperatives' operation and all other transactions.[139] Specific regulations based on each tax law category need to be redesigned to suit the cooperative's identity. First, the provisions of the Corporate Tax Act and the Enforcement Decree, which simply designates some cooperatives as non-profit corporations, should be abrogated for this reform. It should be considered to thoroughly review the legal methodology that justifies the dichotomy between for-profit and non-profit corporations in the long-term perspective.

2. Establishment of Rules for Indivisible Reserves

Due to Korean cooperatives' history, in which cooperatives have acted like government-affiliated organizations, Korean society has a problem with understanding that the cooperative identity lies in contributing to their communities. This lack of understanding leads to the argument that there is no reason to treat cooperatives, especially those established under the Framework Act on Cooperatives, differently from other commercial enterprises. The legal basis of this argument can be summarized in two ways. The first is that

[133] Kim Chin Woo, *supra* note 125, at 2.
[134] *See* Civil Act, art. 38.
[135] *See* Commercial Act, art. 176.
[136] The Act stipulates that "The central government or a public organization shall not encroach the autonomy of a cooperative, federation of cooperatives, social cooperative, or federation of social cooperatives." *See* Framework Act on Cooperatives, art. 10 para. 1.
[137] The 4th principle of ICA is "autonomy and independence", which declares that "Cooperatives are autonomous, self-help organizations controlled by their members. If they enter into agreements with other organizations, including governments, or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintain their cooperative autonomy." *See Cooperative Identity, Values & Principles*, *supra* note 92.
[138] KIM YONG JIN ET AL., *supra* note 9, at 29-30.
[139] For example, investment in other corporations, trading of fixed assets, etc. *See* Nina Aguiar, *supra* note 3, at 2.

the cooperative pays dividends to its members, and the second is that when the cooperative is disbanded, the remaining assets are returned to the members. The argument that a for-profit corporation and a cooperative are the same because the surplus of the cooperative is distributed to members, can be refuted by the principle of patronage dividend as described above. However, it is indeed difficult to rebut the fact that when a cooperative disbands, in Korea, all residual property is ultimately distributed to its members. This means that the final destination of the cooperative's excess profit beyond the surplus incurred from the cooperative's use is the members. It can be a serious obstacle to the growth of cooperatives in that it nullifies the cooperative's efforts that have paid surpluses in proportion to patronage, and it causes inappropriate profits to be returned to members such as profits from transactions with non-members.

Therefore, it is necessary to consider improving the legal system so that profits from non-member transactions can be allocated as indivisible reserves in order to settle disputes on the "for-profit" characteristics of cooperatives and infuse their true identity in cooperative laws.[140] Indivisible reserves function as a device to handle the cooperative's excess profits, which exceed the surpluses obtained from transactions with members, in accordance with the cooperative's core value. Member and non-member transactions should be systematically classified, and profits generated from non-member transactions are required to be accumulated as indivisible reserves so that they will not be leaked outside the cooperative, and members will not be able to enjoy profits other than the transaction they participate in. In addition, as indivisible reserves are not distributed to the cooperative's members, they become permanent assets that can be used for long-term business operations, thus benefiting future cooperative members.[141] Since cooperatives are in principle open to all persons who wish to have rights and obligations as members, assets for future members are ultimately resources for the community. This is another reason to show that indivisible reserves can be a powerful legal mechanism to prevent cooperatives from being mistakenly recognized as commercial enterprises.[142]

The Principle of Cooperative declares that a certain part of the surplus be deposited as an indivisible reserve.[143] Also, the Principles of the European Cooperative Laws, which divide the reserves into "mandatory reserves" and "voluntary reserves," stipulate that "mandatory reserves" shall not be divided even when the cooperative is dissolved,[144] and profits arising from transactions with non-members must be accumulated in indivisible

[140] Several studies in Korea claim that the introduction of indivisible reserve system is essential for the growth of cooperatives. *See*, for example, Yang Dong Su, *Issues on the Revision of the Framework Act on Cooperatives*, Yonsei Global Law Review, 39, 52-54 (2013), Jung Soon Moon, *supra* note 97, at 258-260, KIM YONG JIN ET AL., *supra* note 9, at 364-371.

[141] *See* KIM YONG JIN ET AL., *supra* note 9, at 364. Given the "open membership" principle, one of the seven cooperative principles, it is particularly important to have a financial foundation for future members. *See Cooperative Identity, Values & Principles*, *supra* note 92.

[142] *See* Jung Soon Moon, *supra* note 97, at 258.

[143] *See* GUIDANCE NOTES TO THE COOPERATIVE PRINCIPLES, *supra* note 94, at 29.

[144] Section 3.4.(3) of Principles of European Cooperative Law. *See* GEMMA FAJARDO ET AL., *supra* note 4041, at 83.

reserves.[145] Many European countries already have provisions on indivisible reserves in their cooperative laws. For example, the Portuguese cooperative law stipulates that all mandatory reserves and surpluses from third-party operations are not susceptible of any distribution.[146] In France, cooperatives' remaining assets should be vested to other cooperatives, unions of cooperatives, or another enterprise in social and solidarity economy, not to their members.[147]

In Korea, every cooperative law has its own provision regarding "legal reserves" and "voluntary reserves," but most require that reserves be distributed to members when they are dissolved. "Social cooperatives" formed under the Framework Act on Cooperatives[148] and "health and medical cooperatives" established under the Consumer Cooperatives Act[149] are the only cooperatives with legal regulations stipulating that their residual assets shall not be returned to their members when they are dissolved. Local agricultural cooperatives must distribute residual assets to other local agricultural cooperatives designated by a resolution of general meeting upon cooperatives' dissolution,[150] however, this is regulated by model bylaws, not by law.[151] Likewise, in the case of cooperatives under special cooperative laws other than the Agricultural Cooperatives Act, their model bylaws also said that the cooperative's residual assets shall be distributed to members.

The indivisible reserve system should be introduced, especially for general cooperatives based on the Framework Act on Cooperatives, being the subject of controversy over whether they are for-profit corporations or not. As there are already legislative models of indivisible reserve for social cooperatives and health and medical cooperatives, it would not be difficult to regulate residual asset distribution in the law. The Framework Act on Cooperatives has to be amended to prohibit the distribution of residual assets to members upon dissolution of a general cooperative. Instead, cooperatives may distribute their assets to other cooperatives, higher associations, or government. There can be some criticisms claiming that the cooperatives should be able to decide themselves whether to make the residual assets indivisible or not, on the ground of the principle of contract freedom. However, if this is determined by the bylaws and not the law, unpredictable dissolution of cooperatives could happen because the cooperative's decision to distribute residual assets to the members can be easily made when the cooperative has a large amount of accumulated

[145] *Id.* Section 1.5(5), at. 43, Section 3.7.(1), at 92.
[146] *See* Codigo Cooperativo [Cooperative Code], art. 99 (Portugal), https://dre.pt/home/-/dre/70139955/details/maximized (last visited Mar. 26, 2021).
[147] *See* The 1947 Law, art. 19 (France)
[148] Like France, when a "social cooperative" is dissolved in Korea, the ownership of residual property shall be vested in the higher federation of social cooperatives, a social cooperative for similar purposes, a non-profit corporation, or the Government. *See* Framework Act on Cooperatives, art. 104.
[149] *See* Consumer Cooperatives Act, art. 56.
[150] *See* Art. 153 para. 3 of Jiyeokhyeopdongjohapjeonggwanrye [the Model Bylaws of Local Agricultural Cooperatives], Ministry of Agriculture, Food and Rural Affairs of Korea, Notification. No. 2018-44, June. 11, 2018 [hereinafter the Model Bylaws of Local Agricultural Cooperatives]
[151] Since most of the local agricultural cooperatives adopt the model bylaws, the indivisible reserve system would be effective for them.

assets.[152] Hence, it is reasonable to regulate the distribution of residual assets by law, as in social cooperatives and health and medical cooperatives.

The indivisible reserve system is expected to help the cooperatives fulfill their unique role. The original purpose of the patronage dividend also can be realized only when the indivisible reserves system is working. After the system is introduced in cooperative laws, it is possible to discuss tax benefits for the reserves.[153] Considering the function of such indivisible reserves, it would be desirable to induce cooperatives to accumulate more indivisible reserves by reducing corporate tax on indivisible reserves.

IV. Legal Prerequisites for the Realization of the Patronage Dividend

A. Consistency Between Owners and Users

The core identity of cooperatives is in the form of patronage dividends, and their systematization is the basis for designing appropriate tax policies. Legislative efforts to systematize the patronage dividends become meaningful on the condition that legal regulations are in place for cooperatives to become user-owned corporations. To establish this condition, two stages of regulation must be premised. One is to limit qualification of cooperative members to those who wish to jointly use the cooperative's business. The other is to limit users of the cooperative business to its members.[154] If either of these two levels of regulation is loosened, not only patronage dividends but also various tax benefits for cooperatives lose their function. Therefore, the Korean cooperative legal system has to be improved from this point of view.

The first condition for consistency between owners and users is that those who join a cooperative must be limited to those who wish to use the cooperative's business. Cooperatives should be owned, controlled, and run by and for their members to realize their common economic, social, and cultural needs and aspirations.[155] In other words, the membership of a cooperative should be set appropriately to fulfill the "common needs and aspirations" of those who wish to gather within the fence of the cooperative, and those who do not share the "common needs and aspirations" should not enter the fence in principle.[156] For example, non-farmers cannot join agricultural cooperatives, and non-workers should not join workers cooperatives. If the participation of those who do not have "common needs and aspirations" is allowed, the "common needs and aspirations" of existing members are likely to be broken down. The democratic governance structure of the cooperative will be distorted as well.[157] Hence, properly setting the qualifications of members in line with the purpose of the cooperative is essential to solidify the legal foundation of the cooperative's core principle.

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[152] KIM YONG JIN ET AL., *supra* note 9, at 30.
[153] *See* SON WON IK ET AL., *supra* note 97, at 88-89.
[154] *See* Jang Jong Ick, *A Study on the Identity of Cooperatives' Business*, 37 The Korean Journal of Cooperative Studies, Korean Society for Cooperative Studies, no. 3, 67, 70-71 (2019).
[155] *See Cooperative Identity, Values & Principles*, *supra* note 92.
[156] KIM YONG JIN ET AL., *supra* note 9, at 371.
[157] *Id.* at 42.

The special cooperative laws in Korea stipulate members' qualifications very strictly under this consideration,[158] whereas the Framework Act on Cooperatives entrusts the restriction on unqualified members to the bylaws,[159] so there are virtually no legal regulations on members' qualifications. This is an inevitable side effect of legislation that does not explicitly define types of cooperatives and allows cooperatives to carry out any business, even those irrelevant to their purposes. Korean government has yet to come up with an appropriate solution to this problem.

In addition to proper restrictions on members' qualifications, cooperatives should constantly monitor whether member management is being carried out according to their regulations. Even if laws or bylaws adequately limit members' qualifications, there may be cases in which cooperatives accept unqualified members or unfairly remove qualified members by a resolution of the general meeting or the board of directors, which also leads to fatal damages to democracy and mutuality of cooperatives.[160] For example, in South Korea, despite the fact that the Agricultural Cooperatives Act has rigorous standards of member qualification, local agricultural cooperatives under this act severely suffer from the problem of unqualified members whenever there is an election for the president of the cooperatives.[161] Local agricultural cooperatives conduct thorough investigations at least once a year to confirm members' qualifications.[162] Nonetheless, they are not completely free from disputes about unqualified members in cooperatives. Most cooperatives established under the Framework Act on Cooperatives do not even make efforts similar to the agricultural cooperatives, so the problem is much worse.

The second condition for consistency between owners and users of a cooperative is to restrict the use of non-members to ensure that the cooperative's business can be controlled according to the original purpose of their members. Since there is always a possibility that a cooperative regards non-members as a business target to generate more monetary profits, if control of transactions with non-members is left exclusively to the cooperative, the original purpose is likely to be distorted and undermined quickly. Even if the cooperative law strictly controls member qualifications, the law cannot effectively protect the cooperative's identity if it permits excessive non-member use of the business.[163] For these reasons, many countries'

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[158] For example, The Enforcement Decree of the Agricultural Cooperatives Act has detailed provisions on membership qualifications, such as that the person who wants to join an agricultural cooperative shall have farmland over a certain area and engage in agriculture for a certain period of time. *See* Nonguphyeopdongjohapbeob sihaengryeong [Enforcement Decree of the Agricultural Cooperatives Act] art. 4.

[159] *See* Framework Act on Cooperatives, art. 20, 21.

[160] KIM YONG JIN ET AL., *supra* note 9, at 42.

[161] According to the National Agricultural Cooperative Federation, the membership investigation was conducted on 1,948,481 members in 2018, and 74,872 members of them were found to be unqualified. *See* Lee Tae Su, *Agricultural Cooperatives, tens of thousands of unqualified members who do not farm: Concerns about election dispute*, Yonhap News, October. 18, 2018. As seen above, it is not easy to constitute a cooperative only with qualified members. If an ineligible member of the cooperative enters the cooperative and exercises voting rights, the election of directors or other resolutions of the general assembly may be legally invalidated.

[162] Johaponeui Jagyoekyogeonin nongupinui hwakin bangbeob mit gijun [Methods and Standards for Identification of Farmers, the Qualification Requirements for Members], Ministry of Agriculture, Food and Rural Affairs of Korea, Notification. No. 2018-7, January. 24, 2018, art 2, the Model Bylaws of Local Agricultural Cooperatives, art. 11(5).

[163] Hans-H. Munkner, *Chapter 8. Germany*, *in* GEMMA FAJARDO ET AL., *supra* note 41, 253, 270 (2017).

cooperative laws restrict non-member use of business to protect cooperatives' mutuality.[164] In Korea, the Framework Act on Cooperatives and most special cooperative laws restrict non-member use as well,[165] which shows that the Korean cooperative laws also recognize the importance of consistency between owners and users of cooperatives.[166]

However, as described above, unlike other special cooperative laws, the Framework Act on Cooperatives in Korea do not restrict member qualifications. If a cooperative has already accepted an unqualified person as a member, the provisions of the Framework Act on Cooperatives, which prohibit non-members from using the business, completely lose their meaning. As such, the Framework Act on Cooperatives, which restricts non-members' use of business but does not specifically regulate member qualifications, cannot protect cooperative identity.[167] Thus, Korean legislators must revise the Framework Act on Cooperatives to create a new legal system that controls the non-user member and non-member use. The tax policy for cooperatives without such efforts would be a house of cards.

B. The Criteria for Interpreting the "Use" of Cooperatives

To limit non-user membership, the cooperative should be systematically defined for whom the cooperative exists and what the cooperative is intended to do. Under this systematic definition, the owners and users of cooperatives will be legally consistent, and the principle of patronage dividends can be realized as well. Determining for whom the cooperative exists and what the cooperative does is the same as identifying the "use" of cooperatives. That's why cooperative legislation should establish core criteria for interpreting the concept of "use" of cooperatives. Establishing this concept is a prerequisite to organizing the cooperative tax policies. Although the cooperative law strictly stipulates the obligation to distribute patronage dividends to its members, it cannot be said that the obligations are properly regulated if the standard for the "use" is not provided. If the principle of patronage dividends is unfulfilled, the claim that the cooperative's surplus should be distributed to the members no longer become persuasive.

The concept of "use" of cooperative depends on who founded the cooperative. In the case of a stock company, it is only necessary to distribute dividends in proportion to the number of shares held by each shareholder in accordance with the principle of shareholder equality, but cooperatives that pay dividends based on the performance of members are not easy to set the standard for dividends.[168] For example, the use of producer cooperatives is based on carrying out production activities through the cooperative, such as supplying goods

[164] For example, the Spanish cooperative law places a limit on the total volume of transactions with non-members and requires that profits from transactions with non-members must be accumulated as indivisible reserves. *See* Gemma Fajardo, *Chapter 11. Spain*, *in* GEMMA FAJARDO ET AL., *supra* note 41, 517, at 538.

[165] *See*, For example, Agricultural Cooperatives Act, art. 58, Fishery Cooperatives Act, art. 61, Forestry Cooperatives Act, art. 51, Consumer Cooperatives Act, art. 46, Credit Unions Act, art. 40, Community Credit Cooperatives Act, art. 30.

[166] KIM YONG JIN ET AL., *supra* note 9, at 44-45.

[167] *Id*. at 6.

[168] *Id*. at 52.

to it. The use of consumer cooperatives is the purchase of certain goods or use of services through the cooperative, and the use of worker cooperatives would be to provide labor to the cooperative. Considering these concepts of use, the standard of patronage dividends also has to be different for each type of cooperative.[169]

Special laws for cooperatives in Korea, such as the Agricultural Cooperatives Act and the Fishery Cooperatives Act, have specific regulations regarding types of use, membership qualification, and business types; hence the criteria for evaluating the use of cooperatives have been established over the years. However, under the Framework Act on Cooperatives, general cooperatives are permitted to conduct every kind of business except that of the financial business.[170] Also, compliance with cooperative principles is not subject to audit or supervision; thus, there is no suitable way to control it after their establishment.[171] This has made it possible for cooperative members to receive patronage dividends even for capital gains through a distortion of the standard of cooperatives' use, placing cooperatives in a legally vulnerable situation.[172] Even membership requirements not suitable for the character of the cooperative or conducting other business that does not meet the purpose of the cooperative cannot be effectively restricted under the Framework Act on Cooperatives.

The Framework Act on Cooperatives stipulates that the important issues related to cooperative operation, such as types of use, membership qualifications, and business types, shall be determined by the bylaws. However, these must be stipulated in the law, not in the bylaws, since the bylaws can be changed at any time with a resolution of the general meeting,[173] and a majority of members of a cooperative can freely set the standard for dividends without legal restriction. Besides, a cooperative is a very vulnerable legal entity from the standpoint of creditors because its members have "limited" liability for the cooperative's debts[174] and may claim for refund of their share when they quit.[175] Therefore, it should always be taken into account that the legal personality of a cooperative can be easily abused. Under this situation in South Korea, it seems an empty claim to request tax benefits for cooperatives based on the reason that cooperatives pay patronage dividends to their members and that cooperatives' owners and users coincide. Since the key conceptual element of the "use" of a cooperative, which is the basis for calculating the patronage dividends, should not be easily influenced by majority members, it is reasonable to stipulate it by law rather than in the bylaws.

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[169] *Id.*
[170] *See* Framework Act on Cooperatives, art. 46.
[171] The local governments in Korea, which are the competent authorities, may issue a corrective order to the cooperative only in the following cases: When two or more years have elapsed during which the number of members of the cooperative was less than the minimum number of members, when the general meeting has not been held for two or more consecutive years, or when the essential business of the cooperative has not been carried out continuously for two or more years. *See* Framework Act on Cooperatives, art. 70-2.
[172] KIM YONG JIN ET AL., *supra* note 9, at 52.
[173] *See* Framework Act on Cooperatives, art. 29 para. 2
[174] *See* Framework Act on Cooperatives, art. 22 para. 5.
[175] *See id.* art. 26.

There are two ways to regulate the concept of "use" in the cooperative legislation: the classification of the core types of cooperative use based on member interests such as in Spanish cooperative law[176] or Quebec's cooperative law,[177] and establishing a legal system for periodical audit or supervision of compliance with the Cooperative Principles, such as in German cooperative law.[178] Certainly, it would be ideal if the two methods were concurrently adopted as they are complementary.

In particular, it's worth referring to Quebec's cooperative law in that it attempts to categorize cooperatives more systematically based on the stakeholders who comprise the cooperative's main body, rather than simply categorizing them by "industry" types. As evidenced in the cooperative laws in Spain, Portugal, and France, the method of classification of cooperatives by "industry" serves just to enumerate the predictable industry types of cooperatives in the law. For this reason, regulations become more complex over time, making it increasingly difficult to control cooperatives through consistent standards. Under Quebec-type legislation, on the contrary, the membership entry of those with opposite interests will be fundamentally blocked without any regulations regarding the "industry."

Furthermore, classification centered on the type of member interests, as in Quebec's cooperative law, is reasonable from a legal point of view in that it is easy to assess whether the laws governing the market, such as the fair-trade laws, labor laws, or consumer protection laws, apply to the cooperative, its members, or its counterparts.[179] This is because the existing legal system is also designed to be centered on the interests of economic actors. According to Henry Hansmann's theory, a corporation's "owner" has the right to control the firm and the right to appropriate the firm's profits, and based on who "owns" the corporation, the corporation is classified as a stock company, producer cooperative, consumer cooperative, worker cooperative, etc.[180] Other groups that do not own the corporation are put into contractual relationships with the corporation.[181] When the cost of ownership is less than the cost of the contract, he or she owns the corporation, which means that it is reasonable for other groups to be in a constant contract relationship.[182] This is because they are in a

[176] In Spain, the basic cooperative types are listed directly in a single cooperative act. There are 12 types of cooperatives listed in the Act, each consisting of a single section, including workers' cooperatives, consumer cooperatives, housing cooperatives, agricultural cooperatives, land use cooperatives, service cooperatives, fishery cooperatives, transportation cooperatives, and insurance cooperatives. *See* Law 27/1999 (Spain), https://www.boe.es/buscar/doc.php?id=BOE-A-1999-15681 (last visited Mar. 26, 2021).

[177] The Cooperatives Act of Quebec, Canada also includes five types of cooperatives: producers cooperatives, consumer cooperatives, work cooperatives, shareholding workers cooperatives, and solidarity cooperatives. The chapter on producer cooperatives includes provisions on agricultural cooperatives, and the chapter on consumer cooperatives includes provisions on housing cooperatives and school cooperatives. *See* the Cooperatives Act (Quebec, Canada), http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-67.2?langCont=en#ga:l_i-h1 (last visited Mar. 26, 2021).

[178] German cooperative law establishes an independent organization called the "Confederation of Auditors" to oversee the operation of cooperatives. *See* Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften, art. 54, 55. (Germany), https://www.gesetze-im-internet.de/geng/ (last visited Mar. 26, 2021).

[179] *See* KIM YONG JIN ET AL., *supra* note 9, at 56-58.

[180] *See* HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 11-16 (1ST HARVARD UNIVERSITY PRESS PAPERBACK ED. 2000) (1996)

[181] *Id.* at 18-20.

[182] *Id.* at 20-22.

confrontational relationship in general. Hence, it is proper to establish regulations for each type of group by reflecting these confrontational relations in the cooperative legal system. Most of the research, discussing the typology of cooperatives, also analyzes producers, consumers, and worker cooperatives separately.[183] It is inefficient to design a more specific type by law, because within the same group, diverse relationships can be created, which can be rather reciprocal instead of confrontational. Thus, the cooperative itself should regulate a more detailed structure for member management in its bylaws.

Consequently, it is required to reflect the core concept of "use" of each type of cooperative in the Framework Act on Cooperatives. Supervision by a higher association or competent authority is also essential. Legal reforms in this direction will enable and justify the systematic discussion of cooperative tax policies, including tax benefits for cooperatives. South Korea has not corrected its tax policy on cooperatives since the 1960s. It was not possible because there were no serious attempts for such systematization. Now, the legal framework of cooperatives in Korea, which has no consideration of the concept of "use" of cooperatives, must be reorganized to correctly reflect the nature of cooperatives. Establishing all of the tax incentives for cooperatives should be based on this reform.

V. Conclusions

In South Korea, cooperatives are strictly divided into non-profit and for-profit corporations, just like other legal entities. Historically, under this dichotomous legislation, cooperatives considered to be non-profit corporations have been established and operated to support the country's industrial policy, almost playing the role of sub-governmental organizations. With the enactment of the Framework Act on Cooperatives in 2012, it was expected that legal reform centered on cooperatives' identities would be carried out, but those expectations have not yet been fully realized. Under the influence of previous legislation, the new Act also divides the cooperative's legal entity into two categories: general cooperatives and social cooperatives, and stipulates that general cooperatives are regarded as for-profit corporations while social cooperatives are regarded as non-profit corporations. Due to this dichotomy, the general cooperatives, which account for most cooperatives in Korea, cannot receive any tax benefits at all, even though other similar partnerships established under the Corporate Act may receive such benefits. This unfair situation is created by the legislature's lack of understanding of the cooperative's true nature.

[183] *See* JOHNSTON BIRCHALL, PEOPLE-CENTERED BUSINESSES: CO-OPERATIVES, MUTUALS AND THE IDEA OF MEMBERSHIP 3-5 (2011), Vera N. Zamagni, *Interpreting the Roles and Economic Importance of Cooperative Enterprises in a Historical Perspective*, 1 Journal of Entrepreneurial and Organizational Diversity, no. 1, 21 (2012), KIM KI TAE, KIM YEON MIN, PARK BEOM YONG AND PARK JU HEE, A STUDY ON THE OPERATIONAL MODEL OF NEW COOPERATIVES' TYPES, MINISTRY OF ECONOMY AND FINANCE (2012), Jang Jong Ick, *A Typology of Cooperatives: Focusing on the Cooperatives Newly Established in the Science and Technology Sector*, 33 The Korean Journal of Cooperative Studies, Korean Society for Cooperave Studies, no. 2, 79 (2015), However, these studies are not directly related to the "legalization" of the cooperative type, only focusing on an economic analysis. Regarding the legal typology, *see* KIM YONG JIN ET AL., *supra* note 9, 35-215.

Korean legislators must now abrogate this anachronistic dichotomy that hinders the growth of cooperatives.

The cooperative distributes its surplus to its members in the form of patronage dividends, which justifies the fact that the cooperative's income belongs to its members, not the cooperative. Nevertheless, the Korean tax laws impose taxes on cooperative surpluses both at the corporate level and at the member level. Fixing this double taxation is one of the most important issues for cooperatives. To improve the current tax policy, the principle of patronage dividends, the ideological basis of cooperative finance, must be thoroughly implemented. This requires patronage dividends to be included in deductible payments and the cooperative legislation surrounding the dividends to be revised systematically.

For systematizing cooperative's patronage dividends, member transactions and non-member transactions must be distinguished clearly, and patronage dividends to members must be defined as the cooperative's obligation. In addition, tax regulations that view transactions between a cooperative and its members as a "wrongful transaction" should be revised as well. As these reforms are difficult to implement under the current tax system, which divides all corporations only into for-profit and non-profit corporations, the Corporate Tax Act's regulations that underlie this dichotomy will need to be revised first. The introduction of an indivisible reserve system for general cooperatives could be an opportunity to break new ground to overcome the dichotomy that separates for-profit and non-profit corporations.

There are legal prerequisites to realizing the principle of patronage dividends. Members should be users, and users should be members because a cooperative is an organization of its users. This has to be the starting point of all discussions about the tax treatment of cooperatives. A legal device to control these conditions is strongly required, which Korean cooperative laws currently lack. For consistency between a cooperative's members and users, there must be a constructive answer to what "use" of a cooperative means. Ultimately, it is essential to reflect the interpretative standard for the "use" of cooperatives in the legislation, which will create a solid logical basis for reforming the cooperative taxation policy.

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LEGISLATION AND THE ADMINISTRATION OF TAXATION OF CO-OPERATIVE SOCIETIES: DRAWING AN INTERSECTION FOR SUSTAINABLE DEVELOPMENT

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Abstract

Nigerian co-operatives are enabled by both national and subnational legislation. S*ection 20 (1) and (2) Nigerian Co-operative Societies Act*, (NCSA) *CAP. N98*, exempts societies from the payment of stamp duties chargeable under the *Stamp Duties Act CAP. S8. Section 23 (1) (b)* of the *Companies Income Tax Act, CAP. C21* and *Section 26 (1) (c)* of the *Capital Gains Act, CAP. C1* exempts societies from taxation of profits and gains. Current statistics show that co-operatives are more likely to possess characteristics of community organizations than commercial enterprises, with the consequence that their potential is sub-optimally utilized. There is a need for an appraisal of the specified circumstances in conjunction with some elements of their enabling legislation. The exemption from taxation is identified as a drawback in the implementation of the sustainable development agenda. This points to the need to integrate elements of company law into co-operative legislation to remedy the identified deficiencies.

Keywords: Companization, Co-operative legislation, Nigerian co-operatives, Sustainable development, Taxation.

1. Introduction

The origin of modern co-operatives in Nigeria is traced to the work of C.F Strickland, an expert in co-operatives who was commissioned in 1934 by the British colonial government of Nigeria to undertake a feasibility study on the viability of introducing modern co-operative practices into Nigeria. Strickland's findings were presented to the colonial government in his 1934 Report.[2] This led to the adoption of modern co-operatives in Nigeria, and the promulgation of the Co-operative Societies Ordinance of 1935.[3] The Ordinance was modeled on the Indian Co-operative

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[2] For this major work, see Strickland C.F. "The Co-operative Society as an Instrument of Economic and Social Construction" International Labour Review, Vol. 37, 1938 pp 729 – 753.

[3] The Co-operative Ordinance of 1935 is not available. However, learned authorities such as E.T Yebisi posits in several of their works that it was modelled after the Indian Co-operative Act of 1904 and its provisions form the background to current Nigerian legislation on co-operatives

Act of 1904 as amended in 1912.[4] The sub-division of Nigeria into semi-autonomous regions and later, into thirty-six states, meant that each region or state was at liberty to adopt co-operative legislation that was suited to its environment.[5] This led to various adaptations of the existing Co-operative Ordinance of 1935.[6] Co-operative law is currently in the concurrent legislative list of the Constitution of the Federal Republic of Nigeria, 1999. This means that both the National Assembly, and each of the 36 State Houses of Assembly can legislate on co-operatives and allied matters. However, the application of the constitutional doctrine of "covering the field", that is currently enshrined in the Nigerian constitution, means that if a provision of legislation of a State House of Assembly is contrary to an Act of the National Assembly, the provision of the state law shall be declared null and void to the extent of its inconsistency with the National Act.[7]

The subnational legislatures within the Nigerian federation are often willing to adopt Acts of the National Assembly but are reluctant to tinker with the provisions of the adopted Acts. In some circumstances, this hinders state legislation from integrating local peculiarities into its provisions. This is the current situation with co-operative legislation in Nigeria. The prevailing situation requires an examination of tax administration and management through the lens of co-operatives and their governing laws, particularly the Nigerian Co-operative Societies Act (NCSA),[8] and allied Nigerian legislation.

Section 20(1) (2) and section 21(a)(b)(c)(d) of the NCSA exempts co-operative societies from certain duties, fees, taxes and the compulsory registration of certain instruments.[9] This does not defeat the provision of section 23 (1)(b) of the Companies Income Tax Act Cap C21, Laws of the Federation of Nigeria, 2004 and section 19 (1) paragraph 22 of the Third Schedule of the Personal Income Tax Amendment Act, 2011 which provides that co-operatives are required to pay tax on profit realized from businesses outside co-operatives activities.

The express provisions of these sections capture the intention of the National Assembly to cover the field on the taxation of co-operative societies in Nigeria. Co-operative practitioners argue that tax exemptions confine Nigerian co-operatives to social groups or non-governmental charitable organizations, rather than business-oriented ventures. The implication is that Nigerian co-operatives are neither statutorily nor administratively suited to undertake significant entrepreneurship. This argument has some validity when it is noted that even petty traders are required by statute to pay taxes[10].

Current Nigerian co-operative legislation has the following accrued impacts:

[4] E. T Yebisi (2014), "The Nigerian Co-operative Societies Act, 2004: A Bridge Still Far? Asian Journal of Humanities and Social Sciences. Vol.2. Issues 2
[5] Constitution of the Federal Republic of Nigeria, 1999, 2nd Schedule Pt II as amended.
[6] E.T Yebisi (supra).
[7] Constitution of the Federal Republic of Nigeria, 1999, section 4(5) as amended.
[8] Nigerian Co-operatives Societies Act, Cap. N98, Laws of the Federation of Nigeria, 2004.
[9] Nigerian Co-operatives Societies Act (supra)
[10] Constitution of the Federal Republic of Nigeria, 1999, Fourth Schedule. Which empowers the third-tier government in Nigeria; the Local Government to collect tax from petty traders within its territory.

(a)Nigerian laws do not classify or empower co-operatives to operate as commercial entities; and

(b) Nigerian co-operative societies, as currently administered, are more often social and community organizations.

The Nigerian political class prefers to deal with co-operatives in the same manner as they were dealt with under British colonial rule, a position that compounds the identified challenges. This creates a dilemma that further disempowers the Nigerian co-operative movement. Co-operatives are not equipped to function properly as commercial businesses or as social organizations. The dilemma is consistent with Hagen Henry's 2005 quote: *"it is strange that it is easy to obtain funds for projects and programs dealing with human rights, democracy and the rule of law in abstract terms, whereas no money is made available for the development of genuine co-operatives, which are practical realization of these aims."*[11]

Nigerian co-operative societies, across the cadre of the co-operative movement, find it difficult to obtain funds for projects and programs that build capacity to support business growth and development. A major reason is the perpetual exemption from taxes, which situates them as neither profitmaking nor non-profit making associations. The exemption disempowers the co-operative movement and prevents them from contributing optimally to the sustainable development of the country. Consequently, they do not fit into the framework of the International Co-operative Alliance (ICA), and the United Nations Development Programme (UNDP) on the role of co-operative societies in actualizing the Sustainable Development Goals (SDGSs).[12]

Against this background, this paper examines the effects of the interplay of Nigerian legislation on the taxation of co-operative societies and the sustainable development of the country. Attempts are made to identify the various effects on both co-operatives and the country. Recommendations are made to address the identified deficiencies.

2. Nature of Nigerian co-operative societies and their legislative framework

There are primary, secondary, and tertiary co-operative societies in Nigeria. The number of primary co-operative societies in Nigeria ranges between 700,000 to 1,100,000 million.[13] This figure includes both registered and unregistered societies. The emphasis in this paper is on registered co-operatives. All the known Nigerian secondary co-operatives, and the few tertiary

[11] Henry, Hagen 2005: Co-operative Societies Act, India 1904 – A Model for Development Lawyers? A Worldwide Applied Model of Co-operative Legislation. ICA, Asia Pacific, New Delhi, pp 164 – 200.
[12] Micheal E. Gertler, (2004) "Synergy and Strategic Advantages: Cooperatives and Sustainable Development" Journal of Cooperatives. Vol. 18, Issue 15.
[13] Akanji, Ajibola. A (2020) The Poverty Challenge in Africa: Innovative Cooperativism Through Political Incentives. A case study of Nigeria. Journal Cooperativismoy Desarallo, Universidad Cooperative de Colombia.

co-operatives are registered.[14] The Co-operative Federation of Nigeria, the Odu'a Co-operative Conglomerate Limited, and the Nigerian National Petroleum Corporation (NNPC) Co-operative Multipurpose Society are the three tertiary co-operative societies that are registered with the International Co-operative Alliance (ICA).

Nigerian co-operative societies have their origins in the cultural practices of her people. These customary practices have been upheld by the people of Nigeria from time immemorial.[15] These practices survive to date, not only in form but in substance. In traditional Nigerian societies, co-operative associations drew their membership from the peasants, and the middle class, for socioeconomic survival, growth, and development. Rarely was membership drawn from the elite class of society whose participation was restricted to co-operative security outfits. The customary co-operative background still sustains its hold on the lower and middle classes, but the characteristics of the upper class has been modified.

The modern co-operatives that began shortly before the Strickland Report of 1934, and were predominantly organized solidarities of peasants, medium scale farmers, and allied workers, who had organized themselves in protest to the low prices being offered for their farm produce. The low prices were offered by the merchant buyers such as United African Company, John Holt, and Lever Brothers.[16] The colonial government had a huge stake in these merchant buyers and supported them with state apparatus. In response, farmer's association such as the Agege Planters Union formed co-operatives.[17] The activities of these co-operatives were a form of economic rebellion against the interests of the colonial government that brought about the Ordinance of 1935. These co-operatives did survive the Ordinance of 1935, but did not retain their original character. After the Ordinance, low- and medium-income earners from both the informal and formal sectors started joining existing co-operatives or formed new ones. The elite class were not known to have participated in co-operative societies through active membership. Rather, they utilized co-operatives to suit their economic, social, and political agenda.[18] Although times have changed, these characteristics have survived. Currently, most Nigerian primary co-operative societies draw their membership from the lower and middle rung of the socio-economic ladder. Few members are drawn from the elite class.[19] The Nigerian co-operative movement was harnessed by the elite class in both the public and private sectors, for their own

[14] In Nigeria, primary cooperative societies are expected to be registered at the State Department of Cooperatives. A secondary cooperative society could be registered either at the State or Federal Cooperative Department. A tertiary or apex cooperative society must be registered with the Federal Department of Cooperatives.
[15] Nigeria has about 250 ethnic nationalities. Each of these nationalities has its unique language and customary practices. The predominant ethnic nationalities are Hausa, Ibo, and Yoruba.
[16] Mohammed S. Bello "Frosty Relationship Among Stakeholders: A Major Impediment to Cooperative Development in South-West Nigeria". Text of Presentation at the Cooperative Stakeholders Retreat 2021, Akure, Ondo State, Nigeria. 25th to 28th March 2021.
[17] According to Mohammed S. Bello (supra). The Agege Planters Union was formed in 1907 by a group of cocoa farmers in an area in present day Lagos State.
[18] Such was the approach of the late Chief Akinpelu Obisesan, a prominent cocoa farmer during the pre and post Strickland C.F Report of 1934, who also enjoyed a prosperous cocoa business till into the 1970s. He had during these periods formed many farmer's cooperatives to support his business. His disposition at utilizing cooperatives was adopted by other frontline businessmen of the era. Some of these are late Chief Samuel Adeloye, Chief Elijah Olatunde etc.
[19] Olusoji A.T. *Esusu System (Ajo), Problems and Prospect. Ibadan,* Ogidiolu Publishers, 1996.

economic, social and political gain. This situation draws its roots from the Nigerian Co-operative Ordinance of 1935. The Ordinance was passed at the instance of the British colonialist, and did not come from the Nigerian co-operatives, or from Nigerians. British colonialism was skewed to the benefit of the colonialist. Consequently, the governing frameworks were structured to promote British interests and the Co-operative Ordinance was not an exception.

The colonial government would not have made a law to empower co-operatives at a time of growing nationalism in Nigeria. The growing nationalism in Nigeria coincided with a time when the British government was taking action against the spread of Marxism in Britain. At that time, co-operatives based on the Rochdale Pioneers' model were considered by some sections of the British elite, to be a drift towards communalism.[20] The state was mobilized against co-operatives in Britain. The approach to colonial co-operatives adopted by Britain was replicated in Nigeria through the 1935 Ordinance. Opportunities to reverse this tide were lost under colonial governments and upon self-rule.

The very first Nigerian co-operative legislation came about through the regionalization of the country in the 1950s. Regionalization empowered each of the three regions to pass legislation, and this included legislation on co-operatives. Ironically, the core sections of the 1935 Ordinance were retained by the legislatures in each of the three regions.[21] A striking feature of some co-operative laws still in use in Nigeria, is that they retain some of the core provisions of the 1935 Ordinance.[22] The survival of the core provisions of the 1935 Ordinance is evidence that there is a substantial resemblance between the interests of the colonialists, and those of the Nigerian political class under self-rule. The interest of the elite classes in the two periods were bourgeoise, and the interactions between the two classes is synonymous with class subordination of the less privileged by the privileged. This has largely confined Nigerian co-operatives to a corner, so that the governing laws are "dictated" by the elite class, for their own pecuniary benefit.

3. Taxation and Nigerian co-operative societies

The Constitution of the Federal Republic of Nigeria 1999, provides, inter alia "it is a duty of every Nigerian citizen to declare his income honestly to appropriate and lawful agencies, and also to pay his tax as and when due."[23] This provision sets the legal foundation for taxation in Nigeria. The Nigerian tax system is made up of tax law, tax policies and administration. The framework of Nigerian taxation, as enshrined in the constitution, conforms to the widely held principle across virtually all jurisdictions, that taxation must be authorized by the legislature,

[20] G.D.H Cole (1951) "The British Co-operative Movement in a Socialist Society" Republished May 2020 by Routledge.
[21] E.T Yebisi (supra).
[22] See the provisions of the Co-operative Societies Law of Oyo State, Co-operative Societies Law of Lagos State. Co-operative Societies Law of Ogun State etc.
[23] Section 24 (f), Constitution of the Federal Republic of Nigeria, 1999

through an enabling statute. Accordingly, the constitution legislates against arbitrariness in the interpretation and administration of taxation law in Nigeria.

It is important to reemphasize some provisions of the NCSA,[24] quoted verbatim: ***"****all duties executed by or on behalf of a society or by any officer or member of a registered society, relating to the business of the society shall be exempted from stamp duties chargeable under the Stamp Duties Act,[25] and from registration fees payable under any law, relating to registration of instruments, for the time in force throughout the Federation. A registered society shall be exempted from payment of tax under section 26 of the Companies Income Tax Act (CITA),[26]. Nothing in any law, for the time being in force, relating to the registration of instruments shall apply to:*

(a) any instrument relating to shares in a registered society notwithstanding that the assets of the society consist in whole or in part of immoveable property; or

(b) a debenture issued by a registered society and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to or immoveable property, except in so far as it entitles the holders to security afforded by a registered instrument whereby the society has mortgage, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of the debenture; or

(c) any endorsement upon or transfer of a debenture issued by the society; or

*(d) a charge created in favour of a registered society by a member of that society in respect of a produce of his agriculture or his land****".***

The above provisions exempt registered co-operatives from the payment of taxes in Nigeria. The supposed benefits include:

(a) exemption from the payment of 10% of gains realized upon disposal of a charitable asset in accordance with the Capital Gains Tax Act;[27]

(b) exemption from the payment of 5% on the supply of goods and services in accordance with the provisions of the Value Added Tax Act;[28]

[24] Section 20 (1) (2) and section 21 (a) (b) (c) (d) of the Nigerian Co-operative Societies Act, Cap N98, Laws of the Federation of Nigeria, 2004.
[25] Stamp Duties Act, Cap. S8, Laws of the Federation of Nigeria, 2004. It provides at section 4 that the Federal Government shall be the only competent authority to impose, charge and collect duties upon instruments relating to matters executed between a company and an individual, group or body of individuals. While the state government shall collect duties in respect of instruments executed between persons or individuals at such rates to be imposed or charged as may be agreed with the Federal Government.
[26] Section 26, Companies Income Tax Act Cap. C21. Laws of the Federation of Nigeria, 2004
[27] Capital Gains Tax Act Cap. C1 Laws of the Federation of Nigeria, 2004. It provides for the payment of ten per cent of the gains accruing to any person on a disposable asset.
[28] Value Added Tax Act Cap. VI Laws of Federation of Nigeria, 2004. It provides for the imposition and charging of value added tax on certain goods and services and provide for the administration of the tax and matters related thereto.

(c) exemption from the payment of 2% of assessable profits of a company in accordance with the Education Tax Act;[29] and

(d) exemption from the payment of the personal income tax in accordance with the Personal Income Tax Act.[30]

Registered Nigerian Societies are further exempt from tax on the following documents:

(a) Lease Agreements.

(b) Mortgages; and

(c) Incorporation of Limited Liability Company (if they choose to incorporate one).

These exemptions are in accordance with the provisions of the NCSA and apply to taxes imposed by Stamp Duties legislation of each of the thirty-six states of the federation of Nigeria.[31] These exemptions are laudable incentives that appear to support the upward mobility of the Nigerian co-operative movement. It is expected to position them as key players in the country's drive towards sustainable development. Despite these exemptions, the Nigerian co-operative movement is currently unable to compete favourably with its counterparts in other jurisdictions.[32] This is even more interesting when the performance of the Nigerian co-operative movement is compared to their counterparts in other developing countries. In these countries, co-operatives are not exempt from taxation. This brings to the fore the following questions:

(a) Is the exemption from taxation beneficial to Nigerian co-operatives; and

(b) What is the way forward?

4. Has exemption from taxation benefitted Nigerian co-operatives?

To address this question, a questionnaire was distributed to one hundred and twenty randomly selected co-operative leaders and scholars. All respondents agreed that legislation exempting Nigerian co-operatives from taxation has not been beneficial to co-operative societies. Respondents have a diverse range of reservations about the impacts of the taxation regime on Nigerian co-operatives.

[29] Education Tax Act Cap. E4 Laws of the Federation of Nigeria, 2004. It imposes an education tax on companies registered in Nigeria and to establish an Education Fund and a Board of Trustees to manage and administer the Fund. It is worthy of note, that the Nigerian Co-operative Societies Act (supra) makes provision for Education Fund.
[30] Personal Income Tax Act Cap. Laws of the Federation of Nigeria, 2004. It provides for the taxation of sole proprietorship and partnership businesses in Nigeria.
[31] There Stamp Duties Act (supra) is a legislation of the Nigerian National Assembly. Each of the thirty-six states in Nigeria has in place a Stamp Duties Law, a legislation of the House of Assembly of each state.
[32] For example, Kenya and India.

93 % of respondent agreed that while the law exempts co-operatives from taxation, in practice co-operatives pay some taxes. These taxes are collected directly by the Federal Inland Revenue Service (FIRS) or it authorized equivalent, within each of the 36 states of the federation.[33] 86% of respondents agree that there is a significant disparity between the provisions of laws on taxation of co-operatives and the practice of taxation. 87% of respondents agree that the inconsistency between the provisions of the law and the discharge of duties by tax officers are a reflection of the premium placed on co-operatives by the government and elite class, identified earlier in this paper. 86% of the respondents agree that the supposed benefit of the exemption from taxation was to enable co-operatives to make a significant contribution to the sustainable development of Nigeria. The same 86% agree that a substantial part of the envisaged gains from the exemption has not been met.

This seems consistent with the obligation for co-operatives to pay taxes on profit realized from businesses outside co-operative activities. However, the line between businesses that fall within the purview of co-operatives and those beyond is inexplicitly defined in the face of the realities of taxation.

5. Taxation and sustainable development

The concept of sustainable development has been well canvassed since the Brundtland Report of 1987.[34] It is about the reconciliation of current realities on socioeconomic and environmental survival, growth and development, with projections on survival, growth and development in the future. Sustainable development seeks to strike a balance between our current socio-economic and environmental needs and projected socio-economic and environmental challenges. It depends on the capacity of politicians to put in place the most appropriate public policy framework, that links the international, national, and local, along vertical and horizontal lines. The Sustainable Development Goals (SDGs) are an initiative of the United Nations Development Programme (UNDP).[35] One of the most frequently asked questions about the SDGs and the concept of sustainable development is about its financing.[36] Answers point to both public and private sources.[37]

[33] The Federal Inland Revenue Service Act Cap. Laws of the Federation of Nigeria, 2004. It is a legislation of the National Assembly that empowers the Federal Inland Revenue Service (FIRS) to allocate and collect tax on behalf of the federal government of Nigeria. There is equivalent legislation at the subnational level (thirty-six states of the federation).
[34] Our Common Future (1987) Book by Brundtland Commission.
[35] http://www.undp.org
[36] Cathal Long and Mark Miller (2017), "Taxation and the Sustainable Development Goals: Do Good Things Come to Those Who Tax More?" Overseas Development Institute, London.
[37] Sanjeer Gupta and Jianhong Lie (2020) "Tax Revenue in Africa Will Be Insufficient to Finance Development Goals" Centre for Global Development. Accessed through: https://www.cgdev.org

In the case of Nigeria and many of the developing countries, the answer to the financing question lies substantially with public funding.[38] The development indices in Nigeria show that despite the government's claim that there is heavy spending on social overheads such as electricity, health, and education, development projects have not been adequately financed. This supports the assertion that the rent from the exploration and exportation of crude oil, the major source of public revenue in Nigeria, is not sufficient to finance its sustainable development. In Nigeria, taxation in its different forms is second to the petroleum industry in term of its generation of public revenue.[39] One of the striking features of public expenditure in Nigeria, is that it largely corresponds to the source of its taxation revenue. Geographical areas, and sectors, such as the petroleum industry, or the service industry, seem to benefit in proportion to their revenue contributions.

The link is drawn between taxation and sustainable development expenditure. The notion that public financing advantages taxpayers in proportion to their level of taxation was propounded by economist, Nicholas Kaldor.[40] Kaldor, wrote "whatever the prevailing ideology or political colour of a particular government, it must steadily expand a whole host of its services as a prerequisite for the country's development. These services must be financed out of government revenue. Besides meeting these needs, taxes provide the most appropriate instruments for increased savings for capital formation out of domestic sources". Kaldor's postulation is very relevant to current realities in Nigeria.

Cathal and Mark (2017), say that "There is growing interest in domestic resource mobilization for development".[41] The authors identified some key messages from known initiatives on domestic resource mobilization:

a. Linking the delivery of the SDGs to an increase in domestic resource mobilization is a good idea in principle. More taxation is associated with benefits beyond the finance it raises, including more accountable and effective institutions and more social spending.
b. Some developing countries collect taxes at levels commensurate with their level of economic and institutional development. In many cases, these levels of tax collection are higher than the levels recorded in today's developed countries when they were at a similar level of development.
c. Trying to squeeze too much tax out of the poorest economies has risks. High tax rates can impede private investment. Tax and spending policies are often regressive rather than progressive.

[38] Committee of Experts on International Cooperation in Tax Matters. Seventeenth session (2018). The Role of Taxation and Domestic Resource Mobilization in the Implementation of the Sustainable Development Goals. Accessed through: https://www.un.org
[39] According to the Institute of Chartered Accountants of Nigeria (ICAN), taxation in Nigeria can be classified as follows: Proportional tax, Progressive tax, Regressive tax, or Direct taxation and Indirect taxation, or rather appropriate taxation and tax incentives.
[40] Kaldor, N. (1963), Will Underdeveloped Countries Learn to Tax? Journal of Foreign Affairs. Vol. 41, Issues 2 pp. 410 - 419
[41] Cathal, L. and Mark, M. (2017) supra.

d. Blind adherence to a push for more taxation is likely to have adverse consequences unless the international community prioritizes support for better tax systems, rather than more tax collection. The two are not always compatible. Good things come to those who build tax systems that are compatible with economic growth.

These points capture the position that, although taxation could be subject to various challenges, it remains a core element in the drive for sustainable development. Importantly, it requires the government to put in place the most appropriate tax system for the state. In the Nigerian case, a tax exemption policy for co-operatives has outlived its usefulness.

6. The Nigeria state and taxation of co-operative societies

Countries from the global-south, such as Afghanistan, and El-Salvador, have devised ways of promoting the utilization of co-operatives for sustainable development without an outright exemption from taxation,[42] but rather with tax incentives. This approach is embraced not only in the global south but also in the global north. India,[43] and the United States of America,[44] are examples of countries utilizing tax incentive policy for co-operatives and sustainable development.

According to VG. Alberto et al,[45] "Co-operatives are the most pronounced of all the social solidarity enterprises, they have been known to make significant contributions to the sustainable development agenda, their capacities to contribute to the sustainable development agenda however lies with the applicable tax regime in each country." Although the conclusion was largely based on European co-operatives, the authors arrived at the following conclusions which are also relevant to the Nigerian situation:

a. To support the work of co-operatives at playing improved roles in the drive towards sustainable development of society and state requires tax incentives and not tax exemption; and
b. Such tax incentives must be based on the socio-economic functions of co-operatives and their intrinsic characteristics.

[42] OECD (2014)" Supporting Countries in Growing Their Tax Base". In Development Co-operation Report 2014: Mobilizing Resources for Sustainable Development. OECD Publishing, Paris, France.
[43] See Kalpataru Ghosh, Taxation of Cooperative Societies under Direct and Indirect Tax. Accessed through https://taxguru.in
[44] The Sub-T principle allows cooperative in the United States of America to deduct certain distribution of net income made to the members in addition to making deductions for expenses allowed other businesses. The distribution become taxable income to the members, with the effect that the net income is taxed only once. See Phil Kenkel (2019) Cooperative Taxation: Sub-Chapter T.
[45] Alberto Vaquero Garcia, Maria Bastida, Miguel Angel Vazquez Tain (2020), Tax Measure Promoting Cooperatives: A Fiscal Driver in The Context of the Sustainable Development Agenda. European Research on the Management and Business Economics. Vol.26, Issue 3, pp 127 – 133.

Tax incentives are not alien to Nigerian enterprises. They are regularly employed by the Nigerian government to support different sectors of the economy.[46] However, tax incentives in Nigeria have being substantially built around companization, and most often, on the provisions of the Companies and Allied Matters Act (CAMA) and the Companies Income Tax Act (CITA). Only entities registered as companies under the Companies and Allied Matters Act (supra) may benefit from such incentives.

Because incentives are centred on enterprises that are registered as companies, it raises some questions. For example, "must co-operatives be registered as companies to exit their current tax regime?" Nigerian co-operatives could become eligible to pay some degree of tax, and then benefit from tax incentives. The answer lies between the companization of co-operatives and retaining their specificities as co-operatives, harnessing some of the benefits of sole proprietorship, and partnership businesses, as enabled by the Personal Income Tax Act.[47]

7. Conclusion and recommendations

Tax exemptions were initially made to promote Nigerian co-operatives and enhance their capacity to discharge their various functions. This initiative has lost its relevance in the face of current and projectable socio-economic realities. More compelling is the growing inability of Nigerian co-operative societies to optimize resources in their drive to actualize the sustainable development agenda. The situation in Nigeria shows that public policy places a premium on tax-paying entities, and less so on tax-exempt entities. The reconciliation of the two extremes of taxation and exemption lies in tax incentive. Tax incentives have the potential to promote Nigerian entities more than tax exemptions. This paper supports the abolition of the current tax exemption regime for Nigerian co-operatives, and substitutes it with tax incentives. The following is recommended:

a. The Nigerian Co-operative Societies Act,[48] should be retained. However, the provisions that exempt co-operatives from taxation should be expunged.
b. The Nigerian National Assembly should put in place a "Co-operative Societies Income Tax Act", a legislation to reconcile the following:
   (i) specificities of co-operatives,
   (ii) relevant provisions of the Companies Income Tax Act,[49]
   (iii) relevant provisions of the Personal Income Tax Act,[50]
   (iv) relevant provisions of the Nigerian Export Promotion Act, and

[46] For example, the provisions of the Nigerian Export Promotion Council Act, and the Nigerian Free Trade Zone Act
[47] Personal Income Tax Act (supra)
[48] Nigerian Co-operative Societies Act (supra)
[49] Companies Income Tax Act (supra)
[50] Personal Income Tax Act (supra)

(v) relevant provisions of other Nigerian and some foreign legislation, judicial pronouncement, opinions, and research outputs of learned authors that supports the promotion of tax incentives and the development of co-operatives.

c. The Companies and Allied Matters Act,[51] should be amended with a subsidiary legislation which shall enable Nigerian Co-operatives to be registered with the Corporate Affairs Commission (CAC),[52] and also as co-operatives as provided by the Nigerian Co-operative Societies Act (supra).[53]

The following is a list of some of the tax laws currently in force in Nigeria:

a. Federal Inland Revenue Service (Establishment) Act Cap. F36 Laws of the Federation of Nigeria, 2004
b. Companies Income Tax Act (CITA) Cap. C21 Laws of the Federation of Nigeria, 2004
c. Personal Income Tax Act (PITA) Cap. 8 Laws of the Federation of Nigeria, 2004 (as amended)
d. Petroleum Profits Tax Act (PPTA) Cap. 13 Laws of the Federation of Nigeria, 2004
e. Deep Offshore and Inland Basin Production Sharing Contracts Act Cap. D3 Laws of the Federation of Nigeria, 2004.
f. Value Added Tax Act (VATA) Cap. D1 Laws of the Federation Nigeria, 2004.
g. Education Tax Act Cap. E4 Laws of the Federation of Nigeria, 2004.
h. Capital Gains Tax Act (CGT) Cap. C1 Laws of the Federation of Nigeria, 2004.
i. Stamp Duties Act Cap. S8 Laws of the Federation of Nigeria, 2004.
j. National Information Technology Development Agency Act Cap. N 156 Laws of the Federation of Nigeria 2004.
k. Nigeria Liquified Natural Gas (Fiscal Incentives, Guarantees & Assurances) Act, Cap. N87. Laws of the Federation of Nigeria 2004.
l. Industrial Development (Income Tax Relief) Act. Cap 17. Laws of the Federation of Nigeria, 2004

[51] Companies and Allied Matters Act (supra)
[52] Section 1 of the Companies and Allied Matters Act (CAMA) establishes the Corporate Affairs Commission to among other administer CAMA including the regulation and supervision of the formation, incorporation, registration, management, and winding up of companies under or pursuant to CAMA.
[53]For example, Nigerian banks are primarily registered as public liability companies in accordance with the provisions of the Companies and Allied Matters Act (supra), thereafter registered as commercial bank with the Central Bank of Nigeria, in accordance with the provisions of the Central Bank of Nigeria Act.

Legislation

OUTLINE OF THE WORKERS CO-OPERATIVE ACT IN JAPAN

Akira Kurimoto

Introduction

The Japanese co-operative legislation is characterized by the separate laws that are specializing to regulate the particular categories of co-operatives and enacted in line with the industrial policies, and the strong government's control on incorporation and business activities. The Industrial Co-operative Act of 1900 was a uniform law following the German model and provided for the legal framework of credit, supply, marketing and production[1] co-operatives. After the Second World War, the allied force introduced the radical land reform as a part of economic democratization programs and helped to enact the Agricultural Co-operative Act in 1947 to cement the effects of reform through organizing farmers in agricultural co-operatives. Then, the other co-operative laws were enacted in line with industrial policies (fishery, forestry, banking, SMEs etc.) during 1948-1978. The exception was the Consumer Co-operative Act of 1948 that placed serious impediments to co-operative activities including the complete prohibition of non-member business, the limitation of operating areas within a prefecture and the lack of credit business. As a result, there are more than 10 co-operative laws in Japan that enable governments to make the strong control over co-operative activities for matters related to organization law as well as business laws. Such legal-administrative system based on laws and regulating ministries has resulted in the emergence of different organizational culture and political orientation of co-operatives while it contributed to the creation of fragmented political economy dominated by the iron triangle of ministries, legislature and trade associations (Masahiko Aoki's *compartmentalized pluralism*). It has been very convenient to ministries but might resulted in the lack of identity as a co-operative sector. After nearly 30 years efforts, the Workers Co-operative Act (WCA) passed the Diet on December 4th, 2020. WCA has some unique features compared to the existing laws and may give impacts to the existing co-operative laws. This paper describes the brief history leading to the enactment of WCA, explains the outline of WCA, discusses the potential impact to the existing co-operative laws and concludes with some suggestions to make full use of WCA to operationalize workers co-operatives and energize co-operative movement as a whole.

[1] Later "production" was replaced by "services".

Brief history leading to the enactment of Workers Co-operative Act

In addressing the unemployment and the lack of community services, two streams of workers co-operatives emerged. The first grew out of the trade union movement and the second out of the consumer co-operative movement.[2] The Japan Workers' Co-operative Union (JWCU) is a 16,000-member organization with an annual turnover exceeding JPY 35.1 billion in 2019. JWCU emerged during the 1970s from a trade union of middle-aged and older workers temporarily employed by a national unemployment relief project created in the postwar period. This public project provided daily employment in civil engineering and public sanitation works for unemployed people. The beneficiaries reached 350,000 in 1960 but this tax-funded relief project gradually dwindled when the economic boom largely enhanced job opportunities, and finally terminated in the 1971. The trade union had tried to secure their jobs through extreme actions including strikes, but they finally failed. Mr. Goshu Nakanishi, chairman of the union, proposed a policy of "democratic reformation." To secure jobs for union members, union officers created business units called Jigyodan across Japan to seek business opportunities from the public and private sectors. They encouraged workers to participate in management and to improve the quality of their work. These small business units became the workers co-operatives that constitute the current JWCU. In the 1980s and 1990s, workers co-operatives mainly engaged in building maintenance and sanitation work while they gradually shifted to develop more sustainable jobs to meet the needs of the times, particularly after the Long-term Care Insurance (LTCI) was introduced in 2000. Their current main businesses are elderly care, childcare, and support for youth and the poor. As the workers co-operatives were originally set up by union activists and precarious workers, one characteristic of this group is to look for opportunities to work with people with difficulties such as unemployment, psychiatric and intellectual disabilities, alcohol and drug dependency, etc.

The second stream is represented by the Workers' Collective Network Japan (WNJ) that is a 7,700-member organization with an annual turnover of JPY 13.2 million in 2019. Each of its 400 member organizations called Workers Collectives (W.Cos) has a membership of several to 100 members. In their early stages, W.Cos were operating stores and delivering goods for the Seikatsu Club consumer co-operatives. Later they entered businesses such as catering, community cafes, eldercare/childcare, and editing/translation. These W.Cos were formed in the 1980s by members of Seikatsu Club, predominantly housewives who made joint purchases of safer food including private brand products satisfying strict safety criteria or produce directly bought from farmers and who wished to work for supplementing family income. Seikatsu Club's key policy is to encourage members active participation in every stage of the product cycle from cultivation, production, distribution, consumption, and disposal or recycling. Inspired by the workers collective movement in the United States, W.Cos have a strong feminist stance to

[2] Kubo Y., "Workers' cooperatives as a solution to social exclusion in Japan", *Waking the Asian Pacific Co-operative Potential*", Elsevier, 2020, pp. 355-363. Kurimoto, A. and Kumakura, Y. "Emergence and Evolution of Co-operatives for Elderly Care in Japan", *International Review of Sociology,* Vol.26, No.1, Routledge, 2016, pp.48-68.

counter society's dominant "male breadwinner" model, demonstrating that women could create jobs and make a positive impact on "society at large." They also involve young people with difficulties and senior citizens who help them find solutions and support them as co-workers.

Both groups were inspired by Dr. Alex Laidlaw's report "Co-operatives in the year 2000" that suggested co-operatives for productive labor as the second priority for the future. Since they lacked the legal instrument to incorporate, they had to rely on the different organizational forms such as limited companies (Companies Act), consumer co-operatives (Consumer Co-operative Act), enterprise unions (SME Co-operative Act), and nonprofits (Specified Non-Profit Activities Promotion Act or NPO Act). In the mid-1990s they started campaigns to establish a legal framework, first separately, then jointly. In 2008, bipartisan parliamentary group was formed to promote enactment. In 2017 the ruling party's working team prepared a bill that was approved by other parties and backed up by the Japan Co-operative Alliance (JCA) formed in 2018. In December 2020 Workers Co-operative Act (WCA) was enacted by the unanimous support in the Diet.

Outline of Workers Co-operative Act

WCA is a full-fledged organizational law with 137 articles. It has some characteristics compared with existing co-operative laws.

a. Purpose of law with three basic principles

This Act purports to promote generating a variety of job opportunities and promote businesses responding diverse needs in communities through organizations, thereby to contribute to sustainable and viable communities through providing for necessary matters relating to the establishment, governance and so on of those organizations with basic principles; a) members' share investment, b) reflection of their voice in conducting business and c) their engagement in co-operative activities, reflecting the reality that the opportunities for each person to work in harmony with daily life and in accordance with his/her motivation and capability are not necessarily sufficiently secured (Article 1). This article contains the purpose (purport to …), the means (through providing …) and the context (reflecting …). The purpose and the context show this act is related to the social policy rather than the industrial policy. The means are related to the matters of organizational law rather than business laws. These are characteristics quite different from existing co-operative laws. The basic principles are reiterated in Article 3 and correspond to the generally accepted *owner and user identity principle*. It's peculiar Article 1 has no notion on workers co-operative that appears in Article 2 on the incorporated status and main office location.

b. Mode of establishment

To establish a workers co-operative, more than three potential members need to be movers (Article 22) who shall make bylaws and convene the inaugural meeting (Article 23). Upon the

registration at the main office address, a workers co-operative is incorporated (Article 26). Thus, the establishment of a co-operative is based on the general incorporation rule like the companies and general incorporated associations/foundations while the government permission is not necessary. This is different from other co-operative laws that require the government permission.

c. Membership and worker's composition

The minimum membership is supposed to be five individuals who need to make the labor contract with a co-operative (Article 20) except for officers. As such, member-co-operative relationship is subject to the Labor Contract Act to avoid the risk of the second labor market in which workers may not be protected from employer's abuses. More than 80 % of members need to be engaged with co-operative operations while more than 75 % of engaged workers need to be members (Article 8). This corresponds to the World Declaration on Worker Cooperatives that reads "As a general rule, work shall be carried out by the members. This implies that the majority of the workers in a given worker cooperative enterprise are members and vice versa."[3] There is no provision on the prohibition of non-member business that characterizes the Japanese co-operative legislations but this provision allows less than 25% of workers to be non-members.

d. Scope of activities

There is no limitation in co-operative activities except for those stipulated in the decree (Article 7). This allows workers co-operatives to conduct a variety of businesses including farming, retailing, eldercare/childcare, recycling, renewable energy, community support and so on. There is a huge potential to set up co-ops conducting a variety of activities that were not allowed in the existing co-operative laws that enlist allowed activities. However, the worker dispatch business is not allowed (Article 7, Section 2). The financial business such as banking and insurance requires government authorization based on respective business laws (i.e., Banking Act and Insurance Business Act).

e. Governance

Workers co-operatives need to have bylaws and rules. They elect the board members (more than three) and the auditors (more than one) in the general meeting (Article 32). They can have the delegate meeting in case of co-operatives with more than 200 members (Article 71). The board members must be members while representative board member is authorized to make any kind of acts in or out of court in operating business (Article 42). In case the membership is less than 20, auditors can be replaced by members audit meeting consisting of all non-board members (Article 54).

f. Distribution of surplus

The surplus workers co-operatives can be distributed only after offsetting losses, deducting legal reserves (10% of surplus), reserves for job creation and education (5% respectively) (Article 76). The dividend is distributed to members in proportion to their labor contribution as provided by bylaws (Article 77). The dividend in proportion to shareholding and indivisible reserve are not provided in WCA.

[3] ICA-CICOPA, World Declaration on Worker Cooperatives, 2005.

g. Tax concession

Workers co-operatives have no tax concession for the corporate income tax that is enjoyed by other co-operatives. However, they can enjoy the lower tax rate applied to SMEs that is equivalent to rate for co-operatives.

h. Government supervision and so on

Workers co-operatives are subject to government supervision including reporting, inspection, administrative order and so on. The competent administrative bodies are prefectures for primary co-operatives and the Ministry of Health, Labor and Welfare (MHLW) for federations. The latter publishes guidelines for operations. The rules concerning to the transformation from enterprise unions and nonprofit organizations are provided.

Impact of Workers Co-operative Act to the existing co-operative laws

It is argued that WCA will give great impact to the existing co-operative laws. Firstly, the mode of establishment in WCA is very simple, namely a workers co-operative can be incorporated after the registration while government permission is not required. That is common practice in most of industrialized countries and the Japanese companies and general incorporated association/foundations follow this rule while the government still maintain the permission regime for other co-operatives and nonprofits. In this regard, WCA can be seen as a breakthrough and it is expected to bring about more liberal legislation. Secondly, the membership is not limited to the specific class of people while the minimum requirement of five members is extremely low compared with other laws (i.e., 300 members in case of CCA). This characteristic enables small number of citizens to set up a co-operative to meet the needs much easily. Thirdly, a range of activities is not limited and potentially any kinds of activity are possible. In addition to care workers co-operatives that are operating in many places, doctor's co-ops, worker-owned retail co-ops or renewable energy co-ops are possible. Thus, WCA may induce the review of the existing laws while the possibility of the Framework Act of Co-operatives needs to be examined.

Conclusion: Tasks to be tackled

The enactment is only the beginning for the development of workers co-operatives. First, the existing workers co-operatives organizations need to be reorganized as primary co-ops and the federations in accordance with the provisions of WCA. JWCU has a variety of membership consisting of central/local Jigyodans (SME Co-operative Act, NPO Act or unincorporated), elderly persons co-operatives (Consumer Co-operative Act), social welfare corporations (Social Welfare Act) and so on. The transformation of corporate status and organization structure will

require time and energy. WNJ has simpler membership of primary/secondary W.Cos and associate organizations. Whether two groups will merge or not is another important issue.

Secondly, to create the supporting measures including favorable public policies and support structure is an important step forward so that emerging workers co-operatives can contribute to solving a large number of socio-economic problems and contributing to the attainment of the SDGs. The existing public policy measures can be utilized by workers co-operatives. For instance, the community-based integrated care system based on the LTCI, the needy persons support system, and the public services commissioning are the fields that they are widely involved. The policies for eliminating abandoned houses and farmland, are also concerned with them. The support structure for start-ups needs to be established to promote the establishment and give guidance as in the case of publicly funded NPO centers.

Thirdly, the collaboration between existing co-operatives and emerging workers co-operatives. The former has human and financial resources to extend variety kinds of help to the latter that may give inspiration for rejuvenating the former. There exist two networks to support emerging workers co-operatives. One is the Japan Co-operative Alliance (JCA) founded in 2018 to promote inter-co-operation following the Japan Joint Committee of Co-operatives (JJC) set up with limited function of the ICA affiliates in 1956. It is a national network of affiliated prefectural networks. The other is the National Council of Workers' Welfare (Rofukukyo) set up in 1950 as a coalition of worker-related co-operatives and trade unions. They also have prefectural and local networks. These networks can facilitate inter-co-operation among co-operatives. For instance, agricultural co-ops can help female members or wives set up workers co-operatives to process produce to local specialties. Consumer and health co-operatives have often contracted with workers co-ops to conduct such works as delivery, warehousing and cleaning. It is important to facilitate such collaboration to help workers co-ops to take off. It is expected such collaboration among older and newer co-operatives will energize co-operative movement as a whole.

THE LEGAL FRAMEWORK FOR COOPERATIVE ENTITIES IN ANDALUSIA. EVOLUTION OF THE LEGISLATIVE MODEL

Carlos Vargas-Vasserot*

1 Introduction

At the end of 2021, 10 years had passed since the enactment of Law 14/2011 on Andalusian Cooperatives (LACS). In the Spanish legislative context regarding cooperatives, this law represented a step forward in making the economic and financial framework of this type of entity more flexible. It is for this reason that we have found it interesting for researchers on cooperative company law from other countries to explore some of the most novel and striking features of this law, which, however, has not been without criticism[1].

With its about 8.5 million inhabitants the Andalusian Autonomous Community (Andalusia) is the most populated of the 17 Autonomous Communities that make up the Spanish state: It is also the one with most cooperative societies. More specifically, approximately 4,500 of the 22,000 cooperatives in Spain are in Andalusia, which represents more than 20% of the nation's total. In the Andalusian Community, there are cooperatives in all economic sectors, some of which clearly surpassing the rest. Such is the case of CAJAMAR with headquarters in the city of Almería, which stands out for being the most important credit cooperative in Spain. Several of the agri-food cooperatives that comprise the top ten with the highest turnover and exports are Andalusian, including DCOOP, one of the world's leading companies in the marketing of olive oil and olives, COVAP, which is a cooperative specialized in livestock, and CASI or UNICA GROUP, which are cooperatives excelling in the commercialization of fruits and vegetables.

Before presenting the most original features of the legal framework of cooperatives in Andalusia, it is essential to recall the origin of the current distribution of powers between the Spanish State and the Autonomous Communities as regards this type of entity. The breakdown of competences has resulted in the coexistence of a state law (hardly of any use) and sixteen regional cooperative laws. To explain this legislative strange peculiarity, the Spanish Constitution of 1978 must be considered as a starting point. By assigning exclusive powers to the State vis-à-vis the

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[1]On the legal framework of cooperatives in Andalusia, I have previously published several papers (Vargas-Vasserot, 2017a and 2018) and a few years ago I was the editor of a collective book (Morillas and Vargas-Vasserot, 2017b) that continues to be the reference academic work in this field.

Autonomous Communities, the Spanish Constitution did not make any reference to this particular business entity, although it did so for commercial legislation purposes[2]. This silence was used by several Autonomous Communities (Catalonia, the Basque Country, Andalusia, etc.) to, based on the non-commercial nature of cooperatives, to enact the first generation of autonomous cooperative laws.

Following the content of the Constitutional Court Sentence 72/1983, which resolved the conflict of jurisdiction between the Autonomous Community of the Basque Country and the Spanish State, the general State Cooperatives Law 3/1987 and several regional laws were enacted. However, Law 27/1999 on Cooperatives (LCOOP), which is the current state law in Spain, would significantly change its criteria with respect to the previous one and only applies "to cooperatives that operate in several Autonomous Communities, except when the main activity is developed in one of them"[3]. Therefore, for the State cooperative law to be applicable to a cooperative, two requirements must be cumulatively met: a) that it develops its cooperative activity (of a corporate and internal nature with the members) in several Autonomous Communities; b) that in none of these Autonomous Communities the cooperative operates primarily. In the vast majority of cases, it is normal for a cooperative to operate primarily in one Autonomous Community, and in others, it does so secondarily because it has, for example, fewer members. Thus, State law has little practical use, and it is the autonomous cooperative laws that are actually used. From these, as previously explained, Andalusia's is the benchmark.

Political motives were the driving force that led the state legislator to restrict the scope of application of the LCOOP to the extent of almost emptying it of practical application. Its origin usually dates back to the pacts between the political party that won the general elections at the time (Partido Popular) with the main nationalist parties (Convergencia i Unió and Partido Nacionalista Vasco) to ensure the necessary support for the governance of the country[4].

Additionally, the legislation's fast-paced renewal activity regarding autonomous cooperatives has been astounding. In some communities (Andalusia: 1985, 1999, 2011; Catalonia: 1983, 2002, 2015; Basque Country: 1982, 1993, 2019; Valencia: 1985, 2003 and 2015) a third generation of cooperative laws has already been adopted. The progressive commercialization of cooperatives, i.e. the approximation of their features with those of commercial companies, is also noteworthy because the non-commercial character of cooperatives was the determining factor for the Constitutional Court to give the Autonomous Communities competences on the subject of cooperatives.

[2]Article 149.1.6.ª Spanish Constitution.
[3]Article 2.a LCOOP.
[4]See Vargas-Vasserot et al. (2015), pp. 63-83.

2 Double regulation, through law and implementing rules

One of the peculiarities of the LACS with respect to the previous law of 1999 (LACS 1999) and the rest of laws regarding Spanish cooperatives, is that much of its content was developed through a government regulation, to which its articles refer to many times, and which were approved by Decree 123/2014 (RLACS). This double regulation (Law/Decree) was presented in the statement of motives of the LACS as a "definite" legislative improvement. On the one hand, a "relatively brief" legal text was achieved. On the other hand, it allowed for the "autonomous development" of a good number of subjects according to the unique needs of each company and the "permanence" of the law over time was ensured. However, this peculiar legislative technique, in our opinion, has generated more drawbacks than benefits, apart from not complying with the premises on which the Explanatory Memorandum is based.

In regard to the intended brevity, the LACS has 126 articles, a figure similar to that of most Spanish cooperative laws, while the RLACS has 195. If we add the articles of the LACS to those of the RLACS, the total number is 321 articles. As a result of this, Andalusia holds the less than noteworthy record of having one of the most extensive legal regulations for cooperatives in the world at a time when the European Union has bet on the simplification of corporate rules to modernize companies. Furthermore, after using the excuse of flexibilization, the executive branch - with new authority taken from the legislative branch - was conferred with the possibility of modifying a large part of the legal framework applicable to Andalusian cooperatives - an aspect of serious constitutional concern for us.

The double regulation (law and implementing rules) of cooperatives in Andalusia has historically been used to develop aspects related to the operation of the Cooperatives Registry. However, the regulation of the implementation of the LACS through the RLACS is quite different, as can be seen from a simple reading of its extensive table of contents with a structure that is practically the same as that of the law and it is only totally original in the parts dedicated to the Cooperatives Registry[5] and the system of sanctions and disqualifications of non-compliant cooperatives[6].

Furthermore, this double regulation is very difficult to use, since there is no clear criterion as to what matters to the RLACS and what to the LACS or, in other words, one is confused as to what has changed as compared with the previous regulation. Specifically, the LACS refers to the articles of the RLACS in 125 instances. So, there is a constant need to consult both texts to know what the applicable rule is when a legal question arises. It is also surprising that a good number of articles of the RLACS repeat unnecessarily much of the content of the LACS. This results in a very extensive and repetitive regulation[7]. However, it must be recognized that some of the

[5]Articles 108-166 RLACS.
[6]Articles 167-195 RLACS.
[7] Vargas-Vasserot (2018), p. 4.

novelties contained in the LACS and in the RLACS with respect to the LACS 1999 are so important that the reform of some articles of the LACS 1999 would not have sufficed. This is the reason why the promulgation of new law was necessary.

3 The cooperative principles of the law

As is known, the current formulation of the seven cooperative principles is contained in the International Cooperative Alliance (ICA) Statement on the cooperative identity, approved in 1995 at the XXXI Cooperative Congress. Such principles are recognized by many cooperative laws in the world, in some expressly and explicitly and in others by incorporating references to them throughout their articles. In Spain, the LCOOP and most regional laws expressly refer to the cooperative principles formulated by the ICA, while a few others, totally or partially transcribe their content in a specific article[8]. This latter mode was used by the previous Andalusian cooperative law, the LACS 1999, and it is being used by the LACS. In this matter the Andalusian legislator was very innovative by using the traditional list of cooperative principles of the ICA contained in article 4 and incorporating four new ones of undoubted social interest (promotion of stable and quality employment, with a singular impact on the reconciliation of work and family life; gender equality, with a transversal character to the rest of the principles; business and environmental sustainability; and commitment to the community and dissemination of these principles in their environment).

4 Novelties in the process of constitution of the cooperative

One of the most outstanding novelties of the LACS was to establish the capacity for cooperatives to be constituted and acquire legal status by simply registering the act of the constituent assembly (whose celebration is imposed as mandatory) in the Registry of Andalusian Cooperatives[9]. The intervention of a notary is required in the incorporation process only when real estate is involved[10]. With this measure, Andalusia moves away from an established principle in Spain of notarial control of company law to theoretically facilitate the constitution of cooperatives. It was assumed that having to pass through a notary constituted more of an obstacle than a guarantee for the correctness of the constitutive process. Everything is left in the hands of a Public Law Registry (in the sense of public or administrative law), dependent on the corresponding Autonomous Community. Given the limitation of the liability of the members for corporate debts and for losses to the capital stock, we consider that the notarial control of the process of constitution of cooperatives in Andalusia should have been maintained.

The LSCA 1999 imposed that the capital stock with which a cooperative must be constituted should be at least € 3,000. This is generally the minimum capital contribution required for

[8] Vargas-Vasserot et al. (2015), pp. 36-38.
[9] Article 9.1 LACS and article 5 RLACS.
[10] Article 119.1 LACS. See Feliú (2017), pp. 63-65.

compliance with the rest of cooperative laws. But the current one does not legally impose a minimum share capital figure. In our opinion, it does not seem acceptable to be able to establish a cooperative with ridiculous figures of capital stock, nor that this is the best way to promote cooperativism as an alternative form of business[11].

5 Investor or capitalist members

One of the novelties of the LACS was the admission of *investors as legal figures*, although great care is taken not to refer to them as *members*. No matter how much euphemism is used, these investors are true members of the cooperative. As established by the article that regulates them, these members contribute capital stock, have a voice and vote in the general assembly[12] and can form part of the governing body[13] and are subject to the same legal rules as are the ordinary members[14]. Paradoxically, Andalusian legislation, which was previously the most restrictive when regulating the possible existence of investor members, is now the most liberal of all the Autonomous Communities, especially regarding their remuneration for their participation in the entity (up to 45% of the positive annual results in proportion to the paid-in capital) and the interest they can receive for contributions to the capital stock (a maximum of 8 points on the legal interest of the money, while for ordinary members it is fixed at 6).

6 Free transmission of share contributions

Given that cooperatives are open-ended corporations, there is theoretically free access to the social organization of new members and the voluntary withdrawal of current members, such that the transmission of contributions does not have the sense that it has in capitalistic corporations. For this reason, it had barely been regulated in cooperative laws beyond transfers among members. For example, the LACS 1999 only allowed the transfer of contributions to the capital stock *inter vivos* among the members, as opposed to that of the associates, admitting the possibility that the heirs and legatees of the deceased member could acquire the status of member. However, the 2011 LACS went much further since it practically liberalized the transmission of capital contributions to third parties when provided for in the bylaws[15], which meant a more flexible system for the transmission of capital contributions, unparalleled in any other autonomous Spanish cooperative law.

7 Corporate bodies

In relation to the structure of cooperatives, the main characteristic features of the LACS are the reconfiguration of their legal structure with a clear intention of approximating it to the law of

[11] Vargas-Vasserot (2017c), pp. 369-370.
[12] Article 31.3 LASC.
[13] Articles 17.2 and 38.2 LASC.
[14] Article. 25.5 LASC.
[15] Articles 61.1.a, 89, 96.3 and 102.2 LASC.

capitalistic corporations. On the one hand, it limits the existence to only two required bodies (general assembly and administrative body and prohibition of the existence of the traditional intervention body that is only allowed for cooperatives with more than 10 members). On the other hand, it incorporates new information and communication technologies broadly, both in how it relates to the members of the corporate bodies and to their operation[16].

Regarding the plural or weighted vote of the autonomous cooperative laws, the LACS 1999 did not recognize it in any case for first-degree cooperatives. Nevertheless, current regulations allow it for all service cooperatives, including agricultural cooperatives, in proportion to the volume of cooperative activity carried out by each member[17], without any member being allowed to have more than 7 votes[18].

8 Reduction in the endowment of funds

Regarding the funds that must be provided by the cooperative, the Mandatory Reserve Fund (MRF) - intended for the consolidation, development and guarantee of the cooperative entity - is still considered, as in the previous law, partially distributable in case of termination of membership or liquidation of the cooperative, if so established in the bylaws[19]. This is a very rare measure in Spanish cooperative legislation.

The traditional Education and Promotion Fund (EPF) was renamed to "Training and Sustainability Fund (TSF)" and its purpose is diversified to include, in theory, together with traditional purposes, the realization of some of the cooperative principles which are added by the LACS, such as gender equality or environmental sustainability.

Yet, the truly significant modification regarding mandatory funds with the current law was in their endowment. One must recall that according to the previous regulations, the Mandatory Reserve Fund (MRF) was endowed with a minimum of 20% of the cooperative results (until it reached an amount equal to 50% of the share capital, at which point the percentage was reduced to 15%), with 80% of the results of operations with third parties, and 80% of the extraordinary results. The Education and Promotion Fund (EPF) was endowed with 5% of the cooperative results, with 20% of the results of operations with third parties, and with 20% of the extraordinary results. With these endowments, the LACS 1999 was the strictest Spanish cooperative law regarding the provision of mandatory funds. But, with the enactment of the LACS, the percentages of results destined to provide the Mandatory Reserve Fund (MRF)

[16] For details see Morillas (2017), pp. 241-242.
[17] Article 102.1 LACS.
[18] See Baena (2017), pp. 194-199.
[19] Articles 90.3 and 60. 5 LACS and article 48.3 RLACS: up to 50% of the amount of said fund generated from the income of the member that is determined in function of the cooperative activity developed.

greatly decreased[20].

When the cooperative maintains a single-entry bookkeeping of the total results of the cooperative entity (something that was not allowed under the previous legislation), at least 20% is allocated to the MRF until it reaches an amount equal to 50% of the share capital, and 10% is allocated to the TFS without any limit[21]. If the cooperative has split book-keeping, which will be normal and necessary if it wants to benefit from the special tax regimen for cooperatives contained in Law 20/1990, it must provide the MRF with at least 20% of cooperative results. But, unlike what was required before, the obligation to endow this fund with these results ceases when it reaches 50% of the capital stock figure[22]. The endowment reduction is noteworthy when that ratio between the fund's figure and the actual or subscribed capital stock is reached.

The provision of the MRF with the extra-cooperative results, as we have seen, now includes the old extraordinary items. They must be at least 25%[23]. In addition to an obvious reduction in the minimum endowment (from 80% of results with third parties and from extraordinary results to now 25%), there is an important exception that allows this fund not to be endowed when its amount is applied to productive investments, cooperation and integration between companies or in regard to internationalization[24].

Regarding the TSF, there is a certain increase in the endowment with respect to the previous legislation, since the previous endowment of cooperative results was maintained (minimum of 5%) and the percentage of extra-cooperative results destined to endow this fund is increased by 5 points[25].

9 Changes in the configuration of the results of the cooperative and reduction in the endowment of funds

In the LACS 1999, a distinction was made among a) cooperative results (those derived from cooperative activity with members and investments in cooperative companies or mostly owned by cooperatives), b) results from operations with non-member third parties, and c) extraordinary results (those derived from investments in non-cooperative companies and those derived from the disposal of elements of fixed assets). However, the LACS only distinguishes between cooperative results and extra-cooperative results, which now include both the results of operations with third parties and the extraordinary ones[26].

One of the main consequences of this change in the accounting of the positive results of

[20] Vargas-Vasserot (2018), pp. 22-23.
[21] Article 52 RLACS.
[22] Article 68.2.a LACS.
[23] Article 68.2.b LACS.
[24] Article 68.2.b LACS and article 53 RLACS.
[25] Article 68.2.a LACS.
[26] Article 65.3 LACS.

cooperatives and of the relaxation of the obligation to endow the MRF, which we have previously seen, is that a higher percentage of these can be assigned to the members via returns, which is the sensitive way that cooperative laws use to designate the benefits of cooperatives[27]. From the following table we can deduce the importance that the modification of the LACS has at this point.

LACS 1999	MRF	EPF	AVAILABLE
Cooperative results	20% > 15%	5%	80%
Results with third parties	80%	20%	0%
Extraordinary resultus	80%	20%	0%
LACS			
Cooperative results	20% > 0%	5%	95%
Extra-cooperative results	25% > 0%	25%	75%

Source: Compilation based on the legislation above mentioned.

That is to say, before, only 80% of the cooperative results were available, but not the results with third parties, nor the extraordinary results. Currently, it is possible to distribute 95% of the cooperative results and 75% of the extraordinary results.

10 Reform of the law to reduce the minimum number of members

In Spain, the significant reduction **of** the minimum number of members legally required to establish a first-degree cooperative at the state level (the Cooperatives Law of 1931 required twenty, that of 1942 fifteen, that of 1974 seven, and the LGC of 1987 five), and in the Autonomous Communities should be interpreted as a measure to promote this type of entity. In doing so, projects that require a very limited number of persons for their viability can materialize.

[27] See Paniagua (2017), pp. 434-436.

Originally, the LACS followed the trend by establishing the minimum number of persons to constitute a first-degree cooperative at three[28]. However, in 2018 the LACS was reformed and the number was reduced to two, as had already done the 2015 Law of Cooperatives of Catalonia, among others. The reasoning behind this change was to provide flexibility, as it aimed at facilitating the development of a strategic sector of Andalusia. Based on the 2019 data, it seems that this measure has paid off, because that year the creation of cooperatives in Andalusia grew by 175%, among which worker cooperatives represented 83% of the newly established, and of these, the 78% were made up of two members[29].

11 Conclusion

Since the promulgation of the Spanish Constitution in 1978, Spanish cooperative legislation has evolved between two trends: on the one hand, fidelity to the model that defends cooperative principles and the formation of a collective equity; and, on the other hand, the relaxation of these objectives in order to satisfy the promotion of the socio-economic interests of its members. The first, more social and classical orientation of cooperativism, was the one that dominated Spanish legislation until the promulgation of the Basque Country Cooperatives Law of 1993, which is recognized as the first *economistic* cooperative law in Spain, followed by the LCOOP and some regional laws. Today, most of the Spanish cooperative laws are integrated in this so-called moderate functional model. Yet, successively, with each new autonomous cooperative law, greater approximations to the *economistic* model are perceived (lower endowments of funds, more distribution of results, distribution of the MRF, single-entry bookkeeping, etc.) affecting, therefore, the financial structure of corporations.

Despite important differences between the various Spanish cooperative laws, a certain balance or homogeneity was achieved, as these differences spanned from a moderate social orientation to a moderate economicist orientation. This balance was altered with the enactment of the LACS. It contains a cooperative legal status that breaks with the more conservative cut of its predecessor, the LACS 1999, in several respects[30].

Legislating is an extremely difficult task, especially when the essential characteristics of the principle to be regulated are not clear. It is also hard because there is a business interest not to hinder the development of cooperatives, and a political interest on the part of the respective governments of the Autonomous Communities to meet the demands and desires of the cooperative members. And lastly, there is a real interest to make this business type attractive for the largest number of economic initiatives. This makes it difficult to navigate between the approximation with capitalistic **corporations** and an approach that is more respectful of the

[28]Article 10 LACS.
[29] Europa Press (2020).
[30] Paniagua (2013a), pp. 53-72, Paniagua (2013b), pp. 188-190, Vargas-Vasserot (2017a), pp. 14-21, Vargas-Vasserot (2018), pp. 33-35.

cooperative principles. For this reason, the easiest way is probably to limit any excesses by establishing real tax incentives for genuine cooperatives.

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Court Cases

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Book Reviews

Events

Hagen H e n r ÿ

2021 saw a number of cooperative law related international events and the adoption of international and regional instruments that are relevant for cooperative law. This attests to a heighten interest in cooperative law.

International events

***Belgorod/Russian Federation**:* On April 6 and 7 the Belgorod University of Cooperation, Economics and Law and its UNESCO Chair "Education for the Sustainable Development of Cooperatives", together with Ius Cooperativum, organized a two-day on-line seminar under the title "The Evolution of Cooperative Law in the Era of Globalization in the Countries of Eastern Europe, Central Asia and Other Countries of the World".
In addition to representatives of international organizations the event brought together academics and practitioners from most of the CIS countries, from Eastern Europe, from EU countries, from the Caribbean and from South America. The intention of the organizers to facilitate for the first time such a meeting materialized. Deliberations did not only cover legal questions, but also the role of cooperatives in the development of our societies. The Conference Materials (ISBN 978-5-8231-1030-3), containing also 15 of the many more contributions to the conference may be obtained from the Belgorod University of Cooperation, Economics and Law.

San Sebastian/Spain: On October 1 GEZKI, the Institute of Cooperative Law and Social Economy of the University of the Basque Country, organized a hybrid conference on the topic of "Basque Cooperative Law in the Light of International Cooperative Law". The conference dedicated the first part of the day to contributions dealing with key issues of cooperative law in Africa, the Americas, in Asia and Europe, as well as to thoughts on cooperative law from a global perspective; speakers during the second part of the day dealt with the making, the salient points and the challenges of the new cooperative law of the Basque Country, which came into force in January 2020.

Seoul/Republic of Korea: With the support of the International Cooperative Alliance (ICA) through its Cooperative Law Committee Ius Cooperativum held its 3rd biannual International Forum on Cooperative Law in Seoul on November 29 and 30 in a hybrid form prior to the 33rd

World Cooperative Congress organized by the ICA. Reports on the 1st and 2nd Forum were published in Issues I and II of this Journal respectively. The ICA Congresses held after 1995 are convened only on exceptional occasions such as in the 2012 UN International Year of Cooperatives and the latest edition to mark 125 years of the inception of the ICA. The theme of this Congress was "Deepening our Cooperative Identity". Along with the ICA Cooperative Research Conference the Forum was a precursor for the debates of the ICA Congress. Not only did the theme of the Forum "The identity of Cooperatives and the Harmonization of Cooperative Laws. Match or Mismatch?" link naturally into the debates of the Congress, but it also took up the increasing tendency to define cooperative law as that law which translates the cooperative principles into legal rules and the challenges of the ongoing and planned intra-national and regional harmonization of cooperative laws.
The more than 30 presentations on the situation in some 20 countries and 3 sub/continents covered these and other aspects of cooperative law, such as cooperatives and the share economy and new technologies, the interpretation of the cooperative principles and legal traditions and even the need for law as a guardian of the cooperative principles.
The editors of this Journal appeal to the presenters to submit their contributions to be considered for publication.

In his report to the organizers of the Congress the undersigned accentuated the following five points for the discussion on the "Deepening of our Cooperative Identity": i.) integrate law into thinking the cooperative identity; ii.) link cooperative law to the cooperative principles; iii.) use the resources the ICA has to promote cooperative adequate cooperative law; iv.) act on Paragraph 8 of the 2002 International Labor Organization Promotion of Cooperatives Recommendation (no.193), which suggests that "National policies should … promote education and training in cooperative principles and practices, at all appropriate levels of the national education and training systems …"; and v.) reconsider whether the organization of cooperatives by sectors requires sectoral laws or whether the purpose of the cooperative identity might be better served by general laws, not disregarding the possible needs of specific sectors.

At the end of the Congress representatives of international organizations, governments, cooperative organizations and NGOs met to reflect on the Congress outcomes and on wider policy and legal matters. On this occasion, the UN representatives presented the 2021 biannual Report of the Secretary-General of the United Nations on "Cooperatives in social development" (see below).

International and regional instruments

Report of the Secretary-General of the United Nations: In its 2021 biannual report on "Cooperatives in social development" (A/76/209) the Secretary-General of the United Nations dedicates one out of three main chapters (III) to cooperative law. After having extensively

developed its statement that "Cooperatives adhere to the International Cooperative Alliance statement on the cooperative identity, which should guide the enactment of laws on cooperatives" (Paragraph 19), the report concludes with these words (Paragraph 63. (b)): "National Governments should continue to improve legislative and regulatory frameworks, in alignment with the draft guidelines aimed at creating a supportive environment for the development of cooperatives [A/RES/56/114], to support cooperatives through national constitutions, where not yet done, by providing for their equal treatment in policies and laws, and by passing, where applicable and feasible, a general law applying to all categories of cooperatives in an effort to avoid fragmentation and increase efficiency, in congruence with a single policy document on the promotion of cooperatives, with provisions for secondary and tertiary cooperatives."

European Union "Action plan for the social economy": Under Paragraph 3.1 of its Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Building an economy that works for people: an action plan for the social economy (COM/2021/778 final) the EU Commission deals with the policy and legal framework for cooperatives among other actors of the social economy. Therein, it refers to the EU Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE). Recital (6) of this regulation refers to the UN Draft guidelines (see above); these Draft guidelines, in turn, refer in Paragraph 11. explicitly to the 1995 ICA Statement on the cooperative identity, which contains the cooperative principles.

Practicioners' Corner

Interviews

Interview with Ian Snaith

Questions prepared by Ifigeneia Douvitsa and Hagen Henrÿ

Douvitsa & Henrÿ: Thank You Ian for having accepted this interview!

As one of the editors of the IJCL, the International Journal of Cooperative Law, you know, of course, about its tradition of interviewing personalities who have worked over a long period of time on cooperative law. As with the other interviewees we are curious to learn what made you develop an interest in the subject and - for the purpose of fact finding - we would like to know whether the subject of cooperatives in general, that of cooperative law in particular, was part of Your formal education.

Ian Snaith: Co-operative Law played hardly any part in my formal education. At degree level, my studies were limited to the neighbouring discipline of Company Law, alongside other traditional legal subjects such as Commercial Law and Employment Law. At secondary school, we did cover the history of the UK co-operative movement in the nineteenth century as one small part of the "O Level" History course but that was because we happened to study UK nineteenth century history. That was when I was less that 16 years old (a very long time ago). After that, there was no further mention of co-operatives. However, my mother and her parents had been active members or employees of their local consumer co-operative from early in the Twentieth Century and continued as active members throughout their lives.

Douvitsa & Henrÿ: Is there anybody who inspired and maybe continues inspiring you when it comes to cooperative law?

Ian Snaith: I began working on Co-operative Law in the UK context without reference to other legal systems. I started very much as a "lone scholar" and had no contact with anyone else working in the field. However, when I began working in collaboration with colleagues from Continental Europe, I soon got to know Prof Münkner and I found him a great inspiration, particularly with his suspicion of excessive state control of co-operatives and his emphasis on

their role in a market economy. More recently, when I met Hagen Henrÿ and began working with him, he became another inspiration. He continues to inspire me by his enormous productivity and, as with Prof Münkner, his great facility with a wide range of European languages.

Douvitsa & Henrÿ: The previous issues of the journal carry interviews with Professor Hans-H. Münkner, Professor Dante Cracogna and Professor Isabel Gemma Fajardo García. Would You like to tell the readers how you got to know these three and whether and how they or their thinking has helped you in your career?

Ian Snaith: I have mentioned Prof Münkner above. I do not really know Prof Cracogna even now. Prof García is a long standing and valued colleague. I got to know her as part of our work, together with you, Hagen, Antonio Fici, David Hiez, and Deolinda Meira on the development from 2009 onwards of the Principles of European Co-operative Law (PECOL). It culminated in the publication in 2017 of Fajardo, Fici, Henrÿ, Hiez, Meira, Münkner and Snaith, *Principles of European Cooperative Law: Principles, Commentaries, and National Reports* by Intersentia. That project and my participation in it was a great help to me in pursuing my interest in Co-operative Law. However, it is doubtful how far any work in the field of Co-operative Law has been helpful to my career. The subject is so marginalised in our UK Universities that the path to career success, as usually defined, lies very much in concentrating on other legal disciplines. I have always pursued the subject because I believe in Co-operation as an ideal and as a beneficial system of business organisation. It may, eventually, help us to change the world for the better.

Douvitsa & Henrÿ: The interest in cooperative law is increasing. The recent Report of the Secretary-General of the United Nations on "Cooperatives in social development" (Doc. A/76/209) dedicates one of its two parts to (the importance of) cooperative law; the International Cooperative Alliance has made it one of its priority areas; other international non-governmental and governmental organizations rediscover it; politicians emphasize its importance… But, research and education curricula seem to be slow or their designers not interested. Rare exceptions set aside, the subject continues to be under-researched and hardly anywhere part of the general law studies.

Ian Snaith: I agree that research agendas and curricula rarely focus on cooperative law. Here in the UK, it is also very questionable how far "politicians emphasise its importance" and, in the UK, the influence of the UN Report you mention, any publication or action by the ICA, or any other policies developed by international bodies is likely to be very limited.

Douvitsa: What can be done to have cooperative law included in the education and training of lawyers?

Ian Snaith: Campaigning and attempting to persuade (and pressurise) those with power over such matters seem to be the only ways forward. It will be a long struggle and is by no means guaranteed to be successful. In the UK and Ireland the problem is exacerbated by the absence of any codified "Co-operative Law". That is inherent in our system which operates without "Codes" in the Continental European (or Napoleonic) sense of the word. Most other European countries have a Code labeled "the Co-operative Law". Some people in the UK, such as my friend and colleague Cliff Mills, advocate a similar development for Co-operative Law in the UK. However, I think our co-operatives are enriched by the possibility of using a wide range of legal structures. They can register as "co-operative societies" under the Co-operative and Community Benefit Societies Act 2014 but they are also free to use company structures under the Companies Act 2006, Limited Liability Partnerships (LLP's) under the Limited Liability Partnerships Act 2000, or "general partnerships" which are governed by a combination of judge-made law and the Partnership Act 1890. Alternatively, co-operatives can make their own arrangements by using Contract Law. Co-operativesUK, the member-controlled network of UK co-operatives, provides a range of "model constitutions" for co-operatives using the full range of available legal structures. Those constitutions (or "bylaws") protect co-operatives from the threat of demutualisation as far as is legally possible. This wide choice of structures and arrangements gives scope for creativity and imaginative innovation. That should not be sacrificed for the sake of a single mandatory "co-operative law". Many of the most interesting co-operative developments of recent years involve the formation of software and other "tech" worker co-operatives, many of which use structures such as LLP's or companies.

Douvitsa & Henrÿ: Career opportunities for cooperative lawyers inside and outside academia are scarce. Were you able to make a career out of your interest in cooperative law? If so, how did you do it? Would you recommend to young people to try building a career on it?

Ian Snaith: It's certainly true that, as I have suggested above, involvement in Co-operative Law is not a great career move for a young legal academic or legal practitioner. It is very much a niche interest. However, for me, that was an advantage. In the early 1980's when I began in the field, no-one else had published on the subject and there were few practising lawyers working on it. As a result, I was able to publish (or at least edit) a number of updates to my 1984 book, "The Law of Co-operatives" (under a variety of titles) between that year and 2014. I was also invited to teach the subject at the UK Co-operative College and, separately, through the, then, Co-operative Union (now Co-operativesUK) due to the absence of other "experts". That has continued to provide me with both an interesting life and a useful supplementary income over the

years. I now work, on a freelance basis, with Anthony Collins LLP (http://www.anthonycollins.com) a law firm which specialises in co-operative law and similar areas, such as charities, community benefit societies and housing associations. So I've done quite well out of the subject here in the UK, as well as enjoying travel and interaction with colleagues around Europe. I have no complaints. However, the absence of clear institutional structures, whether academic or professional, is a discouragement for younger lawyers interested in co-operatives.

Douvitsa & Henrÿ: You have not only published widely on cooperative law, but You have also taught, engaged in law-making, consultancies and counseling. Please tell us about these and possibly other aspects of Your work and how they link together.

Ian Snaith: I have outlined my activities above. They link together because I have always been concerned with Co-operative Law either in practice or by researching and writing about it. That is one common thread. The other (of which my interest in Co-operative Law is a part) is being able to meet an excellent range of people of all ages who are interested in social change and the place of the Law in that. As an undergraduate in the late 1960's and early 1970's, I studied a Joint Degree in Law and Political Science. In the late 1970's, at Masters Level, I studied the political and legal structures of the European Community, because, after the UK's accession to the EEC in 1973, that seemed to be an important area to study. I have always been politically active on the Centre Left (as an ordinary member of the UK Labour Party) at local level. In the 1980's, I worked as a volunteer in local legal advice centres in deprived areas of the City where I lived. Some of the consultancies came "out of the blue" because people had heard of me. They included a consultation on Polish Co-operative Law in preparation for Poland's accession to the EU. I think that was where I first met Hagen. In a sense, my activities, being organic in their development, reinforced each other and grew without much planning on my part. I just took advantage of what arose. In the UK, I contributed to attempts to reform the law that applies to co-operatives to ensure that they were in a no less advantageous position than other legal persons, such as companies, operating commercially. At EU level, I was invited to work on the development of the European Co-operative Statute Regulation.

Henrÿ: I do not want to limit your contribution to cooperative law to one essay. But, your contribution to the honorary volume on the occasion of Professor Münkner´s 65th birthday has remained on my mind ever since I read it. As is often the case with honorary volumes, the contributors are more daring than usual, mix genres, speculate in the sense of looking out for perils and opportunities and they reveal their general thinking on a subject matter.
The title of that contribution "Virtual" Co-operation: The Jurist´s Role" contains - at least for me - a trait in your thinking about cooperative law. You imagine what is over the horizon, when for most not even this horizon is reachable. That was in 2000. The factual situation underlying Your

contribution, globalization, is now obvious. But, have we cooperative lawyers learnt the lesson You then taught us? If not, and that also concerns the IJCL, what has to change?

Ian Snaith: I'm flattered that my short essay made such an impression on you, Hagen. Those who are unable to read the essay in the original Collection may wish to read it on my website at https://www.iansnaith.com/wp-content/blogs.dir/8/files/2013/02/Virtual-Co-operation.pdf. That text shows that others, such as Geu, Toffler and Morgan had already formulated most of the rather "broad brush" (or even superficial) ideas that I developed. Their work itself often synthesised and outlined the work of others. I just used their basic ideas to speculate on possible directions for Co-operative Law. Those others were often writing in management journals or books rather than in sources normally referred to by legal scholars. You are right that I was (and was allowed to be) "more daring" than usual and could mix genres and engage in speculation. I'm not sure whether I saw myself as teaching a lesson to others. If there is anything to be learned, it is perhaps to look broadly rather than narrowly for ideas and to be daring (or even reckless?) in using that "broad brush". If there is anything to change for IJCL, maybe it is to welcome broad and varied contributions from different disciplines and perspectives. In fact, the journal already does that to a very large degree. Long may that continue while referees, reviewers, and critics permit.

Henrÿ: And another point: In that contribution you mention an issue which you brought up in many of the meetings at which I had the privilege of learning from you, such as the meetings of the European Commission Enterprise and Industry Directorate General Working Group on Cooperative Legislation: Statute for a European Cooperative Society (SCE), and those of the Study Group on European Cooperative Law, SGECOL, elaborating the Principles of European Cooperative Law, PECOL. The issue is organizational "flexibility", which You seem to see in common law and which You seem to miss in civil law. It reminds me of Carbonnier´s famous book and research on "flexible droit", although I am not sure whether his sociological point of view meets yours, which, to my understanding, is a purely juridical one. Is the difference between common law and civil law on this point a fundamental one? In the end, both legal traditions need to provide for a mechanism for the separation of genuine cooperatives from cooperatives that are cooperatives by name only. Common law does it through administrative procedures; civil law through more "rigid" organizational laws. Of course, Your view has the non-negligible advantage of providing an approach to new, ephemeral, non-organized structures/models, which globalization requires. But is there not a risk that a "flexible" law will not be able to provide legal security in terms of responsibilities and liabilities where these are diluted in such non-organized structures? And, does the approach not presuppose the existence of a modern legal system in the sense D. J. Galligan describes it so pertinently in his "Law in Modern Society"?

Ian Snaith: That point is well made. It is difficult to strike a balance between, on the one hand, beneficial flexibility and, on the other, undesirably undermining fundamental values. The difficulty becomes even greater when one is dealing with radically different legal traditions. I'm sure that we both agree that a fundamental necessity for any Co-operative Law is that it prevents organisations that do not meet the requirements of the ICA Statement on Co-operative Identity from being recognised as "co-operatives". In the UK system, the mechanism for achieving that is administrative in respect of the process for registering co-operative societies and also for striking them off the register if they no longer meet the registration condition of being a "bona fide co-operative". Likewise, the protection of the word "co-operative" from misuse in the business names of companies, LLP's and other partnerships is also administrative – policed by the Registrar of Companies with advice from the Financial Conduct Authority (as registrar of co-operative societies). The word "co-operative" is also used by some community benefit societies, registered under the legislation also used by co-operative societies, and by some of our newer types of legal structure such as Community Interest Companies, registered as companies with additional regulation to ensure pursuit of the community interest. In all of those cases, the same system applies for the protection of the public from the misuse of the name "co-operative". My response on the point you raise on the nature of law in a modern society is that the problems D. J. Galligan identifies apply to both Civil and Common Law systems. In neither system can one ignore different sets of social relations when considering the normative structure of law as a matter of determining the content of legal rules. However, a particular rule is either valid law or not. In the UK system, administrative complaint to the registrar is much easier and cheaper than litigation through the court system for, for example, the members of a co-operative, whichever legal structure is used. For that reason, most co-operative society rules include the possibility of arbitration outside the court system to resolve disputes between the society and one or more of its members. However, decisionmaking about the use of the word "co-operative" in the name is always based on law and the sociological approach to law is neither more nor less relevant under different legal traditions. The reasoning of an administrator, arbitrator, or court will be based on legal norms that are regarded as valid. The sociological or philosophical basis for the rules may carry little weight in that context. As a matter of policy, flexibility of structure is important. But that is a question for those framing the legal rules rather than those applying them. A teleological approach to the interpretation of the words used in legislation is, of course, one available technique and may be helpful in dealing with the misuse of the "co-operative" description. Our courts have been much more comfortable using that approach since they met with it when applying EEC/EU Law between 1973 and 2018. They are now willing to apply a version of it even when interpreting the words used in commercial contracts.

Henrÿ: Hoping to provoke an answer from you which I need because I am stuck with my thinking on this one too, I would like to add another aspect: Your critique of the civil law approach seems to point to another difference between these two legal traditions. The common law populates, so to speak, the law with two figures, contracts and property rights, whereas the

civil law knows of a tertium, namely legal persons not based on contractual relationships between the participating persons. Obviously, both conceptions have their own distinct ramifications for many areas of the law which are relevant for cooperative law.

Ian Snaith: Since the Middle Ages, the common law of England has acknowledged corporations created by the state rather than by contract – either by royal charter or by legislation – as legal persons. The emergence of commercial companies created as legal persons by private parties through administrative registration with a state official only developed in the nineteenth century and was entirely created by legislation, mainly because the Common Law had such a limited approach to legal personality. In English Law general partnerships are not recognised as having a legal personality separate from the personality of the individual partners, except for a few limited pragmatic purposes such as starting litigation. The Scottish courts were more willing to recognise a separate legal entity in that context – presumably because of the Scottish system's closer relations with Civil Law systems and its Roman Law origins. The concept of commercial partnerships created by contract between the partners developed in the eighteenth century but no legal personality was conferred. That was one of the models for the later legislation to permit the creation of corporations by registration to confer legal personality with limited liability of the members for business debts. However, at Common Law the recognition of legal persons (other than individual human beings) was very limited. Bishops were recognised as having that status by virtue of earlier ecclesiastical law. The Monarch had always been recognised as legal person. However, other groups, such as partnerships, were without legal personality, unless Parliament had enacted a specific piece of legislation to confer it on an individual group or "company". In tandem with Parliamentary legislation to set up an individual legal person, the Crown could use its prerogative powers, as it did for e.g. the famous East India Company of the Eighteenth and Nineteenth centuries, to achieve that result. For both registered companies and registered co-operative or community benefit societies, the contractual basis of the relationship between each member and the corporate body created by registration, and among the members *inter se*, is laid down in the law under which the society or company is registered as a legal person. Legal personality is not conferred by Common Law. So, again, that is a matter of the policy implemented by the legislation.

Douvitsa & Henrÿ: The United Kingdom (UK) is considered to be the cradle of modern cooperatives; the "Laws and Objects of the Rochdale Society of Equitable Pioneers" have largely influenced the successive statements by the International Cooperative Alliance on the identity of cooperatives; the UK Industrial and Provident Societies Act 1852 is considered to be the first cooperative law. Our common friend Rita Rhodes has investigated with admirable assiduity the influence of these origins on other parts of the world, as has Prof. Münkner. One could also mention the influence of common law thinking on the European Council Regulation 1435/2003 on the Statute for a European Cooperative Society (SCE). You have deep insights into the

difference between this thinking and the French legal thinking as representing the other one of what many consider to be the two major legal traditions in the world. Without sharing the view that there are main legal traditions, one cannot deny their world-wide influence. As editors of the IJCL we endeavor to see all legal traditions represented in the journal. How would You describe the main difference between cooperative law based on common law thinking and that based on civil law thinking beyond the issue of flexibility? What, if any, lessons are to be learned for our endeavor from their amicable confrontation?

Ian Snaith: As I have said above, it is important to recall the limits of Common Law and the importance of the development of specific pieces of legislation, such as the Industrial and Provident Societies Act 1852 and its successors. The absence of Napoleonic style Codes in the UK system is a central point and a major contrast with the French and other Continental European systems. Ad hoc, particular, pieces of legislation to deal with specific problems is the norm in our system and that is now complicated by the existence of four legislatures under the devolution settlement of the 1990's: Scotland, Wales, and Northern Ireland each have their own legislatures with powers defined in the various devolution Acts enacted by the Westminster Parliament. England is subject only to the legislation enacted by or under the authority of the UK Westminster Parliament. Fortunately, the laws governing co-operatives, whichever legal structure they choose to use are, generally, uniform across England, Scotland and Wales. The same legal provisions are effectively copied into separate legislation enacted by the Northern Ireland Assembly or, at earlier times, enacted as applying to Northern Ireland either by the Westminster Parliament or through secondary legislation made under powers conferred by it. This complexity makes any generalisation about the UK legal system difficult in all areas. For co-operative societies registered as such, there is an additional layer of administrative discretion exercised by the Financial Conduct Authority as registrar under the Co-operative and Community Benefit Societies Act 2014. That administrative role is the key protection of Co-operative Identity in the UK system. On the question of the influence of the UK systems in other parts of the world, the irony, it seems to me, is that, where the UK was the colonial power, it codified the local co-operative law and conferred wide powers on the registrar there to a degree that far exceeded the powers of the UK Registrar. Those colonial laws created a style of legislation not applied in the UK. Rita Rhodes and Prof Münkner have both chronicled and analysed that process very well. The UK Colonial Office pursued its own agenda and set up systems that it considered “beneficial” to the local population. It did not build on local customs and practices but imposed a system modeled on its concept of UK Co-operative Law. To this day, the Republic of Ireland which until 1921 was part of the UK, still uses the Industrial and Provident Societies Act 1893 as the basis of much of its Co-operative Law. That Act does not contain even the limited “bona fide co-operative” requirement that was added to UK legislation only in 1939. Complexity is the key feature of all these measures and accidents of history abound.

Henrÿ: Coming once more back to your contribution to Professor Münkner´s honorary volume in which you seem to (fore)see the necessity for a "cooperative law without borders", I wonder how you see the Brexiteers´ claiming national sovereignty over legislation, including cooperative law. And, related to that, do you share my view that increasing reference to the cooperative values and principles (as enshrined in the 1995 ICA Statement on the co-operative identity, as referred to in the 2001 United Nations Draft guidelines aimed at creating a supportive environment for the development of cooperatives and as integrated into the 2002 Promotion of Cooperatives Recommendation of the International Labour Organization No. 193) in regional and national cooperative laws will make my question about the difference between the legal traditions irrelevant. Are we heading toward the harmonization - not unification - of cooperative laws world-wide?

Ian Snaith: It's important to remember that English Law has a dualist approach to International Law. There is no question of provisions found in International Treaties becoming part of national law unless Parliament legislates that they will do so. In preparation for the UK's accession to the EEC on 1st January 1973, the UK Parliament passed the European Communities Act 1972. That Act provided that EEC (later EU) Law would have effect in the UK in its own terms and gave legal effect to all then existing and later decisions or rulings of the European Court of Justice (ECJ). The courts then accepted, via that Act, such fundamental concepts of EU Law as the direct effect of EU Regulations, certain Treaty provisions and, to the extent that their wording permitted it and/or the ECJ ruled that the doctrine applied to them, EU Directives. They also accepted, through that Act, the supremacy of EU Law over national law. The repeal of the European Communities Act 1972 by the European Union (Withdrawal) Act 2018 removed those EU legal principles from the UK legal systems. However, the 2018 Act empowered the UK Executive to continue particular provisions of EU Law by the use of UK secondary legislation. It also protected from invalidity existing UK national legislation that had originally been enacted to meet a requirement of EU Law. We now have a great deal of UK secondary legislation, made by the Executive under the 2018 Act, that continues particular legal rules that were effective as part of EU Law. However, the effect of those laws is based on their enactment by (or on the authority of) the UK Parliament. Their status within EU Law is not a source of legal effect. UK laws will be harmonised with international or regional legal norms relating to co-operatives only to the extent that the UK Parliament chooses to enact provisions to that effect. But globalisation is a reality that policymakers cannot ignore. So it is likely that important developments in other legal systems will be incorporated into UK national laws, especially those relating to corporate, trade, commercial and contractual questions. Given that co-operatives and their problems are marginalised and that co-operatives have limited political influence, the prospects for such developments are not good. Only the Centre Left has any commitment to co-operatives in principle. For other political groups they will only be considered if they offer a convenient

political solution to problems that concern their supporters. That is most likely to involve agricultural interests. Given that, in 2019, our "First Past the Post" electoral system gave the Conservative Party its biggest Parliamentary majority since 1935, it seems unlikely that the Centre Left will enjoy any significant power before 2027 and it is difficult to know how much global, regional and national circumstances may have changed by then.

Douvitsa: But, possibly, the impact of other concepts, such as social enterprises, social economy, social and solidarity economy, social, solidarity and community economy, might be of greater relevance than that of the mentioned difference between the legal traditions?

Ian Snaith: This may provide a way forward in spite of my rather pessimistic reply to that last question. However, many co-operators would argue that these rather vague labels fail to empower consumer or employee stakeholders in the way that co-operatives do. Setting up new and imaginative co-operatives is surely the way forward. Worker co-operatives in software development and other tech areas, often linked to the free and open source software movement, offer a glimmer of hope. In the UK, the emergence of housing associations in the form of community benefit societies as providers of social housing – often with state funding – is another hopeful sign. That happened as successive governments removed or restricted the power of local authorities to provide social housing, which had been the main system used earlier in the Twentieth Century. It was also a consequence of the popular 1980's Thatcherite policy (continued ever since) of giving tenants of local authority-provided social housing the right to buy the home they occupied at a large price discount. Local authorities were not funded to replace the housing stock they lost to their tenant-purchasers. It is fair to point out that the charitable sector seems to be thriving and protects both assets and objectives by a legally enforceable dedication to charitable purposes. I have faith in the ability of marginalised and vulnerable groups to use a wide range of co-operative or altruistic legal forms as part of a mission to mitigate the worst effects of the economic system. Collective self help, self reliance and the dedication of assets and efforts to such purposes is vitally important and the co-operative model is a key weapon in the armoury of groups with such purposes. That is a source of hope.

Douvitsa & Henrÿ: Thank You again for the interview Ian!

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