

## Comparative Law Review: Cooperatives and their Taxation

### BELGIUM

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#### 1. Does your Constitution consider cooperatives?

No. The Belgian Constitution does not mention cooperatives.

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

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

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

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

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

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<sup>2</sup> Act of 20 July 1955 (*Belgian Official Journal*, 10 Augustus 1955) and and Royal decree of 8 Januari 1962 (*Belgian Official Journal*, 19 Januari 1962).

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

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

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

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

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

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

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

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

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

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

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

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<sup>3</sup> *Belgian Official Journal*, 4 April 2019.

<sup>4</sup> It should be noted that, in 1873, before opting for the consecration of a cooperative legal form, some argued that there was nothing to prevent the insertion of cooperative rules in the articles of association of existing forms of commercial companies.

<sup>5</sup> Art. 8:4 of the CCA.

<sup>6</sup> Art. 8:5 of the CCA.

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

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

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

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

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

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

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

a. If so, the TLE will apply.

b. If not, the CT will apply.

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

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

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

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

#### Application to cooperative societies

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

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

#### Application to cooperative societies accredited as social enterprise

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

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

#### Tax on legal entities *versus* corporate tax

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

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

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

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

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

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

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<sup>7</sup> According to art. 8:5, §1, 3° of the CCA.

<sup>8</sup> According to art. 8:5, §1, 2° of the CCA and Royal decree of 8 Januari 1962 (*Belgian Official Journal*, 19 Januari 1962).

<sup>9</sup> See art. 225 and 226 of the Income Tax Code.

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

#### **4. In particular, when taxing their benefits:**

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

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

#### **4. In particular, when taxing their benefits:**

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

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

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

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

No.

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<sup>10</sup> Possible exemption for natural persons receiving dividends through the savings activation plan and exemption measure in the case of the accredited cooperative society.

<sup>11</sup> Art. 6:4 of the CCA.

<sup>12</sup> Art. 6:115 of the CCA.

<sup>13</sup> Art. 6:116 of the CCA.

<sup>14</sup> Art. 189 of the Income Tax Code and administrative commentary n°189/6, 189/10 and 189/11.