



## ANALYSIS OF THE LEGAL COOPERATIVE FRAMEWORK

### Within the ICA-EU Alliance

### NATIONAL REPORT for BRAZIL

#### I. Introduction

This report was produced within the Cooperative Structure Legal Analysis investigation initiated by the International Cooperative Alliance (ICA) and its regional offices. The research is carried out within the framework of an alliance between the European Union and ICA for the period 2016-2020, the main objective being to strengthen the cooperative movement and its ability to promote international development.

The analysis of the legal framework seeks to improve knowledge and evaluation of cooperative law, with the aim of ensuring that legal regulations recognize the specificities of the cooperative model and the level playing field when compared with other forms of association. Similarly, this analysis will be useful to ICA members as advocacy material and recommendations on the establishment or enhancement of legal frameworks, to document the implementation of cooperation laws and policies, and to monitor their development.

According to the objectives set by the ICA-EU Project, this report aims to provide a general understanding of Brazilian cooperative law and an assessment of the degree of its ability to foster the development of cooperatives. Similarly, recommendations to improve the law have been formulated to overcome some difficulties that cooperatives currently face.

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#### II National Cooperative Law of Brazil

##### i. General context

In Brazil there is a specific legislation for national cooperative societies, which regulate cooperativism throughout the Brazilian territory. The Federal Constitution, of October 10, 1988, in its article 5, item XVIII, assures “the creation of associations and, in the form of the law, of cooperatives, which are independent of authorization, being prohibited state interference in their operation”, in article 146, subsection III, subparagraph “c”, it indicates that it will be incumbent upon the complementary law to establish general rules on tax





legislation, especially on “adequate tax treatment of the cooperative act practiced by cooperative societies”, already article 174, §2, defines that “the law will support and stimulate cooperativism and other forms of associativism”.

Regarding infraconstitutional matters, the Civil Code of 10-01-2002, in its Chapter VII - Cooperative Society, part designed to define general characteristics of the cooperative society without colliding with special legislation, but innovating with a forecast of capital variability or exemption Social. Other articles outside this chapter, bring other norms more concerned with cooperatives, in which, it's emphasized that the code considers the cooperative business society. However, the publication of the Civil Code of 2002, launched, however, does not change the special law (Law No. 5,764, of 1971), only the new rules.

There is also special legislation, as listed below

- Law no. 5.764, of 16-12-1971. It defines the National Cooperative Policy, establishes the legal regime of cooperative societies, and makes other arrangements.
- Law no. 9.867, of 10-11-1999. Provides for the creation and operation of Social Cooperatives, aiming at the social integration of citizens as specified.
- Law no. 12.690, of 19-07-2012. Provides for the organization and operation of the Work Cooperatives; establishes the National Program for the Promotion of Work Cooperatives - PRONACOOP.
- Complementary Law no. 130, of 4/17/2009. Provides for the National Cooperative Credit System.

It happens that, in case of omitted cases or in the absence of provision in the legal text of the Work, Social and Credit Cooperatives, Law no. 5.764/71 (General Cooperative Law) is applied.

In this context, cooperative societies have their own legal nature, can perform various economic activities, provide services to members, and carry out commercial and social activities concurrently. Thus, as a legal entity governed by civil law, in addition to its special legislation, it is subject, with due proportions, to Brazilian law regarding consumer, civil, labor, tax and administrative law, among others.

There are state and municipal laws on cooperative society, however, such laws do not conflict with national legislation, so they are limited to fostering and supporting cooperativism or related to tax regulation of their competencies. In this context, federal legislation can be accessed through the site: (<http://www4.planalto.gov.br/legislacao/>).

## ii. Specific elements of cooperative law





## a) Definition and objectives of cooperatives

The principles established in the Declaration on Cooperative Identity adopted at the ICA - International Cooperative Alliance Congress, held in 1995, are: I - Voluntary and open association; II - Democratic control by the partners; III - Economic participation of the partners; IV - Autonomy and independence; V - Education, training and information; VI - Collaboration between cooperatives; and VII - Concern with the community.

Brazilian law aims to distinguish cooperatives from other legal types of business organizations, such as the for-profit corporation, among others, as well as to establish essential elements of the notion of “cooperative”, has adopted the principles defined by the ICA as the basis of the identity and definition and characteristics of the cooperative society explicitly in the law.

In this sense, Law No. 5.764/71 (General Law of Cooperatives), in its article 4, caput, highlighted and adapted these principles in the Brazilian legal system, which states that “Cooperatives are societies of people, with its own legal form and nature, of a civil nature, not subject to bankruptcy, established to provide services to members. It also mentions that the cooperatives are distinguished from other companies by the following characteristics contained in their subsections: I - voluntary membership, with unlimited number of members, except for the technical impossibility of providing services; II - variability of share capital represented by shares; III - limitation of the number of shares of capital for each associate, however, the establishment of proportionality criteria is allowed, if this is more appropriate for the fulfillment of the corporate objectives; IV - inaccessibility of the shares of capital to third parties, foreign to the company; V - uniqueness of vote, and the central cooperatives, federations and confederations of cooperatives, with the exception of those that exercise credit activity, may opt for the proportionality criterion; VI - quorum for the operation and deliberation of the General Meeting based on the number of members and not on the capital; VII - return of net surplus for the year, proportionally to the operations performed by the associate, unless otherwise decided by the General Meeting; VIII - indivisibility of reserve funds and Educational and Social Technical Assistance funds; IX - political neutrality and religious, racial and social indiscrimination; X - provision of assistance to members, and, when provided in the bylaws, to employees of the cooperative; XI - membership area limited to the possibilities of meeting, control, operations and service provision.

Law No. 12.690/12 (Work Cooperatives), in article 3, caput and clauses, explicitly stated that “the work cooperative is governed by the following principles and values: I - voluntary and free membership; II - democratic management; III - economic participation of the members; IV - autonomy and independence; V - education, training and information; VI - intercooperation; VII - interest in the community; VIII - preservation of social rights, the social value of work and free enterprise; IX - non-precariousness of work; X - respect to the decisions of the assembly, observing the provisions of this Law; XI - participation in management at all decision levels in accordance with the law and the bylaws”. The law



innovated and brought from paragraphs VIII to XI, the incorporation of the concept of Decent Work, defined by the ILO - International Labor Organization, which has as its axis the four strategic objectives “a) respect for international labor standards, in particular fundamental principles and rights at work; b) promotion of quality employment; c) extension of social protection; d) strengthening social dialogue”.

In summary, special laws generally provide a legal basis for the interpretation and application of the principles and values for the general regulation of cooperatives in Brazil.

Law No. 5.764/71 (General Cooperative Law) in its CHAPTER II and III broadly defines the concept, purpose and classification of cooperative societies.

In terms of concept and purpose, it understands as a cooperative: “Companies of persons, with their own form and legal nature, of civil nature, not subject to bankruptcy, constituted to render services to the associates”, constituted by the execution of a contract, in which the persons “reciprocally, they are obliged to contribute goods or services to the pursuit of an economic activity of common interest for no profit”.

Cooperatives are allowed to carry out economic activities and may: “adopt by object any kind of service, operation or activity, ensuring the exclusive right and requiring the use of the term: “cooperative” in its name”, has only as a restriction the prohibition to The use of the expression "Bank" and some rare professions by their own regulation also preclude the creation of cooperative societies to carry out their activities, such as the Lawyer's Statute.

As for the classification, the cooperatives are considered: I - natural, those constituted by the minimum number of 20 (twenty) individuals, being exceptionally allowed the admission of legal entities that have the same or related economic activities of the individuals or, still , those not for profit; II - central cooperatives or federations of cooperatives, those consisting of at least three (3) individuals, and may exceptionally admit individual members; III - cooperative confederations, those constituted at least of three (3) federations of central cooperatives or cooperatives, of the same or different modalities.

Cooperatives may also be classified according to their purpose or the nature of the activities they or their associates perform. In general, the cooperatives can be of various branches and economic follow-up, such as: educational, housing, agricultural, consumer, credit, health, transportation, production or service work, among others. Still, those with more than one object of activities are considered mixed.

It should be noted that some types and segments of cooperatives have their special laws with regulation according to their peculiarities, as follows:

- The Social Cooperative defined by Law no. 9.867/99, according to article 1, has the purpose of “inserting disadvantaged people into the economic market through work, is based on the general interest of the community in promoting the human person and the social integration of citizens”, among its activities. They may: “I - the organization and management of social



and health services; II - the development of agricultural, industrial, commercial and service activities”.

In terms of Article 4, Social Cooperatives may have “one or more categories of volunteer members who provide services to them free of charge and are not included in the definition of disadvantaged persons” as determined by their bylaws.

- The Work Cooperative defined by Law no. 12.690/12, according to article 2, and “the society constituted by workers for the exercise of their labor or professional activities with common benefit, autonomy and self-management to obtain better qualification, income, socioeconomic status and general working conditions”.

Article 4 states that “Labor Cooperative may be: I - of production, when it consists of members who contribute labor to the joint production of goods and the cooperative holds, by any means, the means of production; and II - service, when constituted by partners to provide specialized services to third parties, without the presence of the employment relationship assumptions”.

However, according to article 1, the following are excluded from the regulation of the Work Cooperative Law: I - health care cooperatives in the form of supplementary health legislation; II - the cooperatives that operate in the transportation sector regulated by the public power and which, by themselves or by their partners, own the means of work; II - the cooperatives of liberal professionals whose members perform the activities in their own establishments; and IV - medical cooperatives whose fees are paid by procedure.

It is noteworthy that the work cooperative can be built with a minimum number of seven (7) members.

- The Credit Cooperative defined by Complementary Law no. 130/09, according to article 2 “are primarily intended to provide, through mutuality, the provision of financial services to their associates, ensuring their access to financial market instruments”. It is considered a financial institution regulated also by the legislation of the National Financial System - SFN, apply to credit unions the legal powers of the National Monetary Council - CMN and the Central Bank of Brazil.

The Law no. 13.019, of 07-31-2014. Known as the Regulatory Framework of Civil Society Organizations, it recognized the social function of cooperatives, so that they may enter into partnerships with the public administration, in order to carry out activities or projects of social interest.

It is important to mention that Articles 4 and 7 of Law no. 5.764/71, clarifies that cooperatives may provide services to their members. However, Article 86 of the same law allows cooperative societies to provide goods and services to non-members as long as it is within



their social objectives and not contrary to the law. In this way the cooperative can provide services to non-members, members, obeying its objectives.

## **b) Establishment, cooperative association and governance.**

The cooperative society acquires its legal personality with the registration of its constitutive acts in the Commercial Board (Public Register of Mercantile Companies and Related Activities) and the IRS. In addition, according to its economic activity, it must also carry out State and or Municipal, and other relevant agencies, the credit union must also be registered with the Central Bank of Brazil. As a rule, registration of cooperatives follows the same procedure as conventional companies.

It is noteworthy that before the Federal Constitution of 1988, the registration of cooperatives with the OCB was mandatory. Meanwhile the Constitution in its art. 5th caput, and clauses XVII and XVIII, establishes that "It's full the liberty of association for lawful purposes" and "the paramilitary nature is prohibited" and "the creation of associations and, according to the law, that of cooperatives are independent of authorization, being prohibited the state interference in its functioning", therefore, the registration with the OBC is constantly questioned in court, in order to resolve this divergence, Bill no. 519/2015 (if approved, it will replace Law No. 5.764/71 - General Law of Cooperatives), pending in the Chamber of Deputies, will establish as national entities representing the cooperative system in Brazil: I - the Organization of Brazilian Cooperatives (OCB) and II - the National Union of Solidary Cooperative Organizations (Unicopas), being that, the affiliation to said national entities will be free, however the registration to one of them will be mandatory. It is noteworthy that, the text of that bill had several adjustments in the National Congress, therefore, it currently has a text that is a consensus among organizations. The constitutive acts registered with the competent bodies are: the minutes of incorporation and the bylaws of the cooperative, as the minimum number of members to open, depend on the type of cooperative, which comprises: a) Work Cooperative, may be formed with the minimum number of 7 (seven) members; b) Singular Cooperatives, governed by the General Law of Cooperatives, are constituted by the minimum number of twenty (20) individuals, being exceptionally allowed the admission of legal entities that have the same or related economic activities of the individuals or, even, non-profit ones.

The Cooperative may be dissolved in its entirety as a result of the reduction in the minimum number of members if, until the subsequent General Assembly, held within no less than six (6) months, the minimum number is not reinstated.

The admission of new members to the cooperative is free to all who wish to use the services provided by the company, provided that they adhere to the social purposes and fulfill the conditions established in the bylaws, but the admission of members may be restricted



according to technical criteria, related to ability to provide services by virtue of a particular activity or profession. On the other hand, interested third parties cannot join the cooperative, due to the inaccessibility of shares of capital to outsiders, that is, the shares of each member cannot be sold to third parties. Members are free to leave the cooperative at any time, as resignation of the member will be solely at their request.

At individual cooperative meetings, each associate member has the right to vote, regardless of the capital invested in the cooperative, is the number of its shares, the “one member, one vote” principle is respected, except where If the cooperative has more than 3,000 (three thousand), the bylaws may provide that members be represented by delegates. Central cooperatives, federations and confederations of cooperatives are also represented by delegate in general assemblies.

The organization and governance structure of the cooperative comprises the deliberation, administration and supervisory bodies, being I- General Assembly of the associates is the supreme organ of the company, has the power to decide and deliberates on all matters related to the company and its resolutions are binding on the Company to all associates;II - The Executive Board or Board of Directors, composed exclusively of cooperative members elected by the General Assembly, is responsible for the execution of activities such as financial and fund administration, contract negotiation, disclosure of cooperative products and / or services, purchase negotiations. III - Fiscal Council, composed of members elected by the General Meeting, is responsible for overseeing the Board of Directors in its actions and contracts, analyzing both the financial and accounting reports provided by the banks and by the counter. The statute of the cooperative may provide for other organs necessary for the administration and may even hire technical or commercial managers who are not members of the cooperative. On the other hand, the elected or hired directors will not be personally liable for the obligations that they contract in the name of the company but will be jointly and severally liable for the damages resulting from their acts, if they proceed with guilt or willful intent.

### c) Cooperative financial structure and taxation

The 2002 Civil Code provides for the variability or exemption of social capital for cooperatives. The General Law on Cooperatives does not establish a minimum capital for cooperatives; however the limitation can be established in the cooperative's bylaws, and the share capital will be subdivided into shares, whose unit value cannot be higher than the highest minimum wage in force. In this way, the statute establishes the minimum capital, the value of the share, the minimum of shares to be subscribed by the member, the method of payment of the shares, as well as the conditions for their withdrawal in the cases resignation, elimination or exclusion of the associate. For this reason, in addition to the minimum capital (minimum quota to be paid in), members can contribute and have different amounts of shares



between one member and another, including depending on the type of cooperative, the contribution can be linked, proportionate or according with volume of transactions. Thus, the bylaws establish the minimum capital, the amount of the quota, the minimum of shares to be subscribed by the associate, the mode of payment of the shares, as well as the conditions of their withdrawal in the event of dismissal, deletion or exclusion of member. Therefore, in addition to the minimum capital (minimum quota to be paid), members can contribute and have different values of shares between one member and another, depending on the type of cooperative the contribution may be linked, proportional or according with transaction volume.

The payment of the shares and the capital increase may be made with assets evaluated or withholding a certain percentage of the value of the financial movement of each associate. For the formation of the share capital it may be stipulated that the payment of the shares shall be made by means of periodic installments, regardless of call, by means of contributions.

The quotas paid to the share capital by the associate are updated and refunded to the member upon dismissal, exclusion or elimination. The member's liability to third parties for cooperative commitments continues to those dismissed, eliminated or excluded until the accounts for the year in which the termination took place. Thus, the cooperative may return the quota share of the member after the calculation and approval of the accounts for the year of departure, as the capital may decrease or increase depending on the result.

The distribution of results to members, the return of net leftovers for the year, are made in proportion to the operations performed by the associate, unless otherwise decided by the General Meeting, and fixed interest may be attributed to the paid-up capital.

Cooperatives are required to set up: I - Reserve Fund to repair losses and meet the development of their activities, constituted with at least 10% (ten percent) of the net surplus for the year, and II - Technical Assistance Fund, Educational and Social, intended to provide assistance to members, their families and, when provided for in the bylaws, to employees of the cooperative, consisting of at least five percent (5%) of the net leftovers verified in the year. Reserve and Technical and Educational Assistance funds are indivisible.

The cooperative cannot admit “investing members”, members are associated that participate in the company’s operations. A cooperative that engages in joint sales may register as a General Warehouse, and may therefore issue a Bill of Deposit, Warrant, Agricultural Certificate of Deposit (CDA) and Warrant Agricultural (WA) for the products of its members kept in its warehouses. , owned or leased, without prejudice to the issuance of other securities arising from its normal activities, applying, where applicable, specific legislation.

Cooperatives may provide goods and services to non-members, provided such faculty meets social objectives, but the results of cooperative operations with non-members will be taken into account by the "Technical, Educational and Social Assistance Fund" and will be accounted for. Separately, in order to allow calculation for tax incidence.







Upon dissolution of the cooperative, its liquidators must realize the social asset to pay the liability and reimburse the members of their shares, allocating the remainder, including that of indivisible funds, to the National Treasury.

Preliminarily, it should be noted that the Federal Constitution of 1988, in article 146, item III, sub-paragraph “c”, indicates that it will be incumbent upon the complementary law to establish general rules on tax legislation, especially on “adequate tax treatment of the cooperative act practiced by cooperative societies”.

The Cooperative Act is provided for in Law no. 5.764/71 (General Law of Cooperatives) in article 79, caput, that: “cooperative acts are those practiced between cooperatives and their associates, between them and those and by cooperatives when associated, in order to achieve social objectives. ” However, the sole paragraph of this article states that “the cooperative act does not imply market operation or contract of sale or purchase of product or merchandise”.

In this regard, considering the associative character of the cooperative society, in bringing together people for the exercise of an economic activity, of common benefit, without profit objective, as defined in the General Law of Cooperativism, it is necessary to make some notes on the application and understanding cooperative act in Brazil.

For when the act is carried out between the cooperative and its associate, it is easily recognized as a “cooperative act”. However, the controversy occurs when the cooperative performs an act with a non-associated third party.

The majority of Brazilian doctrine recognizes that the acts practiced by the cooperative with non-associated third parties, due to its social objective, are recognized as “cooperative act”, because the cooperative also represents and carries out its operations for the benefit of its members, it is the extension of its members. However, the governmental administrative bodies and the Brazilian judiciary have not pacified this understanding.

For this reason, it is extremely necessary that the “cooperative act” be regulated so that in fact Brazilian cooperatives have adequate tax treatment as provided for in the Federal Constitution.

Thus, considering that there is no specific law that deals with the taxation of the cooperative in Brazil, let us briefly see the main applicable taxes.

- IRPJ - Corporate Income Tax, are not taxable by IRPJ the results, leftover, from cooperative acts. However, the other results from non-cooperative acts are taxable by income tax.
- CSLL - Social Contribution on Net Income. Fact sheets exempt from Social Contribution on Net Income, as cooperative societies that comply with the specified legislation, in relation to cooperative acts, except for (would be) consumer cooperative societies.



- ICMS - Tax on Circulation of Goods and Services, will be subject to the ICMS cooperative society, when there is circulation of goods or rendering of taxable services, according to the state legislation where the operations are performed.
- The IPI - Tax on Industrialized Products, is applied to cooperative societies that carry out economic activities in their industrial establishment, is subject to the payment of IPI, according to the rate applicable to their products, as described by the respective regulation.
- ISS - Tax on Services of Any Nature has a rate charged and established by the municipalities, as a rule, cooperatives are subject to ISS tax only when they render services to third parties, to the market, for non-cooperatives.

Given that the rendering of services to cooperative members is a cooperative act and does not characterize an operation taxable by the ISS, as it is not a market operation.

- The Social Integration Program (PIS) is applicable to cooperatives, which pay as follows: 1) payroll by applying a 1% tax rate to their employees' monthly payroll, and 2) gross revenue according to its own standards.
- COFINS - Contribution for Social Security Financing is applied to cooperatives that must pay COFINS on gross revenue, with exclusions and exemptions and other procedures in the calculation basis provided for by law.

However, it is noteworthy that it is under discussion in the Brazilian courts, the non-incidence of PIS and COFINS on typical cooperative act, which makes transactions between associates, because as already mentioned, the: “Cooperative act does not imply market operation or purchase agreement and sale of product or merchandise”.

- The INSS - National Institute of Social Security tax is paid by the cooperative of the cooperative, as follows: 1) The production work cooperatives, as an employer quota, pays 20% on the remuneration of their members, in the art. 22, III of Law 8.212/91, there are also additional provisions provided for in legislation in situations related to the degree of work risk exercised by the taxpayer and other special situations; 2) Work cooperatives to provide service, does not pay the employer quota; 3) The cooperative of the labor cooperative is considered by the INSS as an individual taxpayer, thus it pays: a) 20% if it provides services through the cooperative to individuals or charitable entities in exemption from the employer quota, and b) 11% if it provides services to the cooperative itself or to companies in general and similar to the company through the cooperative.

Cooperatives, except those for consumption, cannot join the tax regime of Simples Nacional, which is a differentiated, simplified regime that reduces its tax burden to Micro and Small Business. The tax regime of cooperatives in Brazil still needs regulation to be favorable to cooperatives according to their legal nature, since on several occasions they are still taxed equally or less advantageously than other business organizations.



#### d) Other specific characteristics

The National Cooperative Learning Service - SESCOOP, a legal entity governed by private law, composed of entities linked to the union system, has its headquarters and venue in Brasília, Federal District, currently has the objective of organizing, managing and executing teaching throughout the national territory. Professional training, development and social promotion of workers in cooperatives and members, under the terms of Provisional Measure no. 2,168-40, of 08/24/2001. SESCOOP is run by a National Council, composed of representatives of Ministries of the Federal Government; representatives of the Organization of Brazilian Cooperatives - OCB, including its President; representative of workers in cooperative societies, and also by the Regional Councils, according to their internal regulations. Having its financial and budgetary execution monitored and supervised by the Fiscal Council. SESCOOP's revenues come from: I - compulsory monthly contribution, to be paid by Social Security, two point five percent on the amount of remuneration paid to all employees by the cooperatives; II - donations and bequests; III - voluntary subsidies from the Union, the States, the Federal District and the Municipalities; IV - income from services rendered, from the sale or rental of its assets; V - operating revenues; VI - financial penalties. Credit unions are subject to supervision and control by the Central Bank of Brazil. However, cooperatives according to their purpose of operation are subject to State control and supervision, as regards the regulations of the activities performed.

The principle of cooperation between cooperatives is implemented in national legislation, in addition to its literal provision in the Labor Cooperatives Law. The General Cooperative Law provides for the possibility of constituting central cooperatives, federations and confederations of cooperatives. They aim to organize, in common and on a larger scale, the economic and assistance services of interest to the affiliates, integrating and guiding their activities, as well as facilitating the reciprocal use of the services. These cooperatives may act in defense of the cooperative movement, but associations may also be created as representative organizations of the cooperative movement.

### III Facility of national legislation for cooperatives

The current Brazilian legislation in general, for cooperatives can be summarized stating that it has a "limited friendship with cooperatives". The need for updating is latent, due to the growth of cooperatives in the country, operating in public and private markets, in various segments of economic and social activities. In addition, the current legislation, as



demonstrated in this study, brings concepts and rights, which for effective application without harming cooperatives, need regulation.

#### **IV Recommendations for improving the national legal framework**

In line with the current and proposed difficulties of bills underway in the National Congress, the pertinent legislation to cooperatives needs modernization, updating and regulation for various segments of cooperativism, therefore, needs the following improvements: a) Approval of Bill no. 519/2015, new General Law of Cooperatives, which democratizes and modernizes Brazilian cooperatives; b) Regulation or reformulation of the Work Cooperative Law; c) Regulation or reformulation of the Law of Social Cooperatives; d) Facilitate and foster the creation of credit unions; e) Creation of specific legislation on the Cooperative Tax Regime, with the proper tax treatment of the cooperative act practiced by cooperative societies and the establishment of a simplified accounting system with reduction of the tax burden for small cooperatives; f) Encourage and effect the growth of public purchases of goods and services provided by cooperatives; g) Ensure that cooperative education is included at the different levels of education.

#### **V. Conclusions**

It is appropriate to say that cooperativism in Brazil still has a vast field for growth, with the improvement of legislation and effective implementation of cooperative education in the education system, various segments and market niches can be accessed or supplied by cooperatives.

São Paulo, January, 2020.

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