COOPERATIVES IN BELGIUM IN THE ERA OF THE CODE OF COMPANIES AND ASSOCIATIONS: CURRENT DYNAMICS AND PROSPECTS FOR TAX LAW AND NON-TAX LAW[1]

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Abstract

In this paper, we consider the tax treatment of cooperatives in Belgium. To this end, we analyse the connections between tax and non-tax law, an analysis that is essential for understanding the current tax system (*de lege lata* perspective). In view of these connections, we highlight issues that should imperatively be addressed in the context of a reform of this tax system (*de lege ferenda* perspective).

Introduction

1. Overview. The cooperative society was introduced into Belgian law as a commercial company through an Act of 1873. The framework has always been very liberal and therefore entrepreneurs, who were not inspired by the cooperative ideals, have used this framework for its flexibility. Does the new Code of Companies and Associations considerably change the situation? (I)

From a fiscal point of view, under Belgian law, a resident legal entity is necessarily subject to either tax on legal persons (TLP) or corporate tax (CT), two very distinct regimes. How are cooperative societies treated in this system? (II)

If we consider the tax and non-tax aspects of cooperatives (or, more broadly, of legal persons) together, the interdependency of these different branches of law appears. These links are the key to understanding the rationale for the "TLP/CT" system and the status of companies in this system (III).

In view of this interdependency, and taking into account the major developments in the law of legal persons and economic law, the Belgian tax system – which remains unchanged – appears to be completely obsolete (IV).

In a forthcoming tax reform the Belgian legislator could, as encouraged by some supranational institutions, promote cooperatives or even social enterprises. In this context,

[1] The author refers, for further developments, to her doctoral dissertation (Contribution to the study of the direct tax regime for social enterprises in Belgium: An illustration of the interactions between tax law and non-tax law) presented at the University of Liège on 30 August 2019 (https://orbi.uliege.be/handle/2268/239298). The thesis will soon be published in the collection "Normes" of the Presses Universitaires de Liège.

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other connections between tax and non-tax law should in our view necessarily be taken into consideration, i.e., the links between legal frameworks and public policies (V).

The purpose of this paper is twofold. On the one hand, it is to provide a critical description of the Belgian legal system (tax and non-tax aspects). One the other hand, it is to raise a number of issues that need to be addressed in order to reform an outdated tax system. In this context, the aim of this paper is not to outline a new tax system that we would consider adequate (political opportunity concern) but to highlight constraints to which the Belgian legislator would be subject to grant special tax treatment to cooperatives or social enterprises.

I. Non-tax law aspects[3]

"Any excess is harmful, the excess of flabbiness more than any other"[4]

2. Cooperative societies before the Code of Companies and Associations. The cooperative is a specific legal form under Belgian law. The cooperative society was established by an Act of 18 May 1873 as a commercial company composed of partners whose number and contributions are variable and whose shares are non-transferable to third parties[5].

Despite several legal changes[6], its framework has remained flexible. Due to this, some people adopted this form without sharing the cooperative ideals (democratic governance, indivisible reserves, etc.); a distinction was therefore made between "true" and "false" cooperatives. In the beginning of the 1960s, an accreditation for true cooperatives was created (CNC accreditation[7]).

In the mid-1990s, the social purpose company was created to fill a gap: the lack of a framework to combine large-scale commercial activity with a disinterested purpose. A company could not pursue a disinterested purpose[8]; conversely, a non-profit association (NPO) could not carry out a principal commercial activity[9]. The social purpose company was not conceived as a legal form, but a variant that could be grafted onto most companies with a commercial form, including the cooperative society[10].

The accreditation of cooperatives and the variant of the social purpose company can be cumulated, although they are not necessarily compatible: a social purpose company is

[3] See T. Tilquin, J.-A. Delcorde and M. Bernaerts, "A new paradigm for cooperative societies under the new Belgian code of companies and associations", *International Journal of Cooperative Law*, n°3, 2020, pp. 98-121.
[4] Free translation of "Tout excès est nuisible, l'excès de la mollesse bien plus que tout autre" (Sénèque, *De la providence*).
[5] Act of 18 May 1873 containing Title IX, Book 1st of the Commercial Code relating to companies, *Belgian Official Journal* (hereinafter: *M.B*), 25 May 1873.
[6] See notably P. Nicaise and K. Deboeck, *Vade Mecum des nouvelles sociétés coopératives*, 2e éd., Bruxelles, Creadif, 1995; M. Coipel, "Les avatars de la coopérative en droit belge", in D. Hiez (dir.), *Droit comparé des coopératives européennes*, 2009, Bruxelles, Larcier, pp. 125-143.
[7] Act of 20 July 1955 (*M.B.*, 10 August 1955) and Royal Decree of 8 January 1962 (*M.B.*, 19 January 1962).
[8] Art. 1st of the Code of Companies.
[9] Art. 1st of the Act of 27 June 1921 on non-profit associations, foundations, European political parties and European political foundations, *M.B.*, 1st July 1921.
[10] Art. 1st, al. 3 and 661 of the Code of Companies.

prohibited from being primarily oriented towards serving its members, which is the very essence of traditional cooperatives. In 2016, an exemption was provided for social purpose cooperatives in order to allow the legal complementarity of the two systems: the main purpose of the cooperative society, if it is a *social purpose cooperative*, must not be to provide members with an economic or social benefit in the satisfaction of their professional or private needs[11].

Belgian economic law has been completely reformed in recent years. This reform was carried out in three steps: firstly, the reform of insolvency law (Act of 11 August 2017[12]); then, the reform of business law (Act of 15 April 2018[13] with the dismantling of the Commercial Code); finally, the Code of Companies and Associations (Act of 23 March 2019[14]).

3. Code of Companies and Associations – general principles. The Code of Companies and Associations (CCA) integrates the rules relating to companies, associations but also foundations[15]. The CCA aims to "modernise" Belgian law on legal persons by following three main guidelines.

Firstly, a far-reaching simplification is achieved. This is apparent in various respects, including the abolition of the distinction between civil and commercial companies, the reduction in the number of company forms and, *a priori*, the integration of companies, foundations and associations into a single code.

Secondly, the new regulation promotes more suppletive law and thus more flexibility. The CCA tends to strike a balance between flexibility for companies and their members on one side, and protection of third parties and specifically creditors on the other.

Thirdly, the adoption of new rules mainly to deal with European developments and trends, such as the increasing mobility of companies, is encouraged. Given that Belgium had previously opted for the real seat theory (*lex societatis*), European case law led to undesirable effects since "a Belgian company with its real seat in Belgium could not [e]migrate abroad without changing its nationality, whereas a company from a country that applies the incorporation theory could [im]migrate to Belgium while retaining its nationality"[16]. Taking into account this situation, Belgium is changing from the real seat theory to the incorporation theory to determine the *lex societatis.*

4. CCA and cooperative societies. Given the objective underlying the reform (to offer an attractive new legislative product on the market of legal norms: a simplified, flexible and exportable law[17]), the CCA had initially envisaged to abolish the cooperative society. In

[11] Art. 1st, §8, Royal Decree of 8 January 1962.
[12] See Act of 11 August 2017 inserting Book XX "Insolvency of companies" into the Code of Economic Law (…), *M.B.*, 11 September 2017.
[13] See Act of 15 April 2018 reforming business law, *M.B.*, 27 April 2018.
[14] See Act of 23 March 2019 introducing the Belgian Code of Companies and Associations and miscellaneous provisions, *M.B.*, 4 April 2019.
[15] This Code abolishes the Code of Companies and the Act of 27 June 1921.
[16] Doc. parl., Ch. repr., 2018-2019, n° 54-3119/011, p. 12.
[17] The reform of Belgian law on legal persons is in line with the "normative Darwinism" described by A. Supiot: "The legal representation of the world at work (...) is that of a 'market of legislative products' open to the choice of

doing so, the cooperative principles could be enshrined, thanks to increased statutory freedom, in another legal form: the limited liability company (LLC)[18]. The structure of the cooperative society was ultimately retained.

As Tilquin, Delcorde and Bernaerts mentioned in another issue of this Journal, "the main element of the reform of the legal regime of cooperative societies in Belgium is certainly the new definition of these societies"[19]. This definition is inspired by the definition of the European Cooperative Society (Regulation nr.1435/2003) with adjustments to cover the developments experienced by the cooperative movement over the last twenty years, notably the use of cooperatives for projects oriented towards the general interest[20]. The other provisions of Regulation nr. 1435/2003, which derive from the ICA principles (indivisible reserves, research of limited profit and disinterested distribution of net assets, etc.), are not found in the CCA. There is only a reference to the ICA principles in the preparatory works[21] but not in the legal text which only specifies that "[t]he cooperative purpose and values of the cooperative society shall be described in the articles of association and, where appropriate, supplemented by a more detailed explanation in internal rules or a charter"[22].

Before the adoption of an amendment, only a few articles were specific to the legal framework of cooperative societies. For the rest, except for derogations, the legal regime of the cooperative society was similar to the regime of the LLC to which the Code was referring[23]. *In fine*, cooperative societies have their own book containing all the relevant provisions in the CCA. However, for many provisions, the texts relating to the LLC have been copied without taking into account the specific nature of the cooperative[24]. Thus, for example, while the principle of economic democracy "one man, one vote" was promoted (in a suppletive way) in the initial model, the default rule is finally "one share, one vote"[25].

5. CCA and accreditations specific to cooperatives. In the CCA, the accreditation of cooperatives (CNC accreditation; see *supra*, n°2) is preserved[26].

There is even a new accreditation: accreditation as a social enterprise[27]. This accreditation is intended to compensate for the disappearance of social purpose companies in Belgium (see

individuals who are free to place themselves under the law that is most profitable to them" (A. Supiot, L'esprit de Philadelphie, *La justice sociale face au marché total*, Seuil, Paris, 2010, pp. 64 and 66). See also R. Aydogdu, "La Corporate Social Responsibility, le droit par-delà le marché et l'État (partie 1)", *R.P.S.-T.R.V.*, n° 2018/8, pp. 669-704, spec. n° 49, p. 696 and the references in the footnote (174).

[18] It should be noted that, in 1873, before opting for the consecration of a cooperative legal form, some argued that there was nothing to prevent the insertion of cooperative rules into the articles of association of existing forms of commercial companies. See notably J. Guillery, *Commentaire législatif de la loi du 18 mai 1873 sur les sociétés commerciales, Discussions parlementaires, Exposé des motifs, Rapports présentés aux Chambres législatives*, Bruxelles, Bruylant, 1878, n° 124, p. 163 et s.; J. T'Kint and M. Godin, *Les sociétés coopératives*, Bruxelles, Larcier, 1968, pp. 10-11.

[19] T. Tilquin, J.-A. Delcorde and M. Bernaerts, *op. cit.*, p. 120.

[20] See *Doc. parl.*, Chambre, 2018-2019, n° 54-3119/015, p. 106.

[21] See for instance *Doc. parl.*, Chambre, 2018-2019, n° 54-3119/021, p. 65.

[22] Art. 6:1, §4 of the CCA.

[23] See *Doc. parl.*, Chambre, 2018-2019, n° 54-3119/015.

[24] As Aydogdu points out, in various ways the cooperative ideal has been lost in the process, lost in translation (R. Aydogdu, "L'Amendement: Le but lucratif d'une société coopérative; 'Lost in Translation'", *R.P.S.-T.R.V.*, n°2020/3, pp. 342-344, esp. p. 342).

[25] Art. 6:41 of the CCA.

[26] Art. 8:4 of the CCA.

supra, n°2). Indeed, the gap that the variant of the social purpose companies was intended to fill has disappeared: a NPO can carry out an economic activity, and a company can pursue a disinterested goal (see *infra*, n°18). This accreditation "as a social enterprise" is, in contrast to the previous system, only available for cooperative societies.

The two accreditations can be cumulated with a specific name for the cooperative society concerned[28].

The requirements that a cooperative society must meet when requesting an accreditation as a social enterprise are very similar to those for the accredited cooperative society, except for two questions: the principal purpose and the allocation of the liquidation bonus. The principal purpose of an accredited cooperative society must concern its shareholders[29] whereas the main purpose followed by a cooperative society accredited as a social enterprise must be to generate a positive societal impact for the people, the environment or the society in the general interest[30]. For the accredited cooperative society, the articles of association *may* provide that the liquidation bonus shall be "allocated to economic or social activities which it intends to promote"[31]. For the cooperative society accredited as a social enterprise, the liquidation surplus is mandatorily "allocated as closely as possible to its purpose"[32]. This second distinction should not be overlooked from a tax perspective (see *infra*, n°6).

II. Tax law aspects

6. Tax regime applicable to resident legal entities: tax on legal persons or corporate tax. As far as income tax is concerned, a legal entity which has its real seat[33] in Belgium is necessarily subject to either tax on legal persons (TLP) or corporate tax (CT).

In order to determine the income tax applicable, the reasoning to be applied can be divided into at most three steps[34].

> **Step 1:** Does the legal person engage in any exploit or operations of a profit-making nature?
>
> a. if the answer is no, the legal person is subject to the TLP;
>
> b. if the answer is yes, the legal person is subject to the CT (with some exceptions, see step 2);

[27] Art. 8:5 of the CCA.
[28] Art. 8:5, §2 of the CCA.
[29] Art. 8:4, al. 1 of the CCA.
[30] Art. 8:5, §1, 1° of the CCA.
[31] Art. 8:4, al. 4 of the CCA.
[32] Art. 8:5, §1, 3° of the CCA.
[33] Unlike the change concerning the *lex societatis* (for which Belgium has chosen the incorporation theory) the real seat theory remains applicable in tax law.
[34] Art. 2, 179, 181, 182 and 220 of the Income Tax Code.

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

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

b. if the answer is no, the legal person is subject to the CT (with some exceptions, see step 3);

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

a. if so, the TLP will apply.

b. if not, the CT will apply.

The reasoning is at most divided into three stages because only a "legal person does not pursue a lucrative purpose" may have access to all three stages of reasoning. If the legal person pursues a lucrative purpose, the only question that matters is whether or not it engages in exploit or operations of a profit-making nature[35]. A legal person is considered under "legal person does not pursue a lucrative purpose" when it does not seek to grant, directly or indirectly, a material gain, whether immediate or deferred, to its shareholders or partners[36].

According to the administrative commentary, when it appears from an analysis of the articles of association of a company that it has not been incorporated with a view to exercising a lucrative professional activity, and when it appears that in reality it does not engage in operations of a lucrative nature, the company should not be subject to the CT (thus the TLP is applicable). However, when a company distributes dividends, regardless of the amount, or when the faculty of a distribution of profits is merely foreseen, it must be subject to the CT as it is considered that it is then deemed to be engaged in operations of a profit-making nature[37].

In practice, therefore, in order to claim the "legal person does not pursue a lucrative purpose" status, a term in the articles of association prohibiting the distribution of a dividend is required. Furthermore, the liquidation bonus must also be used for a disinterested purpose according to the articles of association[38].

7. Income tax regime - application to cooperative societies. According to Article 6:40 of the CCA, each share of a cooperative participates in the profit *or* the liquidation bonus. The cooperative society therefore, *de lege lata*, necessarily has the status of a *legal person*

[35] Art. 181 and 182, *a contrario*, of the Income Tax Code.
[36] Administrative commentary, n° 179/12.
[37] Administrative commentary, n° 179/18.
[38] Provided these two conditions are met, it is explicitly stated that social purpose companies can be qualified as non-profit legal persons. The same applies to intermunicipal companies according to various administrative decisions.

pursuing a lucrative purpose (see *supra*, n°6). If the cooperative does not have a provision in its articles of association prohibiting the distribution of a dividend, it will automatically be subject to the CT (see *supra*, n°6).

8. Income tax regime - application to cooperative societies accredited as social enterprises. For cooperative societies accredited as social enterprises, both conditions – statutory prohibition of the distribution of a dividend and disinterested allocation of the liquidation bonus – can be, in our opinion, met. Indeed, the liquidation bonus must be allocated, in a way which corresponds as much as possible to its purpose[39]. Also, dividends are limited to 6%[40]. Consequently, a cooperative society accredited as a social enterprise, subject to an *ad hoc* term in its articles of association concerning dividends, could be considered under "legal person does not pursue a lucrative purpose". According to Article 6:40 of the CCA, each share of a cooperative participates in the profit *or* the liquidation bonus. While Article 6:40 is applicable to all cooperative societies, Article 8:5 applies only to cooperative societies accredited as social enterprises. The latter provision, more specifically, should prevail according to the principle *lex specialis derogat legi generali.*

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

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

The CT is levied on all net profits (active and passive income; including membership fees, donations and subsidies)[41]. The TLP is calculated on a certain number of income items listed in Articles 221 to 224 of the Income Tax Code. These are mainly certain passive incomes, largely from movable and immovable sources. Revenues from economic activities are therefore not taxed.

Multiple tax rates are applied to the TLP according to each taxable item[42]. It has always been commonly said that these rates are generally lower than the basic CT rate. The 2017 CT reform may lead us to reconsider this observation. Under the pressure of international competition, the Belgian legislator amended the CT system by reducing its rate (while broadening its basis to guarantee the budgetary neutrality of the whole)[43]. Since 1 January 2020, the ordinary rate is 25% (from 33.99% before the reform). A reduced rate of 20% is conditionally reserved for small and medium-sized enterprises (SMEs) up to a first income threshold of €100,000[44].

[39] According to Art. 8:5, §1, 3° of the CCA.
[40] According to Art. 8:5, §1, 2° of the CCA and Royal Decree of 8 January 1962.
[41] Art. 183 of the Income Tax Code.
[42] See Art. 225 and 226 of the Income Tax Code.
[43] See Act of 25 December 2017 reforming the corporate tax, *M.B.*, 29 December 2017.
[44] Art. 215 of the Income Tax Code.

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

Given their characteristics, the TLP can sometimes be more burdensome than the CT. In conclusion, it is not possible to determine in absolute terms which of these two taxes is the source of the heavier burden.

10. Specific measures for cooperatives subject to corporate tax. Cooperative refunds are generally treated in the same way as various types of discounts (commercial discounts, credit notes, year-end rebates, etc.) granted by commercial and industrial companies: professional expenses if they are adequately justified. Where the refund is not determined in proportion to personal purchases or sales but in proportion to the participation in the capital, it must be taxed as a component of the company's profit. For *consumer cooperatives* in particular, a nuance must be made between members and non-members for refunds granted *after* the closure of the accounts. All refunds granted to non-members are taxable. On the other hand, refunds to members are only taxable if they do not come from their own purchases[45].

11. Specific measures for accredited cooperatives subject to corporate tax. Four specific measures can be noted for accredited cooperatives (CNC accreditation; see *supra*, n°2) subject to the CT:

1) exoneration of a first tranche of dividends (200 €) distributed to natural persons, whereas distributed dividends are in principle taxable for the distributing company[46];
2) absence of requalification of interest (deductible) as dividends (not deductible so taxable)[47];
3) exemption from withholding tax in case of partial sharing of the social assets or acquisition of own shares[48];
4) extended application of the reduced rate for small cooperatives (several exceptions to the benefit of the reduced rate are not applicable)[49].

12. "**Tax neutrality**" **of the CCA.** A law of 17 March 2019 aims to ensure the "tax neutrality" of the CCA[50]. While various adaptations have been envisaged to take into account, notably, the consecration of the incorporation theory (*lex societatis*) or the

[45] Art. 189 of the Income Tax Code and administrative commentary n°189/6, 189/10 and 189/11. See F. Vanistendael, "Traitement fiscal des sociétés coopératives", *R.G.F.*, 1986, pp. 159-170, esp. pp. 165-166.
[46] Art. 185 of the Income Tax Code.
[47] Art. 18, al. 8, of the Income Tax Code. The justification for the inclusion of this exception in the Code is that these companies, in accordance with the cooperative spirit, traditionally rely on their members rather than on third parties to raise the capital necessary for their functioning and therefore this tax measure hinders an essential source of their financing.
[48] A shareholder of an accredited cooperative is in a special situation: if he wishes to realise his shares, he cannot easily transfer them and realise a capital gain on shares that is in principle tax exempt. Indeed, the shares of such a society are not freely negotiable. A shareholder has no other possibility to dispose of his shares than by resignation or redemption. Such a transaction is considered for tax purposes either as a partial sharing of the social assets or as an acquisition of own shares.
[49] Art. 215, al. 3, 1°, 2°, 4°, of the Income Tax Code.
[50] See Act of 17 March 2019 adapting certain federal tax provisions to the new Code of Companies and Associations, *M.B.*, 10 May 2019.

disappearance of the notion of share capital in most societies, the tie-breaker rules between TLP and CT have been maintained.

III. The connections between tax and non-tax law, key to understanding the rationale behind the TLP/CT system

13. Plan. Unless otherwise specified in the tax law (autonomy), for its application and interpretation, the definitions used in non-tax law must be used when the tax law refers to concepts or institutions imported from non-tax law. By investigating the origin of the current system, which allows for a better understanding, we can highlight the influence of non-tax law on tax law – but more fundamentally the interdependency[51] between these branches of law *in casu*: while the former tax regimes of non-profit associations (or NPOs) provide valuable insights into non-tax law controversies (such as the concepts of commercial profit or ancillary character), the principled influence of non-tax law cannot be overlooked in order to understand the current tax framework. Firstly, the "TLP/CT" system has been implemented to regulate the economic activity of "mixed" NPOs (a); secondly, the automatic CT liability of companies stems from the concept of conventional company to which the cooperative society is assimilated despite its nature (b).

14. (a). Regulation of "mixed" NPOs through the income taxation system in the 1970s. The current "TLP/CT" system was introduced in the mid-1970s essentially to reform the tax treatment of "mixed non-profit associations", i.e., those which engage in an economic activity while allocating the income to the realisation of their disinterested purpose. What appeared problematic in 1976 was the fact that a NPO could act in the economic arena without being subject to the consequences of commerciality, thereby undermining fair competition.

From this concern about the way in which the association should behave in the market, two "overflows" can be counted.

The first is that "legal speciality" (a concept which defines the scope of action of a legal person and, in this case, whether a NPO can act in the market) becomes a primary instrument in the fight against unfair tax competition. According an Act of 27 June 1921, repealed by the CCA, a non-profit association may not engage in commercial activities unless they are ancillary. How is the ancillary character to be interpreted? The controversy was rife. For some authors, in order to be ancillary, the commercial activity had to be quantitatively less important than the main activity, necessary for the realisation of the disinterested purpose and all the profits derived from it had to be allocated to the realisation of this purpose[52]. Other authors defended a more flexible interpretation according to which an activity was ancillary if it was intended to financially support the disinterested purpose; only the condition of

[51] Concerning the interdependence of branches of law, see E. Krings, "Les lacunes en droit fiscal", in C. Perelman (ed.), *Le problème des lacunes en droit*, Brussels, Bruylant, 1968, pp. 463-488, esp. p. 481; G. Vedel, Préface, in P. Bern, *La nature juridique du contentieux de l'imposition*, Paris, L.G.D.J., 1972, p. I.

[52] For authors who follow this trend, see the numerous references cited by M. Coipel, M. Davagle and V. Sepulchre, "A.S.B.L.", Répertoire notarial, "A.S.B.L.", Rép. not. t. XII, *Le droit commercial et économique*, Livre 8, Bruxelles, Larcier, 2017, footnote (5), p. 287 and footnotes (1), (2) and (3) p. 288.

allocation had to be verified[53]. For the former authors, the possibility for a NPO to carry out commercial operations should be as marginal as possible in order to limit as much as possible the harm to fair competition between enterprises[54].

The second overflow consists in the fact that the income tax system becomes an instrument by which the State intends, in a way, to regulate the economic activity of NPOs. A historical analysis of the case law of the Belgian Court of Cassation reveals this: as early as 1921, a NPO engaged in an economic activity could not have its income from activities taxed by a professional tax because of its purpose; the legislator protected these structures from taxation of their income from activities[55]. At the time of the major income tax reform of 1962[56], the legislator affirmed its desire to maintain this approach for NPOs and expressly included it in the legal texts. In 1976[57], however, and as the preparatory work clearly shows, the legislator wanted to make a clean break and give a clear signal: the same tax for the same activities. The income tax system became an instrument for combating unfair competition between NPOs and commercial companies. In order to ensure what is claimed to be "fair competition" between enterprises, the legislator's attention focused on the economic dimension of a NPO – on the activity it carries out – and the (disinterested) purpose remains secondary. From 1976 onwards, we experienced the "sanctuarisation of the activity" in the Belgian income taxation system for legal persons.

15. (b). Concept of company, rationale for its income tax regime. It is clear from various extracts from the administrative commentary (see *supra*, n°6) that the CT is considered a "natural tax" for companies, as they are set up to carry out a profit-making activity. The hypothesis in which the company does not engage in profit-making operations (in which case it should not be subject to the CT) is formally (and theoretically) stipulated. However, when a company distributes dividends, regardless of the amount, or when the faculty of a distribution

[53] See M. Coipel, M. Davagle and V. Sepulchre, *op. cit.*, footnote (5), p. 285. See also the references related to the "liberal thesis", no. 127 *et seq*., p. 294 *et seq*.

[54] For a critique of this approach, see for instance M. Coipel and M. Delvaux, "À quelles conditions une A.S.B.L. peut-elle exercer des activités commerciales à titre principal?", J.D.S.C., 2008, pp. 20-23, esp. p. 22. In their article on the taxation and regulation of the non-profit sector ("Taxing and regulating non-profit organisations", in F. Vanistendael (ed.), Taxation of Charities, EATLP Annual Congress Rotterdam (31 May-2 June 2012, EATLP international tax series, vol. 11, IBFD, June 2015, pp. 3-44) note that M. Bowler Smith and H. Ostik argue that any claim that government policy should be guided by sources of income is wrong (p. 16) and that regulation of the non-profit sector requires, instead, a focus on the sector's primary objective, i.e., maximising its distributive impact. This does not imply a focus on the activities, means or inputs of the sector (p. 21).

[55] See the Act of 29 October 1919 establishing schedular taxes on income and a supplementary tax on overall income, *M.B.*, 24-25 November 1919. The income tax system consisted of three schedular taxes, namely the property tax on income from real estate, the tax on income from movable capital and the professional tax on professional income. The law distinguished between different categories of income subject to professional tax, including the profits of industrial, commercial or agricultural operations of any kind, on one side, and the profits of all lucrative occupations on the other. The tax law did not make any exception for the income of NPOs, nor did the law of 27 June 1921 place them outside the scope of the professional tax. Without a profit motive, however, NPOs did not meet the conditions for taxation in the light of the case law of the Court of Cassation.

[56] See the Act of 20 November 1962 reforming income taxes, M.B., 1 December 1962. The system introduced in 1962 initiated a double shift. Firstly, whereas it was necessary to determine to which tax a given income was subject in the schedular system ("objective" system), it is now necessary to associate a taxpayer with a tax ("subjective" system). In place of the schedular taxes, four income taxes were established: a tax on the global income of the residents of the kingdom, called the personal income tax (or IPP); a tax on the global income of resident companies, called the corporate tax (or CT); a tax on the income of Belgian legal persons other than companies, called the tax on legal persons (or TLP); and a tax on the income of non-residents, called the non-resident tax.

[57] *Act of 3 November 1976 amending the Income Tax Code, M.B., 9 December 1976.*

of profits is merely foreseen, it must be subject to the CT as it is considered that it is then deemed to be engaged in operations of a profit-making nature.

The automatic CT liability of companies derives in fact from the notion of the conventional company[58] and from the non-tax case law developed according to which "the company does not have, like the individual, a double life, that of the professional and that of the private man; it has only one existence entirely devoted to the operation of the business which is the social purpose and this social purpose is, in the final analysis, the realisation of profits"[59].

As Tissot and Culot point out, "the cooperative society was intended to be an alternative structure of economic collaboration to those of the rapidly expanding capitalism. It was to allow, as its name indicates, a more egalitarian and fraternal economic cooperation, by organising a community of means or work in the interest of its members"[60]. Cooperatives have been finally classified as commercial companies and treated as such for tax purposes.

This approach does not fit with the nature of the cooperative. As societies, cooperatives must have the aim of sharing the profits made among their members. At that time, the profit referred only to the gain (direct patrimonial benefit). However, the cooperative society essentially aims to enable its members to make savings (indirect patrimonial benefit). By establishing the cooperative as a society, the legislator has implicitly extended the meaning of the profit motive to indirect patrimonial benefit[61]. Furthermore, the cooperative society differs from the classical society in which the members' own resources are used for the benefit of the society. In a cooperative society, the cooperators are key players in the society from an "economic" point of view, *i.e.*, the transactions concluded with the cooperative are more important than the participation in the capital of the society (principle of dual status)[62].

IV. The connections between tax and non-tax law, a major argument to demonstrate the obsolescence of the TLP/CT system

16. Plan. As we have already mentioned, an Act of 17 March 2019 aims to ensure "tax neutrality" of the CCA. We doubt that a substantial reform of the law on legal persons, such as the CCA, can be neutral with regard to the income taxation system of legal persons. Two reasons, among others, can be referred in this respect: the premises underlying the income taxation system of legal persons in Belgium no longer exist since the Belgian legislator has created the conditions for a level playing field for the various economic players (including

[58] Art. 1st, al. 1st, of the Code of Companies according to which "A company is formed by a contract by which two or more persons put something in common, in order to carry out one or more specific activities and with the aim of obtaining for the members a direct or indirect patrimonial benefit". The particular case of social purpose companies (see *supra*, n° 2.) is provided for in al. 3: "In the cases provided for in this Code, the company deed may stipulate that the company is not formed with the aim of obtaining for the members a direct or indirect patrimonial benefit".

[59] See the opinion preceding a judgment of the Brussels Court of Appeal of 26 December 1931, *J.P.D.F.*, 1932, p. 99.

[60] See H. Culot and N. Tissot, "Le cadre juridique de la société coopérative et les perspectives d'avenir", in J.-A. Delcorde (dir.), *La société coopérative: Nouvelles évolutions*, Bruxelles, Larcier, 2018, pp. 11-45, esp. p. 13.

[61] This "broadening" of the concept of profit was promoted by the doctrine since the beginning of the 1950's but would only be enshrined in the legal texts in 1995.

[62] If the shareholders have another status, such as workers, customers or suppliers, they can be disinterested in this way without providing for a return on capital as such.

NPOs) (a). Moreover, the definition of a society has recently undergone substantial reform and it can no longer be considered that the purpose of a company is necessarily to share profits among its members (b).

17. (a). Economic law overhaul. The context in which the "TLP/CT" system was implemented and which underlay it no longer exists. Belgium has just undergone an overhaul of its economic law in three acts: firstly, the reform of insolvency law; secondly, the reform of business law; and thirdly, the CCA (see *supra*, n°3). This overhaul completes the process of relegating merchant law and merchant to the benefit of economic law and enterprise, a process that began several decades ago under the influence of European competition law[63]. The rules on insolvency law (bankruptcy and judicial reorganisation), market practices and the registration of companies are affected in particular, and NPOs are no longer excluded. In this context, as long as the NPO is subject to the same rules of play, there is nothing to prevent it from playing and therefore from carrying out any economic activity as long as it tends to pursue its purpose. The CCA follows this trend by abolishing the criterion of (authorised) activities to define the "legal speciality" of legal persons (see *supra*, n°5).

18. k (b). Evolution of the concept of a company. In the CCA, the definition of a company states that one of its purposes is to distribute or procure for its members a direct or indirect profit[64]. We are witnessing a conceptual revolution in the definition of the company which, in addition to the distribution of profits, may pursue a disinterested purpose like an association or a foundation. While some authors[65] consider that the new definition of the company could pave the way for the consecration of benefit corporations from any company under Belgian law, it should be noted that a benefit corporation (a hybrid structure established in several States of the United States) must necessarily pursue, in addition to the "normal" purposes, a general social purpose (a purpose to create a general public benefit) whereas *in situ* it is only a faculty.

The new CCA has established a system in which legal persons are distinguished, not on the basis of the activity carried out (the association, the foundation and the company may indiscriminately engage in the same activities), but by means of the purpose pursued (which is reflected, for the association and the foundation, in a constraint of non-distribution of patrimonial benefits, if any, to the members, founders, administrators or any other person except for the disinterested purpose determined by the articles of association); the "sanctuarisation of purpose" is enshrined in the law of legal persons.

[63] See on this subject A. Autenne and N. Thirion, "L'agent économique: Du commerçant à l'entreprise?", *op. cit.*; A. Autenne and N. Thirion, "Le Code de droit économique: Première évaluation critique", *J.T.*, 2014, pp. 706-711; N. Thirion, "Le Code de droit économique: Présentation générale", N. Thirion (ed.), *Le Code de droit économique: Principales innovations*, CUP, vol. 156, Bruxelles, Larcier, 2015, pp. 10-29; N. Thirion *et al.*, *Droit de l'entreprise*, *op. cit.*, pp. 248-255. See also N. Thirion, "Du droit commercial au droit de l'entreprise: Nouveau plaidoyer pour les faiseurs de systèmes", *Revue de la Faculté de droit de l'Université de Liège*, 2006/1-2, pp. 314-324.

[64] Art.1:1 of the CCA.

[65] See A. François and M. Veheyden, « Ceci n'est pas une société ? Premières réflexions relatives au but lucratif à l'aune du Code des sociétés et des associations » in R. Jafferali *et al.* (dir.), *Entre tradition et pragmatisme*, 1e édition, Bruxelles, Larcier, 2021, pp. 1149-1178, esp. n° 11, p. 1156 and footnote (34).

19. Outdated tax law and call for reform. In the light of the above developments, several questions arise: what room is left for a system of taxation designed to regulate the unfair commercial practices of non-profit organisations? What room is left for a Belgian tax system that considers that the society is necessarily set up with a view to sharing profits among its members? What room is there for an income taxation system that focuses on the activity carried out rather than the purpose pursued (see *supra*, n° 14 *v.* n° 18), without any connection to the evolution of the law of legal persons and, more broadly, of all economic law?

A wide-ranging reflection aimed at reforming the income taxation system is greatly needed. This process has become essential since the introduction of the CCA.

V. Connections between tax and non-tax law, data to bear in mind to improve the system

"In a world managed as a set of quantifiable resources, equality cannot be thought of as anything other than undifferentiation, and difference as discrimination." [66]

20. Discourse of supra- and international institutions in favour of cooperatives and social entrepreneurship. If the obsolescence of the current Belgian tax system is an obvious fact, giving a specific orientation of what it should be in the future is certainly a value judgment, depending on a political choice. However, we observe that several supranational institutions promote cooperatives or cooperatives as social enterprises. The European Union and the Organisation for Economic Co-operation and Development (or OECD) share the objective of building more inclusive economies and societies. Social enterprises, by combining the creation of economic value with the achievement of social objectives, are expected to play a key role in achieving this goal and should therefore be encouraged, including through national schemes.

21. The role of law and, in particular, tax law in promoting social entrepreneurship. For cooperatives, as for social enterprises, the establishment of an appropriate legal framework is considered essential for their development - and thus their promotion[67]. In its Communication of 23 February 2004, the European Commission mentioned that the introduction of a special tax treatment for cooperatives could be appropriate to take into account the restrictions and constraints cooperatives face[68]. Therefore, in order to promote their development and sustainability, social enterprises should not be taxed in the same way as commercial

[66] Free translation of "Dans un monde géré comme un ensemble de ressources quantifiables, l'égalité ne peut en effet être pensée autrement que comme une indifférenciation, et la différence comme une discrimination", A. Supiot, *L'esprit de Philadelphie, La justice sociale face au marché total*, Seuil, Paris, 2010, p. 99.

[67] See notably European Commission/OECD, *Synthèse sur l'entrepreneuriat social. L'activité entrepreneuriale en Europe*, 2013, p. 8; Commission européenne, *Économie sociale et entrepreneuriat social - Guide de l'Europe sociale*, vol. 4, 2013, p. 95.

[68] Communication from the Commission to the Council and the European Parliament, the European Economic and Social Committee and the Committee of Regions on the promotion of co-operative societies in Europe of 23 February 2004 (COM/2004/0018 final), n° 3.2.6.

enterprises, as such a tax burden could, in the long run, threaten their viability[69]. The establishment of an attractive tax policy for social entrepreneurship is thus one of the essential components of an appropriate legal framework, according to supranational institutions. An appropriate tax framework is not a reality in Belgium. A social enterprise under Belgian law is necessarily subject to either TLP or CT (see *supra*, n° 6).

22. Need to focus on direct taxation for institutional reasons. In response to the call from these authorities, given the significant harmonisation of indirect taxation at the European level, the income taxation system for social enterprises should be targeted, since in principle a Member State of the European Union is free to define its income taxation system. In order to implement this appropriate framework, giving a prominent place to the taxpayer's purpose (and, in particular, to the allocation of income) is a possible way forward[70]. Such an evolution would require a real paradigm shift: it is no longer the realisation of profits that should determine the taxation regime but the allocation of these profits. Moreover, such a system would be in line with the reform introduced by the CCA, in a way "reconciling" tax and non-tax law.

23. Freedom for Member States of the European Union to spread the tax burden as they see fit, but exercise this competence in accordance with Union law (including State Aid rules): specific tax treatment admissible for specific enterprises. Although the Belgian legislator has, in principle, a great deal of freedom in designing its income tax system, it must nevertheless act in a way that is consistent with European Union law[71]. This consistency is verified in particular by checking that new tax aid is compatible with the proper functioning of the internal market. Only selective aid can be considered problematic and it appears, in this respect, that a measure is selective when it can be perceived as discriminatory[72]. Discrimination arises in situations which entail either a difference in treatment between comparable situations or an identity of treatment between essentially different situations[73].

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[69] See notably OECD, *Favoriser le développement des entreprises sociales: Recueil de bonnes pratiques*, 2017. Concerning social enterprises, we note in particular the Social Business Initiative of the European Commission of 25 October 2011 (COM (2011) 682 final).

[70] Given that social enterprises are distinguished less by the activity they carry out than by their purpose, this is an option that could, in our view, be favoured.

[71] See CJEU, 4 October 1991, C-246/89, *Commission/Royaume-Uni*, p. I-*04585*, point 12; CJEU, 14 February 1995, C-279/93, *Finanzamt Köln-Altstadt c. Roland Schumacker*, p. I-225, point 21; T.P.I.C.E., 27 January 1998, T-67/94, *Ladbroke Racing Ltd c. Commission*, *rec.*, p. II-1, point 54; CJEU, 13 December 2005, C-446/03, *Marks & Spencer*, *rec.*, p. I-10837, point 29.

[72] See notably P. Rossi, "The *Paint Graphos* case: A comparability approach to fiscal aid", in D. Weber and G. Maisto (eds.), *EU income tax law: Issues for the years ahead*, Amsterdam, IBFD, 2013, pp. 123-137, esp. p. 128: "The State aid nature of a tax preference is therefore established when different tax rules are applied to different companies within the same tax system, similarly to a tax discrimination at the base of a potential infringement of the Treaty fundamental freedoms"; R. Szudoczky, "Selectivity, derogations, comparison: How to put together the pieces of the puzzle in the State aid review of national tax measures", in D. Weber and G. Maisto (eds.), *op. cit.*, pp. 163-196, esp. p. 167; opinion of Advocate General Wathelet delivered on 28 July 2016 for Joined Cases C-20/15 and C-21/15, European Commission *v.* World Duty Free Group, formerly Autogrill España SA (C-20/15 P), Banco Santander SA, Santusa Holding SL (C-21/15P), note (58): "the concept of selectivity is comparable to that of discrimination".

[73] See CJEU, 17 July 1963, *République italienne c. Commission*, 13/63, *rec.*, 1963, p. 337 (see esp. p. 360). See also CJEU, 27 September 1979, *Eridania*, 230/78, *rec.*, 1979, p. 2749 (points 18 and 19); P. Rossi, "The *Paint Graphos* case: A comparability approach to fiscal aid", in D. Weber and G. Maisto (eds.), *EU income tax law: Issues for the years ahead*, Amsterdam, IBFD, 2013, pp. 123-137, esp. p. 129: "under Union Law, the prohibition of discrimination has a substantive meaning and does not only require equal treatment to be complied with but also that no inequality is caused in practice by treating in the same way situations that are different".

It seems essential to highlight the specificity of the "cooperative" or, where relevant, "social enterprise" taxpayer in relation to other taxpayers in order to implement a specific tax framework.

On the occasion of the *Paint Graphos* case[74], the Court of Justice of the European Union decided that a differentiated (and possibly more favourable) tax treatment of Italian cooperatives could be compatible with State Aid rules. This differentiated treatment would not constitute preferential treatment, but rather the recognition of the structural diversity of cooperatives compared to other companies. It should be noted that, in its judgment, the Court highlighted the specificity of cooperative societies, *i.e.*, their particular operating principles, based on Regulation nr. 1435/2003 on the Statute for a European Cooperative Society and the **Communication from the Commission on the promotion of co-operative societies in Europe** of 2004[75].

However, in the final analysis, it is up to the (national) referring court to verify, according to the criteria set out by the Court, whether the cooperative societies in question (producers' and workers' cooperatives) are in fact in a comparable situation to that of other operators in the form of profit-making legal entities. The establishment of a binding legal framework appears to be essential to guarantee the credibility of cooperatives/social enterprises. Moreover, the identification and guarantee of their specificity would clearly condition the validity of an appropriate fiscal framework in the light of the European State Aid rules[76].

Conclusion

24. The particular nature of the cooperative society has never been properly reflected in Belgian law. The cooperative society has always been considered the same as any "classical" company in Belgian law. The CCA does not constitute a revolution despite some cosmetic changes.

A cooperative society is subject to either CT or TLP under Belgian law. These two taxes differ in many ways (tax base, tax rate and levying method). Quite logically at the end, the cooperative specificity is not taken into account for tax purposes: the cooperative society is above all a society; a society is considered as entirely dedicated to the realisation and sharing of profits. In contradiction with the system of determination of the applicable tax ("TLP/CT") which is based primarily on the activities that are carried out, CT automatically applies if it is statutorily possible to distribute profits. There are few measures which only accredited cooperatives can benefit from (see *supra*, n°11).

[74] CJEU, 8 September 2011, C-78/08 - C-80/08, *Paint Graphos e.a.*, *rec.*, p. I-7611.

[75] See A. Fici, "A European statute for social and solidarity-based enterprise", research paper requested by the European Parliament's Committee on Legal Affairs and commissioned, overseen and published by the Policy Department for Citizens' Rights and Constitutional Affairs, February 2017, footnote (26), p. 14; A. Fici, "Recognition and legal forms of social enterprise in Europe: A critical analysis from a comparative law perspective", *Euricse Working Papers*, n° 2015/82, pp. 11-12 ; A. Fici, La sociedad cooperativa europea: Cuestiones y perspectivas, in 25 CIRIEC-España, *Revista Jurídica de Economía Social y Cooperativa*, 69 ff. and, in particular, 79 ff. (2014).

[76] A. Fici, "Recognition and legal forms of social enterprise in Europe: A critical analysis from a comparative law perspective", *op. cit.*, p. 12: "The Italian example of the law on social cooperatives sufficiently demonstrates the importance of specific legislation on social enterprise for the latter's promotion and development, especially when substantive rules are coupled with policy measures, especially of a fiscal nature")

The genealogy of the connections between tax law and non-tax law shows, among other things, the great influence of the law of legal persons on the income taxation system: the "TLP/CT" system has been implemented to regulate the economic activity of "mixed" NPOs; secondly, the automatic CT liability of companies stems from the concept of a conventional company to which the cooperative society is assimilated despite its nature.

The Act of 17 March 2019 aims to ensure the tax neutrality of the CCA. However, the context in which the "TLP/CT" system was created and on which it is based no longer exists: the three-stage overhaul of economic law completes the process of relegating merchant law and merchant to the benefit of economic law and enterprise, which began several decades ago under the influence of European competition law. In this context, we note in particular the creation of a level playing field for all economic players and the opportunity for any Belgian company to become a benefit corporation. Given the connections between tax law and non-tax law *in casu*, to ensure the global coherence of the legal system, is tax neutrality really a possible option? Is it possible to ensure the stability of a building by removing its foundations?

According to the discourse of the international institutions, cooperatives and cooperatives under the broader "umbrella" of social enterprises should not be taxed in the same way as commercial enterprises, as such a tax burden could, in the long term, threaten their viability. If the Belgian legislator wanted to respond favourably to the call from international institutions, it would obviously have to consider these economic actors differently; for example, by giving a prominent place to the taxpayer's purpose (and, in particular, to the allocation of income). Such an evolution would require a real paradigm shift: it is no longer the realisation of profits that should determine the taxation regime but the allocation of these profits.

In order to implement such a fiscal framework, and whatever option is retained, it appears necessary to identify, first of all, what makes cooperatives/social enterprises specific. Only then can their credibility be guaranteed and only then can an attractive specific tax policy be accepted. Could the legal frameworks offered by the CCA be used? Given the guidelines that have been followed, it is doubtful.

More fundamentally, from the perspective of fostering cooperatives or social enterprises, is it relevant to think about legal frameworks and the tax system separately? A study on recent developments in the social economy in the European Union has highlighted a circular phenomenon that should not be overlooked: as mentioned above (see *supra*, n° 23), if we want to put in place specific public policies for social enterprises (including cooperatives), we must first identify the target of the measures to be taken and thus define social entrepreneurship[77]. On the other hand, if the framework only serves institutional recognition by means of statutes or legal frameworks, the progress in terms of promoting social

[77] CIRIEC, "Recent evolutions of the social economy in the European Union", study commissioned by the European Economic and Social Committee (EESC), 2017, p. 38 *et seq*.; this paper is available through the following link: https://www.eesc.europa.eu/sites/default/files/files/qe-04-17-876-en-n.pdf).

entrepreneurship (or cooperatives) may appear marginal and this may weaken the legal framing process[78]. In other words, if it does not seem possible to envisage a viable targeted public policy without a framework, it seems just as unwise to create frameworks without thinking about the public policies that should mobilise them. Like their history, the fates of tax law and the law of legal persons appear to be linked.

[78] *Ibid.*, p. 51.