

APPLYING PECOL IN THE CURRENT BRAZILIAN REGULATION OF FINANCIAL COOPERATIVES - CHALLENGES OF THE EQUALIZATION BETWEEN EFFICIENCY AND IDENTITY¹

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Summary: Introduction. 1. Brief considerations on the regulatory environment of financial cooperatives in Brazil. 2. Applying PECOL in the current Brazilian regulation of financial cooperatives. 2.1. The specific legal framework of financial cooperatives. 2.2. Cooperative audit - Resolution CMN n° 4.454/2016. 2.3. About Resolution CMN n° 4.538/2016 – Succession policy. 2.4. Some innovations from Resolution CMN n° 4.434/2015. 3. The structuring tendencies of the national cooperative credit system between efficiency and cooperative identity. 4. Final considerations. 5. Bibliography.

Abstract: With the objective of investigating the risks of possible imbalances between the requirements of economic efficiency and preservation of identity, the article analyzes aspects of the normative regulation of financial cooperatives specifically from the perspective of the “Principles of European Cooperative Law (PECOL)” as a strategy against the phenomenon of the “companionisation” of financial cooperatives.

Key words: Cooperative identity. Financial cooperatives. Regulation. Principles of European Cooperative Law.

Introduction

Based on the “Principles of European Cooperative Law (PECOL)”³, the overall purpose of this research is to conduct a critical analysis of financial cooperative structuring trends from the Brazilian regulatory framework of 2009 to the normative acts of 2017. As specific objectives, it is intended to highlight current practices and regulatory standards that challenge or conform to the application of the

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³ Study Group on European Cooperative Law (SGECOL), Draft Principles of European Cooperative Law (draft PECOL), May 2015. Available at <http://www.euricse.eu/wp-content/uploads/2015/04/PECOL-May-2015.pdf>. Accessed on June 5, 2017.

PECOL to protect the cooperative identity without compromising the socioeconomic efficiency and competitiveness of these enterprises.

The research considers that the PECOL are related to the establishment of an adequate legal regime that preserves the cooperative identity, but that they should not be confused with the structural elements of the typical model that they intend to protect. The research proposes that these elements belong to the world of facts, therefore, instead of being stated, they must be verified in the cooperative historicity, avoiding idealizations. The abstractions would serve to correlate these elements with the principles that govern them and, thus, eventually, contribute to the formulation of a regulation adjustment method. It will also be fundamental to consider that efficiency in cooperatives does not entail segregating its economic and social dimensions.

When we use the expression regulation, we are not referring to norms or legislation in general, but to the exercise of the state function of intervention in the economy through regulation. On the normative level, regulation innovates Law on economic agents in different market sectors through acts carried out by the Public Administration, without the legislative process. In fact, the regulatory function is exercised, besides the acts of normative regulation, through acts of judicial and executive regulation.

The demonstrations will be done through the deductive method and the bibliographic research.

1. Brief considerations on the regulatory environment of financial cooperatives in Brazil

Since 2009, the sectorial regulation of the financial market has entered a new phase. There are several innovations to be analyzed. The scope of the activity of credit cooperatives in general begins to be expanded, so that they have greater participation in the Brazilian financial market.

Naturally, regulation should consider the right of consumers of financial services to form their cooperatives. However, regulatory innovations have been justified by broader socioeconomic interests. Among these reasons is the search for greater economic efficiency, greater scale of operations, reduction of costs of financial intermediation. We also highlight the justification for greater access of financial services to the Brazilian population, socio-environmental sustainability, the ability of cooperatives to promote local development and reduce inequalities. These justifications for altering the regulatory policy were expressly stated, for example, by the Director of Standards and Organization of the Financial System of the Central Bank of Brazil, who later became president of the institution. In addition, the new regulation aims to avoid the misuse of cooperative purposes, damage to the reputation of the cooperative model and setbacks in its regulation (MELO SOBRINHO; TOMBINI, 2010, p. 244-249). These three objectives may highlight an awareness of the regulator regarding the need to preserve the identity of cooperatives.

In order to fulfill the objective of this article, we have selected, up to the date of its elaboration, only the rules that seem to have a substantial impact on cooperative identity as related to the objective of this article: to correlate Brazilian regulation with PECOL. We limit the analysis to the following normative set.

Brazil is among the countries that have a constitutional foundation for cooperativism, especially since the democratic environment reestablished in 1988. The Federal Constitution promulgated at that

time affirms parameters that bind the State to a public policy which is quite clear, but still little respected. It is possible to identify the strong relation between these constitutional vectors and fundamental rights.

Article 5, XVIII states, under the economic perspective, the freedom of constitution and operation of cooperatives and prohibits, in the form of the law, state interference. A very traditional publication of Brazilian Economic Law, authored by a former Federal Supreme Court (STF) Minister, affirms the "free cooperative initiative" as one of the different manifestations of the Free Initiative. Therefore, this form of economic activity must be subject to the same regime of freedom recognized to other forms of insertion in the market, such as capitalist enterprise (GRAU, 2015, P. 199-201). It is originally the right of individuals, as workers or consumers, to fulfill their aspirations in the field of work and consumption, through a company of their own.

Article 146, III, "c" recognizes that the taxation of cooperatives must be compatible with the way in which they carry on economic activity. In recognizing the need for an adapted tax regime, the Constitution of the Federative Republic of Brazil (CF), shows that the State is obliged to exercise an isonomic treatment for cooperatives. That means, of course, that they will have a legal regime compatible with their intrinsic differences and will have indistinct treatment in what equates with capitalist enterprise or other forms. We are in the field of the fundamental right of equality. Rather than representing a violation of equal treatment, it is a guideline of respect for the proper form of cooperatives that rightly respects the fundamental right to equality (TORRES, 2013, p. 1603).

The Constitution also imposes on the legislator, in article 174, §2, a positive induction. This parameter is observed in different constitutional texts of different countries. Considering the vocation of cooperatives to produce better levels of sustainable socioeconomic development, it should be in the interest of the State to foster cooperative activity. This order of support and encouragement to cooperatives is justified by the alignment between the purpose of the cooperatives, the objectives of the Brazilian constitutional economic order and the objectives and foundations of the Republic itself (GAUDIO, 2016, p. 519-544).

These three rules seem to be the constitutional vectors of Brazilian cooperativism that establish the parameters within which the regulation of this model of activity must be established. They bind the state to a regulatory treatment that ensures freedom, isonomic (congruent) treatment and incentive to cooperatives (MEINEN; GAUDIO, 2015, p. 140-146).

Besides these main parameters, the constitution also has other guidelines to the cooperative activity. We should highlight the one that concerns financial cooperatives. Article 192 expressly recognizes that cooperatives are part of the national financial system. The new wording was given to the article in 2003, following a constitutional amendment. Of course, such recognition is linked to the general parameters explained above, but it shows its specific application to financial cooperatives. If cooperatives should have free access to any market, it may seem obvious that they can and should integrate Brazil's financial system. However, this norm has an important pedagogical role for the regulatory authority, because even after 1988, when the current Constitution was enacted, the regulation exerted a strong and unconstitutional restriction on the creation and operation of cooperatives in that market.

These are the Brazilian constitutional parameters for the regulation of credit cooperatives. We indicate below the infra-constitutional structure of this market for cooperatives today.

The main laws that affect cooperatives in this sector are the Federal Laws No. 4.595 of 1964 (establishes the National Financial System), No. 5.764 of 1971 (General Law on Cooperatives) and Complementary Law No. 130 of 2009 (establishing the system of national credit cooperatives).

In addition to these laws in the strict sense, derived from the ordinary legislative process, the regulation is carried out in a more dynamic, fast and impactful way through acts of normative regulation, produced by the state authority of the National Financial System (CMN).

The following CMN Resolutions will be analyzed from the PECOL perspective (CMN, 2017):

- n° 4.434/2015 – Criteria for authorization and operation of credit cooperatives;
- n° 4.454/2016 – Cooperative audit;
- n° 4.538/2016 – Succession policy for administrators of financial institutions.

This normative framework allows us to put forward some general considerations about the regulatory environment for these cooperatives.

Even after the parameters established by the Federal Constitution, enacted in 1988, credit cooperatives went through a substantial period of unconstitutional treatment. Instead of allowing cooperatives to operate in any location and for any membership base, it is considered that from 1960 to 1992, that the existence of financial cooperatives was greatly discouraged by Brazilian regulation (MEINEN, 2014, p. 117).

The Complementary Law 130, published on April 17 2009, that regulates the National Cooperative Credit System, is considered a new regulatory framework for financial cooperatives. Finally, the Brazilian legal system and the regulatory action of the State related to cooperative activity begin to be compatible with the guidelines of the 1988 Constitution of the Federative Republic of Brazil regarding cooperative activity, especially about freedom of association and promotion of cooperatives. (PINHO; PALHARES, 2010, p. 33).

It took more than twenty years of validity of Brazilian constitution for the free cooperative initiative to affect the regulation of the financial market. Before that, in general terms, only cooperatives open to the public could be run, limited to small localities, providing financial services to populations and markets that are less attractive to banks. In municipalities with more inhabitants, cooperatives of class groups or industries should be formed.

Particularly from 2015, with the advent of Resolution 4.434 of CMN it became possible to create so-called free-admission credit cooperatives, open to the general public, regardless of the number of inhabitants in the region. The criteria of classification and regulation of financial cooperatives operations no longer concerns the profile of their membership. It now adopts the type of operations they undertake as a parameter for their regulation, operation and supervision. The level of requirements, guarantees and controls is increased according to the type of financial service offered, its complexity, volume and risks.

At this point, the freedom to engage in any economic activity, also prescribed by the very first PECOL (1.1.1), seems to have finally been approved by Brazilian regulation. However, there are indications of possible new contradictions between the current regulatory trend and the PECOL, which could move financial cooperatives away from cooperative identity and bring them closer to companies.

In fact, the new regulatory environment aims to strengthen cooperatives in this market, opening the field so that they can operate where any bank can operate. There is much less restriction of activity by the corporative model. However, when the necessary opening to growth and free competition is initiated, the pressures for the “companization” of cooperative enterprise increases.

We have selected some reflections among the several others that are certainly possible on the current regulatory environment of financial cooperatives. These issues are related to the old and recurrent

dilemma that presents itself when cooperatives are stimulated or intended to grow: the problem of identity preservation, the cyclical focus of ICA's (International Co-operative Alliance) concern and of numerous authors in cooperative doctrine.

2. Applying the PECOL in the current Brazilian regulation of financial cooperatives

According to PECOL 1.2.3, cooperative legislation and the social statutes of cooperatives are a primary source of the legal regime of cooperatives and may be supplemented by generic legislation as long as it is not in conflict with the nature of cooperatives. What is perceived nowadays is the regulatory authority's aim to produce sectorized rules of the financial market already adapted and directed specifically to the cooperative activity. These are cooperative legislation at the infra-legal level, produced through administrative acts of normative sectoral cooperative regulation.

2.1 The specific legal framework of financial cooperatives

The new environment in which the current sectoral regulation of cooperative financial activity is established is especially made possible by Complementary Law 130 of 2009 (LC 130), considered as the legal framework of credit cooperatives. Among other innovations, the main changes in the regulation of cooperative financial institutions since this law are related to a greater openness to the market. This law and CMN resolutions specifically addressed to cooperatives show normative adaptations to protect in a compatible manner the very way in which cooperatives carry out the financial activity.

Co-operatives have been able to admit the majority of types of legal entities into their membership. Companies whose activities compete with cooperatives are excluded from this possibility, for example. In any case, this allowed expansion to the public of membership by a cooperative's statute still depends on the approval of the Central Bank of Brazil. There has been an alignment between the Brazilian law and the main criterion established by PECOL 1.3.2 and 1.3.3 for admission of the members of the cooperatives: that they are interested in the pursuit of the cooperative's objectives, even if they do not participate in direct execution of the corporate purpose of the society in the simultaneous condition of owners and consumers, suppliers or workers.

This law also establishes the possibility for boards of directors to hire executive boards - market professionals, not elected by the assembly. The Board of Directors remains with its deliberative and strategic functions. The Executive Board with executive functions, reporting to the board. Section 2.5 of the PECOL recognizes that the expansion of the complexity of the cooperative enterprise structure is favored by the segregation between the functions of representation and supervision of executive functions. Contrary to violating any precept of democratic control, such structuring facilitates the organization of the cooperative, in addition to producing greater possibilities for professionalization, good governance, development and sustainability (SERVIÇO NACIONAL DE APRENDIZAGEM DO COOPERATIVISMO, 2016, p. 84-100).

The law states that surpluses cannot be distributed in proportion to the share capital, but only in proportion to the financial transactions of the members. In this regard, the 2009 law is also in line with the PECOL (Section 3.6).

However, in financial cooperatives capital represents an important element to counteract the operations of cooperatives, causing their payment to be fomented in different ways, varying according to different operational strategies. This means that the contribution of shareholders to social capital is not

usually equitable. Although PECOL 3.3.2 foresees a differentiated contribution by the members, the particularity of these cooperatives justifies a mitigation of PECOL 3.3.7, since it authorizes the partial withdrawal of capital without the member withdrawing from the cooperative.

In any case, even for the safety of operations, the rule established in the general cooperatives law of 1971, which limits the concentration of capital by the shareholder to 1/3, is preserved. PECOL 3.3.4 is therefore observed which limits that a member has a percentage of capital higher than the maximum established by the statutes or the law.

Under the 2009 law of financial cooperatives access to the data of the singular cooperatives by central or confederations, among other entities of the segment, are expressly allowed. The objective is to make possible the supervision, audit, control and execution of operational functions of credit cooperatives through cooperative credit systems. The law expressly states that the sharing of financial information with second and third degree cooperatives does not constitute a breach of the duty of secrecy on the operations of members of the first degree cooperative.

The general Brazilian cooperative law of 1971 already provided for the possibility of vertical and horizontal integration of cooperatives into systems (or networks), which include cooperatives of first (singular), second (central or federation) and third (confederation) degree. This same law allows cooperatives to have corporate participation and control over other kinds of societies to better fulfill their objectives. Considering this purpose, which should guide these shareholdings, there is no harm to the cooperative identity. In fact, PECOL 1.1.3 also provides for this.

The 2009 law, in establishing the structure of the national cooperative credit system, formally affirms that horizontally and vertically integrated cooperatives form part of this system, as well as cooperative banks, which are joint-stock companies controlled by cooperatives. This framework law also reinforces the important role of cooperative centers and confederations in the organization, in common agreement and on a larger scale, of economic and assistance services of interest to affiliates, integrating and guiding their activities, as well as facilitating the reciprocal utilization of services.

In addition to this law, the specialized audit in financial cooperatives is the subject of a specific regulatory act that we will analyze.

2.2 Cooperative audit - Resolution CMN n° 4.454/2016

In 2016, regulation began to require that a specialized audit on credit cooperatives operations is carried out at least annually. It is required that the auditing entity is previously accredited by the Central Bank of Brazil. The measure corresponds to Chapter IV of the PECOL. However, Brazilian regulation is still mainly associated with the analysis of operations, under a performance and risk approach of the financial activity itself (article 3° of the Resolution). The focus is on the economic and financial security of the activity. Aspects of regularity of corporate relations, preservation of identity, recommended by PECOL 4.1.2 and 4.1.2.4, or fulfillment of the purpose of cooperatives, one of the most important parameters to ensure the identity of cooperatives required by PECOL 1.1.1 and 1.1.2 are not addressed. This is not an audit with the scope of PECOL 4.2.1.

If, as we have seen, the regulatory authority declares the objective of preserving the characteristics of cooperatives, supervising the fulfillment of its purpose, and other elements that distinguish them from capitalist enterprises is essential.

Providing services to members through the exercise of an economic activity to improve their social and economic conditions vis-à-vis consumers or market workers is to say ontologically what the

purpose of cooperatives is (FRANK, 1973, p. 15-17). The problem is that the purpose of cooperatives is rarely known by non-cooperative sectors. It is more common for these sectors to recognize easily what is not the purpose of these societies: the production and distribution of profits. This means a limited understanding that makes it difficult to perceive that cooperatives can be audited by verifying the achievement of the socioeconomic results that they must produce for their members. A good cooperative is one that is economically efficient for its members as consumers, suppliers or workers, according to PECOL 1.1.1.

In cooperatives, the search for economic efficiency is fundamental, but it is not a value in itself, especially if it is not recognized that it has an instrumental character to reach the socioeconomic result for the members and not for the cooperative itself. The fulfillment of the purpose of the cooperatives is the most tangible element of the identity, since it is related to the externalities that they must produce. By mere perception of third parties, it is not possible to identify that the consumer of a cooperative is also the owner of it. Other internal and intrinsic characteristics of cooperative identity are not perceived by others: existence of educational, technical and social assistance funds, democratic control, capital contributions, etc. For the different social sectors, the fulfillment of the purpose constitutes the external and perceptible face of the cooperative identity. When it is perceivable that the member of the cooperative is materially in a position of economic and social superiority in relation to the simple consumer of the market, the distinctive character of cooperatives is perceived by society.

The difficulty of distinguishing concretely and materially the cooperative consumer from the ordinary consumer is perhaps the greatest indication of cooperative “companisation”. The State, considering its declared objectives for the sector, must permanently improve the guarantees of efficient fulfillment of the purpose of financial cooperatives through regulation.

In this sense, the audit of financial cooperatives should contemplate the verification of the fulfillment of the purpose of the cooperatives, in addition to other structural elements⁴.

2.3 About Resolution CMN n° 4.538/2016– Succession policy

Since 2016 Resolution 4.538, which applies to financial institutions in general, now also applies to financial cooperatives. There are requirements of greater guarantees of technical training for senior management, as well as a succession policy that involves the preparation of successors and that has to be approved at a general meeting by the members. In this way, there will also be objectivity and transparency about the rules for competitors to elective positions.

The requirements of good governance are important for the good reputation and sustainability of cooperatives. Especially in segmented cooperatives, there is a greater risk of bad political influence in the life of the cooperative. Normally, segmented cooperatives are made up of groups from the same company or from some institution. These cooperatives tend to suffer greater political influence from companies,

⁴ In our preliminary researches, corroborated in an unsystematized way by the economic and legal doctrine of cooperativism, we identify three structuring facts of cooperative identity (GAUDIO, 2016. p 532-539). Principles derive from the observed facts of experience to establish a pattern of behavior consistent with these typical structures (MÜNKNER, 2015, p.1). So, cooperative principles integrate the normative dimension of cooperative identity (FICI, 2012, p. 8) and do not constitute the concrete facts characterizing the empirical type. Whether or not they are introduced into the positive law of different countries, whether or not they have a rule of law, are related to the observance of certain rules that preserve the elements what characterizes the model, whether they are the self-imposed principles by the members of the cooperative (Rochdale Pioneers, HOLYOAKE, 1933), whether they are the revisited Principles advocated by ICA, the PECOL or principles envisaged by law, they are part of the cooperative identity in its normative dimension.

class organs, and local politicians. Often, these cooperatives depend on the good relationship and the politics of the organs or municipalities in which their membership is linked. This influence is often reflected in the choice of less skilled managers, in the occupation of the cooperative as a political trench, in the increase or decrease of support to the cooperative, in the pressures on the credit criteria. All this puts at risk the activity of the cooperative. Therefore, the requirements of training, qualification and succession serve to increase sustainability, the guarantees of professional management, the continuity of cooperatives, but also to mitigate the negative effects of political influences. Although it is an element of good governance, it means increased costs for any financial cooperatives, including segmented and small ones.

Thus, a balanced degree of governance requirements, while representing some increase in the costs of the operation, tend to produce more benefits than problems, as well as avoiding criticism of lack of organization or amateurism against cooperatives.

By requiring succession policy to be approved, publicized and planned in cooperatives and its members to be qualified for succession, the standard reinforces the membership rights provided for in Section 2.3 of the PECOL. In addition, it extends the requirement for access to information and transparency always recommended in the PECOL, such as items Sections 2.3.4.a, d; 2.3.5.a; 2.5.7.e; 2.6.1; 2.6.3.

2.4 Some innovations from Resolution CMN n° 4.434/2015

Currently, the main regulatory norm of Complementary Law 130/2009 is Resolution 4.434/2015. Some new points seem more relevant to the present study:

- The increased general requirements for constitution and authorization of operation of cooperatives;
- the new classification criterion for cooperatives about their operation and regulation (innovation commented on in item 1);
- the increase in transaction costs and entry barriers of new cooperatives in the market - through new limits of equity and capital; of controls, reserves and provisions, of more sophisticated governance;
- the improvement of the rules of governance, by increasing the requirements of professionalization of administration and segregation between deliberative bodies and executive bodies;
- the discouragement of the continuity of cooperatives not affiliated to cooperative credit systems and the strengthening of the importance of affiliation to these systems.

For the constitution of a new financial cooperative a high number of requirements must be satisfied (Article 6). However, if the cooperative under constitution previously opts to join a system, it will be exempt from such obligations.

Among other requirements, a comprehensive and detailed business plan, including:

(a) a financial plan that demonstrates feasibility (economic and project premises, projections of activities, etc.).

(b) a marketing plan with numerous elements to be demonstrated, such as strategic objectives, intended area of action, strategies for effective membership, main products and services, etc.

(c) a detailed operational plan, which includes the physical structure, governance, organization, profile of members, technologies, internal control structure, supervision, internal and external audit, risk management structure, demand estimation, etc.

The group of founders should decide whether or not the new cooperative intends to join a central cooperative of a cooperative credit system. There are greater guarantees against the insolvency and liquidation of a cooperative that is affiliated with a system. Central cooperatives monitor the activity of singles, facilitating the supervision by the Central Bank, as well as providing specific funds to guarantee operations, rationalize costs and increase revenue opportunities. The existing structure in the central cooperatives also presupposes and exempts that the new cooperative also presents a technical person who demonstrates effective knowledge about the business and the market where it will be inserted (Article 4).

In addition, the central cooperatives and confederations will carry out the monitoring and supervision of the first-degree cooperatives, rationalizing state supervision through central control. These factors, among others, make the regulatory authority prefer and encourage cooperatives to be part of systems.

In fact, there are several facilities and cost reductions for entry into the market for groups wishing to form cooperatives already linked to a system. One of these advantages is the exemption from prior inspection of the existence of the entire complex organizational structure provided for in the business plan.

All this analysis will be done by the regulatory authority of the Central Bank of Brazil before the formalization of the constitutive acts of the new cooperatives will be authorized.

As observed, the initial requirements and costs tend to constitute an effective barrier to entry for cooperatives, even for those that wish to serve small groups or localities and that offer fewer risks to the financial market or to consumers.

An important point for the analysis should be the above-mentioned change of classification and regulation criteria. From this resolution, the rules of operation and supervision of cooperatives of first degree will not use as a criterion the segment of people who will participate in its membership. In principle, any public could be admitted as a member of the cooperatives. The by-laws should establish the criteria for membership. The business plan must be compatible with this option.

The new criterion classifies credit cooperatives according to their operations, as (a) capital and loan, (b) classic, and (c) full cooperatives.

The first type will carry out the smallest scope of financial operations, of lower risk and complexity. "Full" cooperatives will be able to carry out a greater number of different operations. The broader the spectrum of operations, the greater the risks and so the requirements on business structure, controls, guarantees, provisions, professionalization, corporate management segregation.

From that resolution of 2015, as mentioned, the constitutional parameter of freedom of association and constitution of cooperatives scheduled since 1988 seems finally to be fulfilled. The State no longer classifies, limits and regulates cooperatives by restricting the public that may become a member.

Considering this, the established standards based on the new criteria will regulate: (a) any existing credit cooperatives and those that will be created, (b) all credit cooperatives that are open to the public, as well as those which remain segmented, (c) all cooperatives affiliated or not affiliated to a cooperative credit system.

Regardless of the class, cooperatives have begun to be submitted to a higher level of requirements. Each of the three resolutions selected for analysis in this article increases the transaction costs of cooperatives.

However, for cooperatives that are accepted at a central cooperative and become part of a cooperative credit system, these transaction costs are rather diluted.

These systems focus on a number of services for cooperatives, such as human resources, accounting, auditing, marketing, technical advice, brand sharing, know-how, data processing and technology platforms that integrate product and service management, internet banking, automated risk management, among others.

In addition to cost rationalization, one of the main advantages is access to a broad portfolio of products and services to be offered to members of cooperatives, which can generate numerous revenues in addition to those arising from loans and financial investments.

On the one hand, regulation has greatly aggravated the costs and operating requirements of cooperatives, but, on the other hand, the admission of cooperatives into cooperative credit systems has leveraged their activities in economic efficiency and competitiveness.

Central cooperatives gain a lot of power in new regulation, because they decide whether or not to join a cooperative that is unique to the cooperative credit system that provides so many advantages in terms of economic efficiency, business structure, products, services and revenues. They are also the ones who, in practice, decide whether or not a new cooperative will be constituted, since entry barriers for non-systemic cooperatives are aggressively greater.

Regarding governance rules, the Central Bank of Brazil began to enforce the setting of proper remuneration for members of a statutory body. The idea is to foster professionalization and dedication of leaders. The Resolution is more explicit regarding the competences of organs, avoiding reasons for the omission of liability.

Minimum requirements for structure and organization are extended. The possibility of management segregation between strategic-deliberative body (board of directors) and executive body (executive board) is provided. However, full segregation is mandatory in “full cooperatives”, as well as in “classic cooperatives” that own more than R\$ 50 million on average total assets.

The absence of affiliation must be justified and it must be demonstrated that it will be possible to act without membership in a central body. For these cooperatives, among the requirements for constitution is the presentation to the Central Bank of an executive summary of the business plan, as well as technical interviews with future leaders. If this preliminary phase is exceeded, only then will they begin to prepare the constitution process to submit to the body, with an extensive number of requirements. It includes a meticulous business plan (financial, marketing and operational plan), in addition to the minutes of constitutive acts. In short, the cooperative would have to demonstrate how it would function without centralizing services offered from central cooperatives (auditing, accounting, ombudsman, internet banking, bank account management systems, human resources, etc). If the cooperative is not affiliated with a central cooperative, the minimum capital and shareholders' equity limits are substantially higher.

At the same time that the costs of joining new cooperatives have been greatly increased, the supervisory authority has no interest in increasing the number of entities to be audited in that market. Given the possibility of creating cooperatives open to the public, central cooperatives tend to have an interest in keeping a smaller number of cooperatives to be served, since they would not need a larger number of cooperatives to increase the volume of operations. Segmented cooperatives became less interesting. In addition, the smaller number of affiliates makes it easier to maintain established power

structures and translates into a smaller number of cooperatives to be served by the services to be provided. They have fewer affiliates to audit, less accounting and bookkeeping to perform, fewer political actors needing contingencies provisions, etc. On the other hand, with fewer affiliates, each cooperative tends to assume a higher apportionment of the operation costs of the central. This represents less economic efficiency.

The problem worsens as with transaction costs, operational requirements and higher entry barriers it is increasingly important that cooperatives, segmented or not, can join the central, rationalizing costs and gaining service capacity. Central cooperatives gain the power to make smaller cooperatives unfeasible or to seek incorporations by other cooperatives, especially by open-source cooperatives.

In the context of freedom of constitution and freedom to organize and carry out any economic activity a rigid clause of the Brazilian Constitution (Article 5, XVIII) also evident in PECOL 1.1.1. deserves a closer analysis, given the new regulatory dynamics.

The same constitutional vector for cooperativism also prevents the State from interfering in the functioning of cooperatives in an inadequate manner, creating unjustified or artificial limitations that restrict the freedom of action. Certainly, justifications for the good technique of sectorial regulation can always be invoked as a legal argument for imposing restrictions. However, one of the possible criteria for benchmarking when operating interference is unconstitutional may be to verify whether there is a similar constraint on capitalist competitors.

This brief digression seems timely because of the possible barrier of entry that may be forming through the relationship between single cooperatives (not affiliated with a cooperative credit system) and central cooperatives. It so happens that these second-degree cooperatives are being absolutely strengthened by regulation.

If they are managed by managers of other cooperatives that already have cooperative credit systems, it is very probable that a conflict of interests will be established. It occurs that systemic cooperatives tend not to be interested in new cooperatives being formed or joining the system. If the current rule allows cooperatives to have any member of the public in their membership, for those who adopt the open cooperative model, the others will tend to be perceived as competing cooperatives. These leaders will have an interest in incorporating segmented cooperatives rather than allowing them to choose whether or not to join the system. More subtly than this, if such incorporation is not possible, they will prefer that these cooperatives be extinguished rather than admit them as competitors strengthened by the structure of cooperative credit systems.

Even a viable cooperative with great potential could be artificially prevented from joining a cooperative credit system. Certainly, if such conduits are supported by regulation, flagrantly unconstitutional state interference will be practiced indirectly by central cooperatives, which act in a challenge the pursuit of some illicit practice in the field of Antitrust Law, such as some of the categories of compulsory negotiation (SALOMÃO FILHO, 2013, p. 500-518).

The importance of cooperative credit systems, in return for the risks stemming from the power conferred on central cooperatives, reinforces the necessity of the implementation of some PECOLs - especially regarding the criteria for admission of first-degree cooperatives in the social context of second-degree cooperatives.

The normative content of the principle of free and voluntary admission is of strategic importance in the current regulatory context. Through it, it is possible to prevent cooperatives that already participate in cooperative credit systems from creating artificial entry barriers or

using anti-competitive practices to prevent single cooperatives from being able to join central cooperatives.

Resolution No. 4,435 / 2015 refers only to the admission of members of first-degree cooperatives. It requires that the conditions of admission are laid down in the statutes, as well as the area of operation of the cooperative. Although Chapter VIII of this resolution is specifically aimed at central and confederation activities, the issue is not addressed. The framework law of credit cooperatives (2009) does not address the issue either. Thus, the primary source remains the general law of cooperatives (1971).

However, the resolution, on the other hand, allows the central or confederations to establish rules so that the requirements of efficiency, economy, utility, and cooperative principles are observed. It also requires that the central cooperative inform the Central Bank of the criteria adopted when it admits or refuses to admit first-level cooperatives to membership.

As noted, although the resolution does not establish the criteria, it expressly recognizes that cooperative credit systems must respect cooperative principles. Applying the PECOL, these rules of affiliation established by the cooperative systems must observe the following parameters.

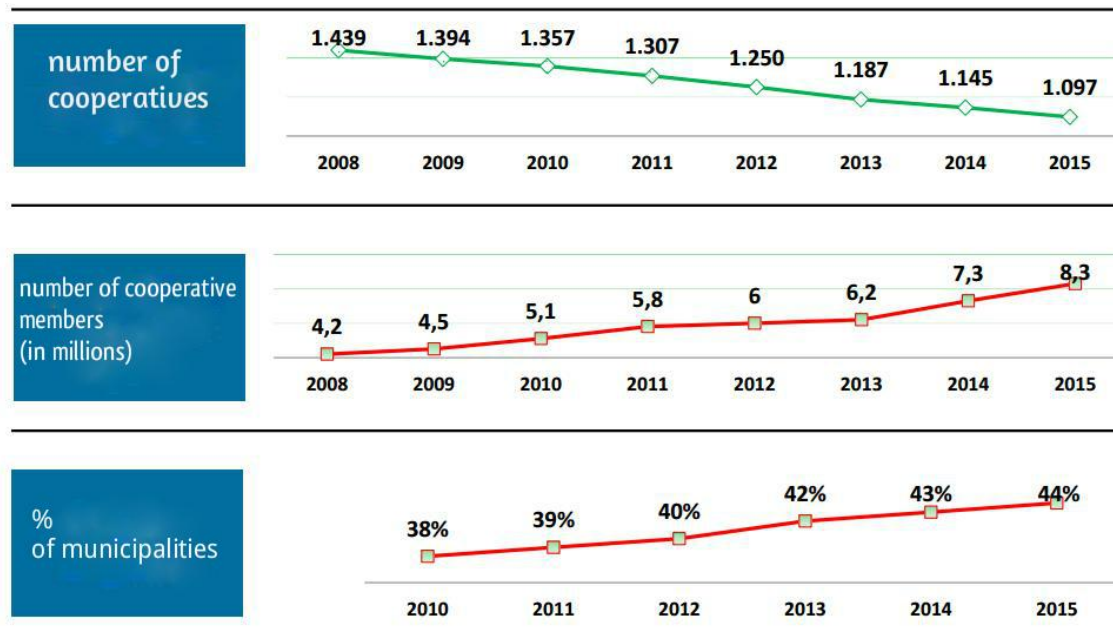
In dealing with admission in general, the PECOL reinforces the tradition of the cooperative principle of free and voluntary membership. On general membership, PECOL states that admission is conditional on the commitment of the member to participation in the cooperative activity. In addition, it requires that membership requirements be reasonable, compatible with the cooperative segment and its objectives and, above all, should not constitute artificial restraints (1.3.2, 1.3.6). On the contrary, it emphasizes that, as a rule, the membership must be open to anyone who is able to participate in the activity and who assumes the risks of the enterprise. It requires that the rules of admission be formally decided by a competent organ of the cooperative, that the denial of membership is justified, that the interested party can appeal against the unfavorable decision and that he has a right to be heard (2.2.1 to 2.2.3).

The PECOL are more detailed about the procedure and criteria of membership and expand the requirements of objectivity and transparency of these decisions. In fact, they present more guarantees than the general law of cooperatives of Brazil in this matter. Their application would be an important reference to fill the existing gap in the regulation of financial cooperatives. Especially at the present time, these parameters are important to prevent the anti-competitive use of cooperative credit systems against cooperatives that do not participate. PECOL also enhance the valorization of the right to information and transparency in cooperatives (Section 2.6).

The theme still includes an important perspective related to the cooperative identity and its protection by the principles: the cooperation among cooperatives. It is this element that justifies the horizontal and vertical integration of cooperatives into systems. The values of solidarity and equality permeate this principle in PECOL 5.1. The breakdown of cooperation between systemic and non-systemic cooperatives challenges the preservation of identity, still supposedly justified by economic efficiency.

3. The structuring tendencies of the national cooperative credit system between efficiency and cooperative identity

Analyzing official data, it is possible to observe the tendency of concentration of cooperatives through incorporations, to counter the increase in the number of associated individuals and municipalities covered.



source: Central Bank of Brazil (BCB)– may/2016



Sources: OCB (Number of associates: until December 2015), FGCoop (Number of associates: December 2016, with answers from 96.95% of cooperatives), IBGE (total population).

Along the same trend line, the number of segregated cooperatives that have their membership in each category by professional category or group of companies has declined each year. The number of cooperatives open to any public has increased.

TABLE 1.1 – NUMBER OF SINGULAR CREDIT COOPERATIVES - DECEMBER 2016

SEGMENTATION BY TYPE	Dec/15	Dec/16	Annual Change
Professional Activity	103	91	-12
Mixed Membership Criteria - Businessmen	28	29	1
Mixed Membership Criteria - Others	39	44	5
Employees or Servers	366	352	-14
Businessmen	10	30	20
Free Admission	319	338	19
Associative Nature or Business Chain		4	4
Rural Producer	211	153	-58
TOTAL	1.076	1.041	-35

Source: BCB

This creates the risk of a great paradox. Although regulation has moved towards freedom of action and openness for cooperatives, they are increasingly constrained to adopt the membership model open to any member of the public and to be incorporated by other cooperatives. Such information is provided, for example, in the 2016 annual report of the FGCOOP - Cooperative Credit Guarantor Fund.⁵

However, some risks not covered by the statistics may also be occurring.

Faced with the new regulatory conformation, centrals tend to accept only those compatible with their pre-established regional action plans. There is also the risk that cooperatives affiliated to central cooperatives act in their own interest as competitors to cooperatives that are still outside the system. This can happen not only with fragile cooperatives with less potential for growth, but even in the face of viable cooperatives or with great potential, but which depend on participation in these systems in order to develop. Under the auspices of the regulation, central cooperatives gain the power to make the functioning and creation of cooperatives unfeasible by refusing to admit individual cooperatives.

The regulation displays its inspiration in the German model of financial cooperativism. This system is structured in cooperatives functioning as cooperative banks, open to any member of the public, without segmentation and obligatorily linked to a cooperative credit system. The model also underwent a strong movement of mergers and incorporations, which were justified by the achievement of scale and efficiency. The National Cooperativism Learning Service in Brazil confirms that the current Brazilian regulation is inspired by the German model, seeking to reduce the number of business structures and geographically increase the presence of cooperatives (SESCOOP, 2016, p. 62-65).

Notably, the German cooperative banking model diverges from the capitalist banks on a more subtle level and presents more challenges to the disclosure of cooperative identity. Even the distribution of executives based on social capital is allowed and is used as a strategy to stimulate capitalization. The legal regime of cooperatives is practically analogous to that of banks in general, especially in activities with non-members.

In Brazil, a possible approximation of cooperatives with the open public profile that characterizes the banks market has already inspired a tax equalization of the tax on financial transactions.

Of course, reducing the number of supervised economic agents facilitates the work of the state regulatory authority. However, the freedom of operation of cooperatives also has as its content the

⁵ <http://www.fgcoop.coop.br/documents/19/43822/RELAT%C3%93RIO+ANUAL+2016+3.pdf/1e84926c-963a-4909-95fc-60f4ba847968>, accessed on June 5, 2017.

possibility of choosing a model that, although it seeks efficiency, can choose to have a greater identity among its members. This criterion of a bond between members can be either based on particularities of locality or a segment of activity or companies. This model also has advantages, such as the development of financial products and services more adapted to the specific demands and particularities of its members. In addition, cooperatives with an indefinite public and broad area of action present greater challenges to ensure democratic participation. One of the elements that identify credit cooperatives is the participation of consumers of financial services also as owners. This second condition is materialized especially by the effective right of democratic participation.

A broad membership base requires strategies to ensure participation and the technique of holding delegate assemblies is not properly a strategy to ensure effective participation. PECOL 2.4 affirms the importance of sectorial assemblies in cooperatives with a wide and dispersed set of members, but is concerned, especially in these cases, with identifying strategies to increase the guarantees of participation and control by members (2.4.14). Expanding these guarantees should be a concern of this type of cooperatives of general public and wide area of activity. Technologies and local action groups are possible strategies beyond delegates. In the future, PECOL could contemplate other contemporary instruments and methods to protect the interest of participation and democratic control.

Alternative models, such as the Canadian cooperativism, show that it is possible to preserve this freedom of organization and still produce efficiency and scale of operations. Despite the freedom given to cooperatives to operate in any geographical area and to have any audience as a member, the artificial imposition of a single model may represent a different way of restricting the freedom of cooperatives and threatening their identity.

Concerning again the purpose of cooperatives (PECOL 1.1.1), one of the structural elements of these societies, some risks of this new development should be highlighted.

The hegemonic economic model is characterized by standardization, while cooperatives are distinguished by local solutions, tailored to local conditions which are given priority over the volume of turnover. In addition, a large or economically strong cooperative is not necessarily indicative of a successful cooperative. Often, they are the ones who fail to fulfill their purpose, turning toward themselves instead of their members. The economic efficiency of the cooperatives must not contradict the economic and social efficiency directed to its members.

The cooperatives' own method of activity usually limits the basis of admission of members territorially to allow democratic control. This dynamic also allows local development and, moreover, it allows the cooperatives to know the socio-economic needs and particularities of the people and localities that they serve. This effect is manifested in a more natural way in segmented cooperatives, which know the profile, particularities and needs of their public better.

Cooperatives open to the general public, which are subject to the rules of credit established by the regulatory system, may not always serve the public contemplated by the segment they are established to serve, because financial services tend to be more standardized.

With the increase in scale and the reduction of the bond between members, services tend to level and differentiate through prices rather than through the ability to meet the common characteristics of the needs of the group. The needs of families in the interior of the country are not the same as those of residents in the capitals or urban centers. Many characteristics distinguish, for example, the financial needs of teachers, civil servants, professionals, entrepreneurs or farmers from each other.

A standardized cooperative has more difficulty in establishing the specific profile of its members and is less likely to know the details of its members' reputations and their level of economic

understanding. Although the co-operative knows the profile and the particularities of its members, it can be forced by the standard rules not to grant credit and so has less capacity to provide local and individual attention. Knowing and designing services to meet the specific needs of the segment or local particularities of its members concerns the quality of services and satisfaction of the interests of the members. This usually distinguishes cooperatives from capitalist competitors beyond economic efficiency.

For example, a member who has a good reputation and who in the rural area used to offer an animal as collateral may, in the name of the standardization and safety of operations, no longer receive the service he or she regularly received from the cooperative. The members who previously fully honored their financial commitments might no longer have a profile that is accepted by uniform credit granting rules.

By opening admission to any member of the public and/or operating in a very large area, the cooperative will be more vulnerable to the entry of malicious people, because it will meet fewer people who make up the target audience. It will tend to increase other costs, such as risk control, among others, and so lose efficiency.

Although regulation improves the freedom of cooperative activity, it mitigates the freedom of cooperatives to adopt a model different from that chosen by reference to regulatory authority - even if the State does not understand the most important dimensions of cooperative identity and is not fully interested in it. On the other hand, while the membership of cooperatives in cooperative credit systems tends to be strategically interesting and important, admission criteria must be transparent, harmonious and consider aspects of technical feasibility, without adopting an unreasonable anti-competitive stance.

It is possible that, at this moment of the financial market, the regulator is indifferent to the kind of membership a cooperative has. The pressure to open the cooperatives to the general public and to extinguish the smaller and segmented ones even if they are working effectively, has led to an emphasis on the importance of scaling up operations and expanding the number of consumers included in cooperative credit systems. In fact, there is an indirect interest ensuing cooperatives to influence the reduction of financial intermediation costs imposed by the capitalist sector, especially in an excessively concentrated market such as the Brazilian one⁶.

It is important to reinforce that being large or having a scale of operations is not necessarily a natural requirement for cooperatives because they can have all of this and do not fulfill their purpose - under PECOL 1.1.1, meeting the needs of their members. Size and scale are not values in themselves for cooperatives, unless they constitute a means to better serve the purpose of the consumer, supplier or worker.

If regulation previously has interfered by limiting the admission of members and requiring association conditions by determining groups of people by categories, industries or localities, today it pushes cooperatives to broaden their membership base to a wider public that does not have so much in common - only the generic condition of using consumer financial services. The two forms may represent an inappropriate interference with the freedom of organization of the cooperative enterprise. The recent form, however, is more subtle.

Although more companies in the same market serve, as a rule, to increase competition and generate economic advantages, the proliferation of cooperative financial institutions to be supervised does

⁶ About the high concentration of Brazilian financial market, see SILVA, 2014.

not tend to interest the Brazilian Central Bank. It is more interested in indirect and centralized oversight through central cooperatives.

The current regulatory pressure seeks to limit financial cooperatives to the model of cooperatives open to any member of the public and any area of action, to strengthen central cooperatives and foster incorporations. In addition to the analyzed points, other specific challenges of this tendency of the financial cooperative market are evident and need to be treated in a particular way:

- 1) Need to objectify the admission criteria in central cooperatives;
- 2) Challenges to the fulfillment of the purpose of cooperatives, considering the
 - a. Homogenization of credit granting rules;
 - b. Stratification of products;
 - c. Less knowledge of the public, especially in their personal profile;
- 3) Expansion of membership territory and challenges to maintain the democratic participation of members;
- 4) Increase in average activity costs;
- 5) Risk of inadequate legal treatment due to the increase in similarities between bank and cooperative operations (consumer, labor, tax, etc).

Because refinement of regulation is a necessary and constant process in the markets, it is likely that the behavior of cooperatives and capitalist competitors will influence new changes in the regulatory structure.

4. Final considerations

It was possible from the outset to recognize that PECOL 1.1.1, which deals with the freedom to exercise any economic activity by cooperatives, finally finds correspondence in the Brazilian financial market regulation. However, confronting current regulation with other principles of the PECOL it is possible to identify some characteristics of the phenomenon of "companisation" of cooperatives in the legal framework of the Brazilian financial cooperatives.

It is necessary to conclude that the freedom of cooperative initiative, as a fundamental right of consumers of financial services, also involves the possibility of such companies to freely choose to operate in ways other than a single imposed model, which may jeopardize formal and material aspects that the cooperatives distinguishes from capitalist enterprises, albeit in the name of economic efficiency. There is a strong tendency to approximate the structure of financial cooperatives to foreign models that have already lost much of their identity vis-à-vis banks.

In several others respects, the alignment between the PECOL and the current regulation is identified. The professionalization and modernization of governance according to the complexity of the business structure of the cooperatives is one of them.

In order to broaden participation guarantees and supervise members, PECOL may, in addition to sectorial assemblies, advocate for contemporary methods of broader and more effective participation. These alternatives are especially important regarding the trend of dilution of the identity of members in non-segmented cooperatives, as well as on the expansion of the territorial base of action of these cooperatives.

However, many shortcomings of the current regulation can be met by the PECOL, providing greater guarantees against the "companisation" of credit cooperatives. Perhaps the most important of these contributions is the need for specialized audits carried out independently by third parties to contemplate the analysis of the structure and activity of the cooperative as compatible with the identity that characterizes a cooperative as a cooperative (PECOL 4.1.2). Among these aspects of identity, strengthening the fulfillment of the purpose of cooperatives deserves to be highlighted as a pressing requirement, due to pressures of scale and efficiency, which can lead to a loss of reference to the fact that cooperatives have no interest of their own but to better serve interests of its members.

The PECOL also complements and reinforces the guarantees of free and voluntary adhesion against the use of artificial barriers to entry of new cooperatives or the permanence and sustainability of cooperatives in the market. This is of vital importance in the current regulatory context, where cooperatives are strongly encouraged to participate in cooperative credit systems, from affiliation to central cooperatives. In addition to the traditional requirements, also provided for in Brazilian legislation, the normative element of reasonableness, the requirement to state reasons for the denial of membership and the right of appeal of the rejected candidate constitute important advances in the moralization of this dissenting element of cooperatives in relation to non-cooperative companies.

In addition to these aspects, the numerous contributions of PECOL translate into important mechanisms to balance the efficiency and identity of cooperatives.

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