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

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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

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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?

Tax regimes applicable to resident legal entities: tax on legal entities or corporate tax

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

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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.