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Abstract: The approval of the new Basque Cooperatives Act (Law 11/2019) is an opportunity to address the tax regime applicable to the fund allocated to cooperative education and promotion and other public interest purposes, known by its initials in Spanish as the COFIP. This paper aims to analyse the relevant tax regulations for this fund in the Historical Territories of the Basque Country.

The taxation provisions applicable to cooperatives owe their specific character to two elements. Firstly, to the fact that a set of rules is needed to adapt the tax regulations to the characteristics of all cooperative societies, which are different from corporations. Secondly, to the fact that some tax advantages can be enjoyed by those cooperative societies that meet certain requirements. The first applicable rules are the so-called "adjustment rules". These are particularly relevant to the deductibility as an expense of the amounts allocated to the COFIP. The second rules, namely, the tax advantages for which cooperatives that meet certain requirements are eligible, are also worth discussing, because some of these requirements are linked to the correct application or use of the COFIP.

Keywords: education and promotion fund; taxation; Basque Country.

Resumen: La aprobación de la nueva Ley vasca 11/2019 de Cooperativas nos da pie para abordar el régimen tributario aplicable a la Contribución para la educación y promoción cooperativa y otros fines de interés público —COFIP—. Este artículo, por tanto, tiene por objeto realizar un análisis de la normativa tributaria aplicable a dicho fondo en la normativa tributaria de los Territorios Históricos de Euskadi.

La especificidad de la fiscalidad de las cooperativas responde a dos razones: por un lado, se fijan una serie de reglas que pretenden la adecuación de las normas tributarias a las características de una sociedad cooperativa que le diferencian de las sociedades capitalistas y que, por este motivo, estas reglas fiscales especiales resultan de aplicación a todas las sociedades cooperativas; y por otro lado, se establecen una serie de beneficios fiscales para aquellas sociedades cooperativas que cumplan determinados requisitos. Las primeras reglas son las que denominamos reglas de ajuste y nos interesan especialmente por lo que se refiere a la deducibilidad como gasto de las dotaciones realizadas a la Contribución para la educación y promoción cooperativa y otros fines de interés público —COFIP—. Pero también nos interesan las segundas reglas, esto es, los beneficios fiscales a que tienen derecho las cooperativas que cumplan ciertos requisitos, porque alguno de estos requisitos se vincula a la correcta aplicación o utilización de la COFIP.

Palabras clave: fondo de educación y promoción; fiscalidad; Euskadi.

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I. **Introduction**

The purposes of cooperatives go beyond strictly profit-seeking goals to include educating their members and promoting their economic and social interests and those of their environment. A cooperative society regulates and creates funds for this special purpose. One such fund is the "Fund for Cooperative Education and Promotion and Other Public Interest Purposes" (known by its initials in Spanish as the "COFIP") under Basque law[2] (hereinafter, "COFIP" or the "Fund"). The COFIP is equivalent to the Fund for Cooperative Education and Promotion provided for by state and regional legislation on cooperatives in Spain[3]. The COFIP is a mandatory and non-distributable reserve that is allocated annually for public interest purposes. The approval of the new Basque Cooperatives Act (11/2019) (hereinafter, the "BCA") is an opportunity to analyse the tax regime applicable to the contribution made by cooperatives to education, promotion, and other public interest purposes. The purpose of this article is therefore to analyse the tax regulations applicable to the COFIP[4].

Before examining the tax regime applicable to the Fund, it should be noted that the tax regulations currently in force in Spain include a special regime for cooperative societies. The territorial articulation of the Spanish State means that tax regulations are not exclusively provided for by a single body; rather, the powers for establishing special tax regulations for the cooperative regime are distributed between the Spanish State[5] and areas with special tax status (hereinafter, "Areas with Special Tax Status"), namely, the Navarra province and the Historical Territories that

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[2] Effective 1 January 2009, the Fourth Additional Provision of Law 6/2008, of 25 June, on Small Cooperative Societies of the Basque Country (Official Gazette of the Basque Country no. 127, of 4 July 2008, and no. 212, of 3 September 2011), amended Article 68 of Law 4/1993 on Basque Cooperatives. As a result, the term Cooperative Education and Promotion Fund was replaced by the current Fund for Cooperative Education and Promotion and Other Public Interest Purposes (COFIP), a provision that is essentially contained in Article 72 of the current Basque Cooperatives Act (BCA).

[3] Nagore Aparicio (2020: 272) disagrees with the different name adopted by the Fund in Basque legislation.

[4] Official Gazette of the Basque Country, no. 247, of 30 December 2019. This regulation was modified by Law 5/2021, of 7 October, which amended Law 11/2019, of 20 December, on Basque Cooperatives (Official Gazette of the Basque Country no. 209, of 20 October 2021). However, the reform did not affect the provisions applicable to the COFIP.

[5] Law 20/1990, of 19 December, on the Tax Regime for Cooperatives in Spain (hereinafter, "Spanish Cooperatives Tax Regime"). See Spanish Official Gazette no. 304, of 20 December 1990.

make up the Basque Country (the provinces of Alava, Biscay and Guipuzcoa). Each of these three Historical Territories in the Basque Country has its own regulations, although the differences between them are only formal in nature, since their material content does not differ at all from one territory to another. These regulations are the Biscay Tax Regime for Cooperatives 6/2018, of 12 December[6] (hereinafter, the "Biscay Cooperatives Tax Regime"), the Alava Tax Regime for Cooperatives 16/1997, of 9 June[7] (hereinafter, the "Alava Cooperatives Tax Regime"), and the Guipuzcoa Tax Regime for Cooperatives 2/1997, of 22 May[8] (hereinafter, the "Guipuzcoa Cooperatives Tax Regime").

While cooperative societies are subject to the tax rules of companies, the special tax regime applicable to them means they have some specific features. The taxation provisions applicable to cooperatives owe this specific character to two elements (Alonso Rodrigo 2001, 79). Firstly, to the fact that a set of rules are needed to adapt the tax regulations to the characteristics of a cooperative society, which are different from those of companies, and are applicable to all cooperative organisations. Secondly, the unique character of cooperatives gives rise to a series of tax advantages to be enjoyed by cooperative societies that meet certain requirements. As a result, the classification of cooperatives for tax purposes is based on the tax protection accorded to them under the law (Aguilar Rubio 2016, 52). The COFIP has an impact on both aspects of the tax regime (Alguacil Marí 2014).

The first applicable rules are the so-called "adjustment rules". These are particularly important for the deductibility as an expense of the amounts allocated to the COFIP. Although these reserves are entered as liabilities on the balance sheet, they may be deducted from the corporate income tax base, unlike what happens with amounts allocated to other mandatory or voluntary reserves that are not usually deductible.

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[6] Biscay Official Gazette no. 249, of 28 December 2018. The language of these provisions can be found at: https://www.bizkaia.eus/Ogasuna/Zerga_Arautegia/Indarreko_arautegia/pdf/ca_6_2018.pdf?hash=1c48493ad892505f0bae4eab52f2d291&idioma=CA (last accessed on 22 June 2021).

[7] Alava Official Gazette no. 68, of 18 June 1997, Supplement. The language of these provisions can be found at: https://web.araba.eus/documents/105044/985469/NORMA+FORAL+SOBRE+R%C3%89GIMEN+FISCAL+DE+LAS+COOPERATIVAS+% 281% 29.pdf / 3e160ef4-e352-7682-bb85-2ffd816a6022? T = 1578575218820 (last accessed on 22 June 2021).

[8] Guipuzcoa Official Gazette no. 101, of 30 May 1997. The language of these provisions can be found at: https://www.gipuzkoa.eus/documents/2456431/15299016/NF+2-1997+%282021-1%29.pdf/9e0626ed-6211-4604-cf74-4774f12f342e (last accessed on 22 June 2021).

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However, a similar rule exists for amounts allocated to the Mandatory Reserve Fund of cooperatives, which are deductible, albeit partially.

The second types of rules mentioned above are also relevant for the purposes of this analysis, that is, the tax advantages for which the cooperatives that meet certain requirements are eligible. Some of these requirements are linked to the proper allocation or use of the COFIP. If a cooperative does not apply or use the COFIP correctly, it will lose its tax benefits, and may even have to include the amount previously deducted into the tax base as income.

The next section will discuss the provisions that govern the COFIP in the applicable tax regulations. Whereas the analysis will be focused on Basque tax regulations, reference will be made to the common tax regime applicable throughout Spain when it is deemed appropriate.

II. **Classification of cooperatives for tax purposes**

First, the existing types of cooperatives from a fiscal perspective will be outlined. Depending on the type of cooperative in question, it will be entitled to greater or lesser tax advantages. Tax regulations set out three types of cooperatives; nevertheless, this classification does not have any consequences outside of the tax sphere, that is, it has no legal relevance to the corporate, labour and civil law spheres (Atxabal Rada 2021). According to the applicable tax regulations, cooperatives can be classified as protected and non-protected.[9] Within protected cooperatives, there are two levels of protection, which lead to a distinction between protected and specially protected cooperatives. Thus, the types of cooperatives for tax purposes are:

a) Non-protected cooperatives
b) Protected cooperatives
c) Specially protected cooperatives

The tax classification of cooperatives is directly linked to the proper allocation and application of the amounts contributed to the COFIP,

[9] ALONSO RODRIGO (2001: 92) holds that, in accordance with the promotion mandate contained in Article 129.2 of the Spanish Constitution, "there are protected and non-protected cooperatives, provided that the distinction between them is well founded and not arbitrary. The only valid argument to conclude that certain cooperatives are not protected is the fact that they do not comply with the essential requirements of cooperative operation, and therefore, the obligation of promotion is not required as far as they are concerned".

since misuse of the Fund will affect the classification of a cooperative for tax purposes. A cooperative that does not apply the COFIP for public interest purposes will lose its status as a tax-protected cooperative, that is, it will lose a number of tax benefits to which it may otherwise be entitled. These benefits are outlined below.

2.1. *Protected cooperatives*

Protected cooperatives are those that comply with the operating rules established in the relevant law applicable to cooperatives. Therefore, they must be societies that fulfil the principles and provisions of the Basque Cooperatives Act (BCA) or any other applicable cooperatives act. However, meeting this requirement is not enough to be entitled to protection. The circumstances of protection listed in the tax regulations must also be complied with by cooperatives, as non-compliance would cause the cooperative in question to be excluded from the tax-protected category[10]. These grounds include the improper use of the COFIP.

Protected cooperatives enjoy a series of tax advantages for the mere fact of holding this tax qualification. Their main tax benefit is the application of a tax rate that is lower than the general corporation tax rate.

Cooperatives are exempt from Transfer Tax and Stamp Duty on instruments of incorporation, capital increases, mergers, and spin-offs, as well as on taking out and cancelling loans, including long-term bonds. Lastly, the acquisitions of goods and rights using the COFIP or similar reserves are also exempt. This exemption is applicable to operations subject to Transfer Tax and Stamp Duty but not to VAT (Alguacil Marí 2020).

Two measures are provided for corporation tax purposes. One of these measures is that under Basque regulations, the tax rate on the general tax base is 20% (18% if the cooperative qualifies as a small or micro-business), in contrast to the general tax rate, which is 24% (20% for small and micro-businesses). The second measure provides that cooperatives are free to decide on the depreciation of their new depreciable fixed assets, intangible assets, and property investments acquired within three years from the date of their registration in the Cooperatives Registry. This benefit is compatible with the deductions for investments set forth in corporation tax regulations.

[10] Thus, in simple terms, all cooperatives are protected cooperatives (Tejerizo López 2010), unless they are specifically included in a different category under the Law, or they have lost their protected status due to failure to comply with the requirements established by the applicable Law.

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Finally, agricultural and community exploitation cooperatives enjoy a 95% rebate on their real estate tax, and, where appropriate, on the surcharges corresponding to agricultural assets.

2.2. *Specially protected cooperatives*

Specially protected cooperatives are those first-degree protected cooperatives that meet a number of requirements, including being closer to the mutual principle (Rodrigo Ruiz 2010, 20; Alonso Rodrigo and Santa Cruz AYO 2016, 83) and being among the types of cooperatives listed in the tax regulations. For a cooperative to be classified as being specially protected, it must meet certain criteria established by the tax regulations, namely, some limitations in operations with third parties, economically disadvantaged members, and being part of any of the following types of cooperative: worker cooperatives, agricultural cooperatives, community cooperatives, consumer cooperatives, learning cooperatives, or housing cooperatives.

Specially protected cooperatives also enjoy immediate tax advantages, without the need for prior approval from the public authorities. As well as the tax advantages granted to protected cooperatives, their tax regime includes additional ones.

Aside from the benefits of protected cooperatives, specially protected cooperatives are exempt from Transfer Tax and Stamp Duty on acquisitions of goods and rights directly intended for the fulfilment of their corporate purposes and of those set out in their articles of association, without any time limit.

They are also entitled to a 50% rebate on their corporation tax[11]; their tax rate is therefore 9%, as they are largely either small or micro businesses. These rules are also applicable to cooperatives of second or lower degree that are made up of specially protected cooperatives[12].

2.3. *Non-protected cooperatives*

From a tax perspective, non-protected cooperatives are those which, despite being ordinarily incorporated and registered in the appropriate

[11] The tax rebate increases to 75% for priority-status farms that are specially protected agricultural cooperatives.

[12] When the member cooperatives are protected and specially protected, they will enjoy a tax rebate on the part of their revenue coming from the operations carried out with specially protected cooperatives.

Cooperative Registry, no longer meet the requirements to have tax-protected status. In other words, as Alonso Rodrigo (2001, 91) stated, while a cooperative may comply with the operating rules imposed by the substantive law, it may not be protected for tax purposes because it has lost its protected status (although this is unlikely to occur under Basque tax regulations). These cooperatives, as is the case for protected societies, may apply adjustment rules but are not entitled to any tax advantages for being cooperatives.

Ultimately, the tax regulations related to the COFIP are applicable to all cooperatives. This is due to the fact that adjustment rules apply to all of them, regardless of their qualification for tax purposes. One of these rules refers to the deductibility of the amounts allocated to the COFIP; and cooperatives may lose their tax advantages if they do not use or apply the COFIP properly. The next section will discuss what the COFIP is, before dealing with the applicable tax regulations.

III. **Fund for cooperative education and promotion and other public interest purposes (COFIP)**

The COFIP is an internal reserve allocated to specific legal purposes related to the fifth, sixth, and seventh principles of the International Cooperative Alliance (hereinafter, "ICA"), that is, education, training and information; cooperation among cooperatives; and concern for the community (Polanco 2004). It is a mandatory reserve[13] that cannot be seized[14], and cannot be distributed among members[15].

As noted by Gondra Elguezabal (2021: 140), "this legal concept is widely used and recognised. Special attention is given to it in the legislation when designing the structure of cooperative societies to ensure that

[13] The ICA's recommendations suggest that the different legal systems freely establish the parameters for the distribution of surplus among non-distributable funds (the Mandatory Reserve Fund and the COFIP). However, the legal systems of the Basque Country and the rest of Spain have made it compulsory to allocate funds to that reserve, without subordinating it to a specific provision contained in the articles or to an Assembly resolution to that effect (Gondra Elguezabal 2021, 139; Nagore ApaRICIO 2020, 271).

[14] This unseizable status is set out in Article 72.3 of the BCA, and affects all creditors of the cooperative, including the Public Treasury, which cannot collect unpaid debts from the COFIP. This is the case even if the cooperative is wound up, as the funds in the COFIP must be made available to the Higher Council of Cooperatives of the Basque Country, according to Article 98.2.a) of the BCA.

[15] The COFIP cannot be distributed, either during the life of the cooperative or if it is dissolved and liquidated (Art. 98.2.a) of the BCA). Any funds remaining in the COFIP must be made available to the Higher Council of Cooperatives of the Basque Country.

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it is consistent with their distinctive purposes and the regulation of their entire corporate life. This includes both their internal and external aspects of interrelation with the community and even with public bodies, especially regarding contributory and administrative control aspects".

Article 72 of the BCA establishes the basic guidelines for the application of the COFIP. It includes the rule that "it be used for activities" that fulfil "any of the purposes" outlined immediately below. Strictly speaking, one could speak of a multiplicity of purposes which can be grouped around the three aforementioned cooperative principles, namely, education[16], inter-cooperation, and concern for the community.

The activities for which this Fund is to be used and the basic guidelines for its use must be established either in the articles of association or by the General Assembly. It is, therefore, the responsibility of the General Assembly to "set the basic guidelines" for application of the COFIP, which must be consistent with the purposes listed in the applicable regulations. The COFIP is to be applied by the Board of Directors, unless there is a specific provision in the articles that entrusts this task to a different body.

The purposes set forth in Article 72 of the BCA may also be fulfilled indirectly through non-profit organisations or inter-cooperation organisations, by making the amounts in the COFIP available to them in part or in full. However, the ultimate use of the funds must always be in line with any one of the legally established purposes.

If the amounts allocated to the COFIP are not applied within the legally required period, they do not need to be used to purchase Basque public debt, as required by Law 27/1999, of 16 July, on Cooperatives[17]; rather, cooperatives must deliver these amounts to non-profit entities to be used for the public interests set forth for the Fund.

IV. **Loss of tax protection due to misuse or misallocation of the COFIP**

The first area to be addressed when analysing the tax regime applicable to the COFIP is related to the causes of loss of tax protection,

[16] The principle of education is inseparable from that of promotion, in accordance with the ICA Principles. These stipulate that cooperatives should have a fund to offer education to their members on the principles and methods of cooperation, both in economic and democratic terms, whether they are partners or salaried employees with a standard employment relationship.

[17] Law 27/1999, of 16 July, on Cooperatives. Spanish Official Gazette no. 170, of 17 July 1999.

since an improper use or application of the COFIP will cause cooperatives to lose their tax advantages. The tax regulations provide the circumstances in which cooperatives would lose their protected status, thus becoming unprotected cooperatives and no longer having tax advantages. These circumstances coincide with the basic rules of operation established by corporate laws applicable to cooperatives[18].

Following the mandates of the corporate laws governing cooperatives, most grounds for exclusion from protected status use taxation to ensure compliance with certain requirements considered inherent to cooperatives under applicable corporate laws which, if not met, somehow deprive cooperatives of their very nature, such as requirements related to non-distributable reserves (Atxabal Rada 2018, 146). It is striking that these arise from limitations previously established by corporate laws where tax regulations play a monitoring role regarding compliance with corporate laws (Rosembuj 1991; Ispizua 1997, 79).

The grounds for exclusion from protection under the tax regulations can be systematically grouped according to a number of criteria (ATXABAL RADA 2020). This paper is focused on the grounds related to the distribution of cooperative surplus in a manner contrary to that prescribed by the substantive regulations of cooperatives, as stated in Article 12 of the Biscay Cooperatives Tax Regime, of the Alava Cooperatives Tax Regime, and of the Guipuzcoa Cooperatives Tax Regime. These provisions stipulate the following grounds for losing tax protection:

1. Failure to allocate the relevant amounts to the Mandatory Reserve Fund and to the COFIP, in the circumstances and on the terms required in the applicable cooperative legislation.
   Article 70.2.a) of Law 11/2019 provides that the available surplus must be annually allocated as follows: an overall thirty percent must be allocated to the Mandatory Reserve Fund and to the COFIP. At least ten percent must be allocated to the COFIP, and twenty percent must be allocated to the Mandatory Reserve Fund.
2. Distributing the reserve funds that are non-distributable during the life of the cooperative society among its members, or distributing the remaining equity at the time of liquidation.

[18] The tax regulations applicable to cooperatives in the rest of Spain (except for the Areas of Special Tax Status) refer to the legislation previously in force and diverge from the rules contained in some substantive regional regulations, and even in the current 1999 Spanish Law on Cooperatives (Alguacil Marí and Romero Civera 2013). Basque tax regulations, on the contrary, overcome this contradiction by applying the "protected" status of cooperatives only according to the rules established by the substantive Basque legislation (Alonso Rodrigo 2001, 91).

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The second ground for losing tax protected status occurs when a cooperative discontinues operations and, therefore, is no longer required to pay corporation tax. According to Article 14.2 of the Biscay Cooperatives Tax Regime, Article 14 of the Alava Cooperatives Tax Regime, and Article 14 of the Guipuzcoa Cooperatives Tax Regime, tax protection status is lost in the fiscal year when the cooperative fails to meet the requirements for protection. Therefore, a cooperative would be subject to the general tax regime only in the last fiscal year of its operations, in which the decision to liquidate is made. In this case, liquidators may be liable under the General Regulations applicable to the Areas with Special Tax Regimes (BUSQUETS, 2005).

One interpretation which could give the rule greater force is that a cooperative could be deemed not to be tax protected if the cooperative's articles establish that those amounts can be distributed (even if a resolution on the distribution had not yet been passed).

3. The third ground is using some amounts from the Fund for purposes other than those established in Article 72 of the BCA.

These grounds allude to non-distributable funds, and a tax "penalty" is imposed on the cooperative if it either does not allocate them properly, distributes them when it is not allowed to do so, or uses them for purposes that are not legally permitted (Atxabal Rada 2018, 145-146). These are conducts that deviate from the obligations that cooperative laws provide for the creation and use of these non-distributable funds.

Montero Simó (2016, 43) criticised, however, the consequences that arise from applying these grounds for exclusion from tax advantages, mainly on the first and second grounds. The tax rule should only impose those requirements that justify the applicable adjustment rule or the specific tax advantage. For example, for the amounts allocated to the COFIP to be deductible, the cooperative should be required to comply with the statutory criteria on these allocated amounts and, furthermore, to ensure that they are non-distributable. Failure to comply with the requirements should not result in cooperatives being excluded from the tax benefits accorded to them based on their status as protected cooperatives; it should only entail the loss of the right to apply the adjustment rule; that is, it should prevent the allocated funds from being tax deductible, as is the case in companies with distributable reserves. However, the loss of tax protection has always been considered logical (Alonso Rodrigo 2001, 219), because the distribution of these

reserves contravenes the substantive rule of cooperatives, and the tax rule links tax advantages to compliance with the mandates of cooperatives' substantive laws. This position varies depending on whether the substantive regulations allow for the distribution of funds, as some regional legislation does.

The third ground refers to the corporate laws and regulations applicable to cooperatives (the Cooperatives Act), to verify the purposes for which the activities and the amounts in the COFIP may be used. The tax regulations provide that the Fund can be used for the purposes set out in Article 72 of the BCA. It is extremely important to comply with the purposes established in the BCA. The list contained in Article 72 of the BCA is not simply a limited set of activities, but is open-ended and allows for multiple activities, provided that they accomplish the purposes laid down in Article 72.

V. **Public interest purposes. Use of the fund**

Pursuant to Article 72 of the BCA, the COFIP must be allocated to any of the purposes of public interest listed below, according to the basic guidelines established by the cooperative's articles or the General Assembly. The adjustment rule provides for the deductibility of the amounts allocated to the Fund and the application of tax advantages insofar as the public interest purposes are consistent with those set forth by the general Spanish regulations (Alonso Rodrigo 2001, 237). Therefore, the tax rule refers to the purposes contained in the substantive law in terms of applying the tax protection regime.

5.1. *Cooperative training and education*

The first purpose for which the COFIP can be used is the training and education of cooperatives' members and workers on cooperativism, cooperative activities, and other matters not related to their job.

It has been criticised that other rules (including the regulations contained in the BCA prior to the amendment operated by Law 6/2008, of 25 June, on Small Cooperative Societies in the Basque Country, which entered into force on 1 January 2009) extend educational purposes to economic, technical or professional matters. Nevertheless, it should be noted that the Basque legislator has not only removed these purposes or options from the new regulations, but has even specifically excluded job-related matters from these purposes. In contrast, the Spanish leg-

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islator allows the application of the education and promotion fund to professional training expenses and costs involved in attending specialist conferences[19].

In the words of Gondra Elguezabal (2021, 152), the COFIP can only be used for training, and therefore the term "cooperative activities" cannot be interpreted as a catch term to justify the use of these funds for any technical training action directly related to the corporate purpose of the cooperative. The term "cooperative activities" may be interpreted to include those actions that cooperatives are required to engage in that are specific and inherent to their spirit, such as the effective implementation of participatory democracy processes for the members through their participation in the General Assembly. This does not imply that any action carried out within the General Assembly can be included in the public interest purposes mentioned above, but only those strictly and directly linked to the organisation of the General Assembly, excluding divergent actions[20] such as facilitating attendance of the members (travel expenses), or organising a communal meal for the members, among others.

For example, this purpose would include organising and offering activities aimed at introducing, enhancing, or qualifying for knowledge on cooperativism for those within the cooperative that may be related to or interested in the matter, such as information and training courses, specialised courses linked to cooperative theory and legislation, and seminars and conferences focused on similar issues. This section also involves preparing internal cooperative documents to be disseminated among members (circulars, etc.), subscribing to publications, or creating infrastructures and methods for training, document collection, a library, etc.

Following Gondra Elguezabal (2021, 153), any training actions (organising and participating in courses, seminars, conferences...) aimed at non-members of the cooperative[21] are therefore excluded from these purposes. These refer to training actions based on technical training and education (logistics, supply, production, commercial, economic-financial, accounting, organisational, innovation...), even when it is aimed at the stakeholders mentioned above; infrastructures and R&D projects; and any indirect costs derived from organising the Gen-

[19] Alguacil Marí 2020.

[20] Resolution of the Central Tax Appeal Board (TEAC) of 14 June 2007.

[21] For example, as Alguacil Marí (2020) stated, training or schooling expenses for children of members or employees are excluded, as highlighted by the third legal ground of the Supreme Court Judgment of 19 November 2012 (Appeal 4727/2009).

eral Assembly and meetings of the rest of the cooperative's corporate bodies or work teams, as they are all deemed to form part of the corporate and business dynamics of the cooperative.

5.2. *Inter-cooperative relationships*

The second purpose for which the Fund may be used according to the BCA is the promotion of inter-cooperative relationships, such as covering expenses for participation in organisations created for the promotion, assistance, common management, or activities of mutual support between cooperatives.

Appropriate purposes for allocating COFIP funds are, in general terms, any activities that can be framed within the principle of inter-cooperation, specifically, the promotion of technical assistance and the creation of cooperative support structures. It encompasses any activity that ultimately results in the promotion of inter-cooperative relationships, used in the broad sense defined by current legislation.

Gondra Elguezabal (2021, 154) has clarified that these specifications do not only refer to the promotion of inter-cooperative relationships, but also to their development and maintenance. This means that there is scope for relationships between cooperatives, whether corporate, protective of sectoral interests or, simply, business interests, provided that they take the form of an interest held in an entity with its own legal personality that pursues the promotion, assistance, common management, or support of activities between cooperatives. In addition, there are no provisions under the BCA regarding the need for those entities to have the same corporate form, although emphasis is made on the fact that relationships must be "between" cooperatives and not "with" cooperatives, thus highlighting their active role[22].

Special consideration should be given to the use of COFIP funds to cover expenses derived from holding an interest in second-degree cooperatives; integration with other entities that have been created

[22] Gondra Elguezabal (2021, 155) particularly stressed, among others, the expenses related to any interest held by a cooperative's in a corporate group, whether or not it is a cooperative, that is, regardless of its corporate form; the expenses of inter-cooperative activities between several cooperatives to conduct joint activities in certain areas; expenses or contributions related to cooperative promotion entities, namely, the Association for the Promotion of the Social Economy of the Basque Country (APES Euskadi), the Society for the Promotion of Cooperatives Elkar-Lan, S.Coop, Bizikoop, Promokoop Fundazioa, etc.; and research actions directly aimed at creating or holding an interest in an entity other than those that make it up.

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for the promotion, assistance, common management or provision of support activities between cooperatives, such as the payment of fees to cooperative federations; maintaining or providing superstructure services; and the cost involved in a first-degree cooperative holding an interest in a cooperative of second or subsequent degree, among others.

Some of these expenses would also be directly deductible, as established in Article 18 of the Biscay Cooperative Tax Regime, and Article 16 of the Alava Cooperative Tax Regime and of the Guipuzcoa Cooperative Tax Regime. In this way, therefore, the cooperative would not need to allocate the amount to the Fund one year before, as an intermediate step to be able to use it to cover the expense in the following fiscal year, as will be seen later.

A number of actions are not deemed to fall within the scope of the COFIP, namely, the usual commercial transactions between cooperatives (creation of temporary labour unions); relationship actions between cooperatives; the transfer of the COFIP to another cooperative to be freely used, with the exception of those entities specifically created based on inter-cooperation criteria, whether they are cooperatives or not; and relationships between cooperative members rather than between cooperatives[23].

5.3. *Promotion in society*

The third purpose that the Fund can be used for is educational, cultural, professional and assistance promotion, as well as the dissemination of the characteristics of the cooperative movement in the social environment in which the cooperative operates and in society in general[24].

These fields are very difficult to define because it is practically impossible to establish limits to the terms "educational", "cultural", "care", "professional" and "dissemination", all of which are included in the BCA The aims are related to personal and collective development with a view to improving people's quality of life, based on the solidarity brought by cooperatives to society. For example, collaborating in the

[23] Alguacil Marí 2020.

[24] This intention to "educate" in cooperativism; to "teach" society in general translates into providing information about the cooperative world, as well as disseminating its existence, characteristics, and achievements, in order to further publicise its purposes in an informed and receptive environment.

reconstruction and refurbishment of a parish church or providing books for the local library would fall within the scope of these aims[25].

As Gondra Elguezabal (2021, 156) stated, it is impossible to fully cover the breadth of applications provided for in the BCA. Practically any action that benefits the community or certain groups in the cooperative's environment that are eligible for assistance (not exclusively in the business interest of the cooperative) could be covered by this reserve. This is linked to the general opening statement of the current substantive law, which describes the purpose of cooperative societies as carrying out any economic and social activity at the service of its members and the surrounding community[26].

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[25] Request for a binding tax resolution no. V1202-00, submitted to the General Tax Authority on 26 May 2000.

[26] Gondra Elguezabal (2021, 157-158) provided a list of actions that are within the scope of these purposes, including, but not limited to those outlined below.

Dissemination activities include carrying out social media information campaigns, editing publications, brochures or other forms of advertising on relevant issues, publishing specialised training programmes or content on these matters in any audio-visual format, organising competitions, cultural, recreational or festive projects for merely informative purposes, excluding typically marketing-based actions aimed at advertising the society (brand, etc.).

Educational promotion activities include organising or sponsoring technical conferences, symposiums, seminars, or visits; supporting the presence and participation of cooperatives in fairs, exhibitions, contests or other similar events; funding research and documentation on cooperativism; publishing material on consumerism, and in general, on consumer cooperatives. Likewise, expenses incurred in preserving, repairing, or amortising the assets related to these purposes can be allocated to the Fund. Other purposes could also include grants to universities or university research centres; grants to training centres in any of the degrees; scholarships for researchers to improve educational systems; or scholarships to help students cover part of their expenses outside their usual place of residence, among others.

Cultural promotion activities include support for cultural centres in the municipalities where the cooperative is based; help for residents of the municipality where the cooperative is located to visit museums, go to the theatre, opera, cinema, etc.; support for arts-and-crafts professionals to publicise their trade in the areas of influence of the cooperative; funding to co-finance cultural events or fairs; support for ICT training.

Professional promotion activities encompass professional promotion that is not limited to schools or formal education, but would also include all support for occupational training, information and career guidance projects, promotion of new companies, etc. These activities cover grants to take courses that improve people's knowledge and skills, and grants for the acquisition of computer resources for the professional advancement of members or employees.

Assistance promotion activities also comprise aids for people with disabilities in the cooperative or in the local environment; support for day centres, nursing homes, etc.; funding for operations or surgical interventions not covered by the Public Health Service/Osakidetza network; financial support for purchasing educational books; help for nursery expenses for children; financial support for family care expenses, support for disadvantaged groups.

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It should also be noted that the purpose of any promotion and dissemination action that uses amounts from the COFIP must be the promotion (cultural, support, etc.) and dissemination of cooperativism. These activities must be clearly different from other purposes linked to the business and improvement of the cooperative. For example, sponsorship and advertising contracts that seek to improve the image of the brand or the product would not be eligible to be funded by the COFIP. Sometimes it is very difficult to draw the fine line between promotion that is within the scope of the law and mere advertising[27].

5.4. *Other purposes under Article 72 of the Basque Cooperatives Act*

Under Article 72 of the BCA, the Fund may also be used for other purposes, notably including promoting the use of the Basque language.

The fact that this purpose has been singled out gives it greater visibility and a practical outlook. Otherwise, it could merely have been listed among the cultural activities mentioned in the previous section. Some activities that may be conducted to promote the Basque language include the design and implementation of Basque language plans, both in the cooperative itself and for its members, salaried workers, suppliers, clients... and in general, with third parties that the cooperative society has a link with within the Basque Country[28]. Other activities that could be funded by the COFIP are cultural events that use the Basque language, and support for organising and participating in events to promote the Basque language, such as: Korrika, Ibilaldia, Araba Euskaraz…

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[27] Gondra Elguezabal (2021, 162) explained, for example, that sponsoring a sports organisation in the town where the cooperative's headquarters are located does not seem to violate the current regulations; however, would this sponsoring comply with the law if it were given in exchange for the sports organisation displaying cooperative advertising on their t-shirts? Would it have the same repercussion and legal consideration if the good produced by the cooperative were directly targeted (for example, mattresses or tax advice) or not (components for vehicles or advice on business internationalisation)? That is, if it were capable of being directly consumed by the recipients of that "advertising"? It is deemed that in the first case, the action of the cooperative would clearly have business repercussions, because it would be aimed at potential clients, but in the second case it would not, as the 'cultural' promotion of the environment seems to be the final objective. That is why sometimes it is reasonable to consider that the actions taken by cooperatives should be treated differently regarding whether or not they fulfil the legally established purposes for applying the amounts allocated to the COFIP. Nevertheless, this only makes it more difficult to specify the possible purposes of the Fund.

[28] Gondra Elguezabal (2021, 159).

Article 72 of the BCA also mentions the promotion of new cooperative companies through monetary contributions to a non-profit entity promoted by the Basque cooperative movement.

The letter of this provision is intended to promote the increasingly important role that organisations such as APES-Euskadi, Bizikoop, Elkar-Lan, S. Coop. and Promokoop Fundazioa play in the promotion of new cooperative companies; however, these actions would also have a place within the purpose related to inter-cooperative relationships.

An additional purpose provided for in Article 72 of the BCA is the training and education of cooperative members and workers in effective policies to advance towards equality between women and men.

Activities such as the implementation of equality plans could be funded and executed either directly by the cooperative itself or through specialised external consultants.

5.5. *The exceptional situation arising from the COVID-19 pandemic*

Special reference must be made at this point to the regulations in connection with the Fund for Cooperative Education and Promotion and its applicability to mitigate the effects of COVID-19 (Alguacil Marí 2020). Article 13 of Royal Decree-Law 15/2020, of 21 April, on urgent complementary measures to support the economy and employment[29], established that the Fund for Cooperative Promotion and Education may be used to alleviate the effects of COVID-19 from the declaration of the state of emergency until 31 December 2020. This was extended to 2021 by Royal Decree-Law 8/2021, of 4 May[30]. As the Decree-Laws explicitly referred to the fund regulated in Article 56 of Law 27/1999, of 16 July, on Cooperatives, which is applicable to cooperatives located in territories that have no specific regional legislation, some doubts may arise about their application to the Basque Autonomous Region (Gondra Elguezabal 2021, 165-166). However, the three Provincial Councils of Alava[31], Biscay[32] and Guipuz-

[29] Spanish Official Gazette, no. 112, of 22 April 2020.

[30] Spanish Official Gazette, no. 107, of 5 May 2021.

[31] Urgent Tax Regulatory Decree 5/2021, of the Provincial Council of 8 June, which approves the tax measures applicable to the tax regime of cooperatives and corporation tax (Alava Official Gazette, no. 66, of 16 June 2021).

[32] Instruction 7/2020, of 1 July (accessible at https://www.bizkaia.eus/instrucciones/instruccion_7_2020_55_es.pdf); and Instruction 5/2021, of 22 December (accesible at: https://www.bizkaia.eus/instrucciones/instruccion_5_2021_60_es.pdf)..

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coa[33] have implemented similar rules for cooperatives that apply regional tax regulations.

In this regard, the Fund for Cooperative Education and Promotion (and also the COFIP) may be used, totally or partially, for the following purposes:

a) As a financial resource to provide the cooperative with liquidity in its operations, if necessary. The amounts allocated to these funds must be returned by the cooperative using at least 30% of the freely available profit generated each year, until it reaches the amount that the fund had at the time when the decision was adopted to allow its application on an exceptional basis, within a maximum period of 10 years.
b) For any activity that helps curb the COVID-19 health crisis or alleviate its effects, either through its own actions or through donations to other public or private entities.

In short, as an exceptional rule due to the COVID-19 pandemic, cooperatives will not lose their tax protection if they use these funds to provide liquidity to the cooperative (subject to the obligation of repaying the amounts within ten years) or for any activity that helps to curb the health crisis or alleviate its effects between 14 March and 31 December 2020, or in 2021. Any amounts that have been used for these purposes will not be considered to be part of the cooperative's income.

The question then arises as to what happens if the amounts applied to provide liquidity to the cooperative are not repaid within the statutory 10-year period (despite compliance with the 30% minimum allocation), considering the monitoring powers of the Higher Council of Cooperatives of the Basque Country in corporate liquidation processes (distribution of the cooperative's assets) under Article 98.2.a) of the BCA, and, above all, of the Treasury for the relevant Special Area for Tax Purposes[34].

From a tax perspective, if the funds are not repaid within the statutory period, this constitutes non-compliance with a requirement contained in the special rule that was obviously unknown when the COFIP

[33] Order for the Guipuzcoa Special Area for Tax Purposes 380/2020, of 29 September (Guipuzcoa Official Gazette no. 189, of 2 October 2020); and Order for the Guipuzcoa Special Area for Tax Purposes 518/2021, of 18 September, which approves the interpretation whereby the cooperative promotion and education fund can be used in 2021 to alleviate the effects of COVID-19 (Guipuzcoa Official Gazette no. 184, of 24 September 2021).

[34] Gondra Elguezabal 2021, 168.

was used to provide liquidity to the cooperative ten years before. In this case, Article 119.2 of the Biscay General Tax Regulations and Article 117.2 of the Alava and Guipuzcoa General Tax Regulations, respectively, would be applicable. If an exemption, deduction, or incentive recorded in a self-assessment is subject to the fulfilment of a requirement (repaying an amount before ten years have elapsed, for example), it must generally be adjusted in the self-assessment tax form corresponding to the tax period in which the non-compliance occurred. This will trigger default interest, but filing a complementary or replacement self-assessment form will not be necessary.

Gondra Elguezabal (2021, 166-168) has rightly criticised[35] the minor economic and financial outcomes that are likely to result from this measure. This is due to the fact that the amounts allocated to these funds for a given tax year must be applied during the following tax year. In other words, the amounts that could benefit from the measure in 2020 would be those that had been allocated in the 2019 financial year; and when the first Royal Decree was approved, cooperatives no longer had room for manoeuvre in terms of allocations from the previous year.

5.6. *Activities conducted through third parties*

Finally, the BCA specifically provides that cooperatives may fulfil all the purposes either directly or indirectly, that is, channelling the COFIP through monetary contributions to non-profit entities or any inter-cooperation entities, to enable these third parties to perform the activities for which the COFIP is intended.

If the intermediate entity fails to use the COFIP for the purposes set forth by law, there would be consequences for the cooperative. Nevertheless, the actions of the third party should not be attributed to the cooperative, as they are beyond its freedom of choice and outside its control. For this reason, I believe that there should not be any tax consequences for the cooperative; that is, the cooperative should not be excluded from tax advantages and the amount that had already been deducted should not be imputed as income.

[35] The economic measure approved by the Spanish authorities is especially beneficial for those Basque cooperatives that have systematically failed to comply with their obligations regarding the availability of the amounts to be allocated to the Fund, as opposed to those that have sought strict compliance with the legal provisions.

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VI. **Deductibility of the amounts allocated to the COFIP**

Another important aspect of the tax regime of cooperatives relates to the adjustment rules applicable to all cooperatives, regardless of their level of tax protection. These are rules that affect the determination of the tax base, the applicable tax rate, and the application of certain deductions from the fees payable by cooperatives. One of these rules refers to the deductibility of amounts allocated to the COFIP.

There are reasons to argue that the amounts allocated to non-distributable funds should be considered to be deductible expenses (Rodrigo Ruiz 2010). These are based precisely on the non-distributable (quasi-tax) nature of the funds, based on the principle that it must be beneficial to the community (public service requirement). That is, making reserves available to the community can be regarded as a true individual tax on any amounts payable to members (Ispizua 1997, 82). The allocation of social funds that cannot be distributed has been connected with the origins of modern cooperativism and the rest of worker associations since they emerged in the 19th century (Mata Diestro 2018). Tax advantages have been linked to non-distributability and have inspired cooperative fiscal policies in Spain (Ispizua 1997, 77). Thus, the non-distributable nature of the Fund and its compulsory character justify that the allocation should be a deductible expense in corporation tax (Alonso Rodrigo 2001, 219-220). This idea can be expanded further by looking at the general interest purposes for which the Fund is intended. Considering that cooperatives perform a role that is not for their own benefit but for the benefit of the community, and considering that this results in some reduced costs for the State, it seems fair that the amounts allocated to these purposes should be deductible (Alonso Rodrigo 2001, 236-237).

6.1. *Deductible expenses*

The expenses that are considered to be deductible from the income of cooperative societies (unlike that of corporations) in terms of calculating the tax base are outlined below. Applicable provisions are contained in Article 18 of the Biscay Cooperative Tax Regime and Article 16 of the Alava Cooperative Tax Regime and of the Guipuzcoa Tax Regime, respectively.

a) 50% of the amount allocated to the Mandatory Reserve Fund, as required by law or by the articles of association.

b) The amounts that cooperatives are required to allocate to cooperative education and promotion, and other purposes of public interest, which will be discussed in more detail in the following sections.
c) The amounts that cooperatives contribute to the inter-cooperative cooperation institutions intended for financial recovery or the promotion and development of cooperatives or new activities. In order to benefit from this deduction, the institution in question must have been recognised as an inter-cooperative institution by the Tax Authorities prior to making the contribution[36].
Although these purposes are included among those that can be funded using the COFIP, these amounts are directly deductible. This is an advantage because it means that they do not need to be included in a plan approved by the General Assembly, nor is separate accounting required. Nevertheless, as the institutions that receive the contribution are required to be among those recognised by the Public Treasury, cooperatives are constrained in their choice of institution. On the contrary, the COFIP can be allocated to carry out activities of institutions not recognised by the Public Treasury, provided that they fulfil the purpose of inter-cooperation.

The deduction of the contribution will also be applicable to any other contribution or fund that is similar in nature and purpose, even if it has a different name under the applicable regulations (Article 19.8 of the Biscay Cooperative Tax Regime, and Article 17.8 of the Alava Cooperative Tax Regime and of the Guipuzcoa Cooperative Tax Regime, respectively). However, amounts earmarked for non-distributable funds other than the mandatory reserve fund and the education and promotion fund are not deductible from the tax base (Montero Simó 2016, 34).

6.2. *Deduction of the amounts allocated to the COFIP*

Pursuant to Article 19.1 of the Biscay Cooperative Tax Regime, and Article 17.1 of the Alava Cooperative Tax Regime and of the Guipuz-

[36] Pursuant to Article 18 of Biscay Cooperative Tax Regime, and Article 16 of Alava Cooperative Tax Regime, and Guipuzcoa Cooperative Tax Regime, these institutions will be recognised based on the terms established by the applicable regulations. The institutions recognised by the Tax Authorities that aim to promote inter-cooperative cooperation will not be taxed on the amounts received from the associated cooperatives, provided that they account for the fact that the amounts received have been used consistently with the corporate purpose of the institution.

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coa Cooperative Tax Regime, respectively, any amounts allocated to the COFIP are a deductible expense, capped at 30% of the net surplus in each financial year. As it is included as an expense in the Profit and Loss account of the cooperative's financial statements, in principle, it will not result in any off-balance sheet adjustments[37] in the tax base for corporation tax.

In this sense, ALGUACIL MARÍ (2020) affirmed that the deductibility of the amounts allocated to the fund as a fiscal expense constitutes an exception to the tax treatment of amounts earmarked for future risks and expenses, which are normally not deductible. Their deductibility is justified by the general interest or public interest purpose that is sought to be achieved by applying the fund.

As in any allocation of funds, the deductibility of the expense precedes its effective application; that is, it is the contribution to the fund that is deductible, and not the expense itself, which is to be accounted for separately from the accounting records kept in the ordinary course of business of the cooperative.

Regarding the COFIP, the expense for the amount allocated will be deducted from the general tax base of the cooperative, on the understanding that if the amount is allocated to the income included in the special tax base, the item would not be tax deductible for two reasons. One reason is that deductible expenses cannot be used to calculate the special tax base; therefore, if the amounts came from the profit included in the special tax base, they would not be tax deductible. The second reason is that tax rules only allow the deduction of the amounts from profit included in the general tax base, which means that tax deduction cannot be applied if it is not deducted from the general tax base.

6.3. *Deductible portion of the amount allocated to the COFIP*

The entire amount allocated to the COFIP is, in principle, deductible, provided that it does not exceed 30% of the net surplus of the cooperative. However, the Cooperatives Act requires that 10% of the available surplus be allocated to it. Net surplus and available surplus are two different, but related concepts. Available surplus is the result

[37] See binding requests for a resolution no. 1090/2005 and no. V2746-11 submitted to the General Tax Authority on 14 June 2005 and 18 November 2011, respectively. Given that it is an adjustment rule, this treatment will also apply to non-protected cooperatives (ALGUACIL MARÍ, 2020).

of deducting the losses from previous years and the corporation tax from the net surplus. However, the tax rule does not refer to the available surplus, but rather limits the deduction to 30% of the net surplus. Two limitations must be noted: while corporate regulations refer to available surplus, tax regulations refer to net surplus. It seems that the amount mandatorily allocated will always be deductible because it is a lower percentage (10%) and is calculated on a smaller base (the available surplus); whereas fiscally the limit is set at 30% of the net surplus, unless the articles of association provide for a higher amount.

Likewise, the limit of the deduction included in the tax regulations mentions a non-tax concept, net surplus, which is included in the substantive regulations, specifically, in Article 69 of the BCA[38], and does not limit the deductibility to a percentage based on tax base, as is customary in these cases. Therefore, it seems useful to analyse the BCA to ascertain what is meant by net surplus and what similarities or differences it has with respect to the tax base for the corporation tax. The net surplus is the accounting profit before tax, deducting losses from previous years. Therefore, it is a concept that does not coincide with that of the tax base (which arises from applying the tax adjustments to the accounting profit). This is the case even when the losses coincide with the negative tax bases of previous years (which are not equivalent concepts either). Ultimately, an accounting concept must be resorted to in order to confirm whether the amount allocated to the COFIP has exceeded the limit imposed on deductions.

According to Article 70 of the BCA, regarding the amount that can be allocated to the COFIP that may be deducted for corporation tax purposes, that is, the amount that must be allocated to the COFIP, 'the available surplus is the amount of net surplus after deducting the amounts used to offset losses from previous years and paying any required taxes.

The following amounts from the available surplus must be allocated annually:

(a) an overall thirty percent must be allocated to the Mandatory Reserve Fund and to the COFIP. At least ten percent must be allocated to the COFIP, and twenty percent to the Mandatory Reserve Fund.

As long as the Mandatory Reserve Fund does not reach an amount equal to fifty percent of the share capital, the minimum allocation to be made to the COFIP may be reduced by half'.

[38] Article 69.1 of the BCA: "The accounting rules and criteria established for companies must be applied to determine the net surplus, unless this is specifically regulated for cooperative societies".

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Therefore, at least 20% of the available surplus must be allocated to the Mandatory Reserve Fund, and 10% to COFIP on an annual basis. This is without prejudice to the additional amounts earmarked for the purposes established in the cooperative's articles of association or approved by the General Assembly regarding the remaining surplus. Given that these percentages are mandated by law, it must be concluded that the articles of association may establish equal or higher percentages, but not lower ones. In any case, Article 70.3 of the BCA introduces a new development to be applied on an exceptional basis, whereby the percentages mentioned above can be modified; the percentage allocated to the COFIP may be 5%, provided that the Mandatory Reserve Fund does not reach an amount equal to 50% of the share capital.

The amount eligible for deduction is the mandatory amount to be allocated to the COFIP. From the wording of Article 18 of the Biscay Cooperatives Tax Regime, and Article 16 of the Alava and Guipuzcoa Cooperative Tax Regimes, respectively, it can be deduced that the mandatory allocation referred to in these articles includes both the allocation provided for by the law and that included in the cooperative's articles. In fact, regarding the deduction of the amount allocated to the Mandatory Reserve Fund, the Basque Tax Regimes mentioned above refer to the amount stipulated by law or by the cooperative's articles; since both the Mandatory Reserve Fund and the COFIP are mandatory, non-distributable funds, it should be concluded that this reference can also be extrapolated to the COFIP. "Mandatory" therefore means "compulsory" in both cases, either stipulated by law or by the articles of association.

Likewise, both the minor jurisprudence[39] and the case law of the Spanish General Tax Authority (DGT)[40] and the Central Tax Appeal Board (TEAC)[41] (Alguacil Marí 2020; Ispizua 1997, 81) have ruled that the mandatory allocation is the one that is, at least, established in the articles of association. They have established that a resolution of the General Assembly is not sufficient to increase the percentages mentioned above, as the difference would have to be considered to be vol-

[39] See, in chronological order, Judgments 283/2000 of 12 May (rec. 287/1997) and 521/2009 of 3 September (rec. 197/2008) of the High Court of Justice of Aragon, 2451/2010 of 29 October (rec. 1782/2004) of the Superior Court of Justice of Castilla y Leon, of 22 March 2012 (rec. 139/2009) of the National Court, and 1977/2015 of 7 September (rec. 377/2014) of the High Court of Justice of Andalusia.

[40] Binding requests for a resolution of the Spanish General Tax Authority numbers V2746-11, of 18 November 2011, and V0163-15, of 19 January 2015.

[41] According to the resolution of the Central Tax Appeal Board of 16 April 2004.

untary. If the General Assembly approved an amount greater than that provided for by law and/or in the articles, the excess would not be deductible. Therefore, if an amount was allocated that was greater than the legal percentage, it would be deductible if established in the articles. However, an allocation higher than the legal percentage of the surplus that has been decided upon by the Assembly but is not provided for in the articles of association would not be deductible.

Consistently with this approach, the excess that does not give the right to deduction as an expense should not be considered in terms of the tax consequences that not using that amount for COFIP purposes or using it for a purpose other than the intended one could have; this is without prejudice to any administrative consequences that non-compliance may have[42]. The non-deductible excess is income taxed by corporation tax and cannot be imputed as income again, even in the event of non-compliance. Additionally, the cooperative should not lose its protected cooperative status.

Regardless of the above, this does not explain why, if the Assembly decides to allocate an amount that is above the legal threshold or the threshold stipulated by the articles of association, it cannot be deductible. As has been noted, the mandatory allocation to the COFIP is deductible because it cannot be distributed among the members and because it is used for public interest purposes. The deductibility of the difference allocated in excess of the amount established by law or in the cooperative's articles could be justified for the same reasons; the amount decided upon by the Assembly, as is the case for the amount provided by law or by the articles, cannot be distributed among the members and will be used for public interest purposes, so it makes no sense that it cannot be deductible. An analogy can be established by reference to Article 13 of the General Tax Regulations for Special Areas for Tax Purposes to argue the deductibility of the full amount allocated

[42] According to sections a) and b) of Article 159.2 of the BCA, failing to allocate the minimum percentages of available surplus to the COFIP and to use the amounts allocated to COFIP for the purposes established by the Law are very serious infractions. By virtue of the sanctioning regime (Art. 160.1 of the BCA), a penalty of EUR 3,000 to 30,000 shall be imposed on very serious infractions, taking into account their importance and the economic and social consequences, whether there has been bad faith, falsehood, repeat offending, and the economic capacity or volume of operations of the cooperative (Art. 160.2 of the LCE). The penalty to be imposed on the cooperative may cause it to be disqualified (Arts. 160.1 and 161 of the BCA). If the infractions cause or could cause significant economic or social damage, or entail repeated and essential violation of cooperative principles [Art. 161.1.a) of the BCA], the cooperative must be dissolved (Art. 161.4 of the BCA).

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to the COFIP, not only of any amount allocated as required by law or by the articles, because it meets the same requirements that justify the deductibility of the amount. In other words, even though the same requirements are met, in one case the amount allocated is deductible (amount as stipulated by the law or by the cooperative's articles), and in the other case deduction is prevented (that is, regarding the difference decided by the Assembly in excess of the amount set out by law or in the articles).

Additionally, the amount allocated to the COFIP must be calculated based on the available surplus, that is, after the losses of previous years and the corporation tax of the cooperative's net surplus have been subtracted. Post-tax allocation requires the application of some complex equations to calculate the amount, because the amount allocated is taken into account when calculating the tax base of the tax, and is calculated after subtracting the corporation tax. The Spanish General Tax Authority (DGT), in response to a request for a tax resolution (1304/1998) submitted on 20 July, declared the tax validity of the equations necessary to make this calculation, in order to consider the 'mandatory amount to be allocated'. The amount of the net surplus is calculated by subtracting the tax amount from the profit of the cooperative, which will be determined by the algebraic sum of the result of applying 19% to the special tax base and the result of applying 20% or 18% to the general tax base reduced by 50% of the amount allocated to the Mandatory Reserve Fund, and by the entire amount allocated to the COFIP.

Taking 20% as a tax rate, this could be graphically expressed as follows:

$$TDX= 0.2 * [CPTP-a * (CPTP-TDX) – 0.5 * b * (CPTP-TDX)] + 0.19 * STB$$

Which can be solved as follows:

$$TDX= [CPTP * 0.2 * (1-a–0.5 * b) / (1–0.2 * a–0.1 * b)] + 0.19 STB$$

Where:

TDX= Tax due on the general tax base
CPTP (Cooperative's pre-tax profit) = General Tax Base (excluding expenses for the amount to be allocated to the Mandatory Reserve Fund (known as FRO) and the COFIP
STB = Special Tax Base
a= Coefficient to be allocated to the COFIP as stipulated by the articles of association
b= Coefficient of the cooperative's profit to be allocated to the FRO

6.4. *Other requirements for the amounts to be deductible: Assembly Plan and separate accounting*

In addition to the requirements already mentioned, the deductibility of the amount paid into the Fund is conditional upon the COFIP being applied as provided in the plan approved by the General Assembly of the cooperative (Article 19.1 of Biscay Cooperatives Tax Regime, and Article 17.1 of the Alava and the Guipuzcoa Cooperatives Tax Regimes). However, in 2020 and 2021 the Board of Directors was exceptionally granted this power for purposes linked to situations caused by COVID-19, by virtue of the two Royal Decree-Laws mentioned in previous sections. If the General Assembly does not approve the Plan, following the Supreme Court Judgment of 19 November 2012, the interpretation is that the amount allocated to the Fund has not fulfilled the required purpose[43]. The Supreme Court ordered the amount allocated (already deducted) to be imputed as income and excluded the cooperative from the tax advantages that protected cooperatives can benefit from.

The amounts allocated to the Funds, as well as the applications required by the plan, whether they are running costs or investments in fixed assets, must be reflected separately in the corporate accounting (Article 19.2 of the Biscay Cooperatives Tax Regime and Article 17.2 of the Alava and Guipuzcoa Tax Regimes, respectively). Therefore, not only must the amount allocated to the Fund be accounted for correctly in order to be deductible, but there is also a requirement for expenses and investments made against the Fund to be separately accounted for.

By virtue of the regulation contained in the sixth rule of Order 3360/2010, of 21 December, which approves the rules on accounting aspects of cooperative societies of the Ministry of Economy and Finance, the most appropriate solution for its accounting is to create a new grouping in the liabilities of the balance sheet separately from other items. This involves that it is not deemed to be part of the Equity section, because it must be used for specific purposes. The amount allocated to the Fund will be reflected as an expense, and shall be recorded in the profit and loss account, regardless of the fact that it is calculated based on the profit from the fiscal year. The application of this fund to its purpose is removed and generally recorded by being credited to a treasury account.

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[43] Other resolutions along the same lines were Judgment 283/2018, of 14 June (rec. 790/2016) of the High Court of Justice of Madrid and request for a binding tax resolution no. 610/2010, submitted on 29 March to the General Tax Authority (Alguacil Marí 2020).

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Both the amounts allocated to the Fund and the applications required by the plan, whether they are running costs or investments in fixed assets, must be recorded in the corporate accounting separately, in accounts that clearly indicate that they are earmarked for the Fund[44]. Therefore, accounting is done separately, to the extent that the items of expenses, losses, income, and profits transferred to the Profit and Loss account of the COFIP will not be taken into account for the determination of the general tax base of the cooperative (Polanco 2004)[45].

6.5. *Failure to meet the deadline or use the fund for the purposes mandated by law*

The tax rules establish that the COFIP must be applied to its purpose in the year following the allocation of the relevant amount. If the contribution is used for purposes other than those approved, the amount will be deemed to have been improperly applied and regarded as income for the year in which it occurs. In addition, the cooperative will lose its tax protection, if it had it (Article 19.4 of the Biscay Cooperatives Tax Regime, and Article 17.4 of the Alava and Guipuzcoa Tax Regimes, respectively). However, if the cooperative uses the Fund for purposes other than those approved by the Assembly but permitted by law, as noted by ALONSO RODRIGO (2001, 228-229) the cooperative would continue to be protected, since this diversion is not included among the causes for loss of tax protection.

The amount not allocated to public interest purposes must be delivered to non-profit entities to be used for public interest purposes within the financial year following the one in which the distribution of the surplus was approved (Article 19.3 of the Biscay Cooperatives Tax Regime and Article 17.3 of the Alava and Guipuzcoa Cooperatives Tax Regimes, respectively). That is, if it has not been earmarked throughout the year in which the decision was approved, the distribution of surplus must come out of the cooperative's assets within the following year. Nevertheless, it does not lose their tax status or protection for this rea-

[44] By virtue of Sections 5 and 6 of Article 19 of the Biscay Cooperatives Tax Regime, and Article 17 of Alava and Guipuzcoa Cooperative Tax Regimes, at the close of the financial year, expenses and negative income will be charged and income and positive income will be credited to a special income statement for the Fund.

[45] Article 19.7 of the Biscay Cooperatives Tax Regime, and Article 17.7 of the Alava and Guipuzcoa Cooperatives Tax Regime, respectively.

son, nor is it considered tax revenue, even if the cooperative has not allocated it to the envisaged activities.

It is true that the BCA does not establish a deadline for the amount to be used by the relevant receiving entity; but it seems logical[46] to infer that the most cautious deadline would be the end of the fiscal year in which the transfer would have been carried out, thus extending the deadline granted to the cooperative. If the entity to which the Fund is delivered fulfils the purposes laid down in the articles of association and is legally obliged to do so, what is the responsibility of the cooperative if the intermediate entity fails to use the amount for one of the purposes provided for in Law 11/ 2019, because it fails to meet the deadline or because it uses the amount for a different purpose? This would apply both to the Administration and to the intermediate entity and in terms of legitimations and procedures[47]. As discussed above, the conduct of the third party that causes non-compliance should not be attributable to the cooperative. Therefore, in my opinion, the cooperative should not be subject to the tax consequences of non-compliance; that is, the amount allocated should not be imputed to it as income, and the cooperative should not lose its protected status or the tax advantages that it entails.

VII. **Conclusion**

The approval of Law 11/2019, of 20 December, on Cooperatives in the Basque Country, did not bring about any substantial changes in the regulation of the Fund for Cooperative Education and Promotion and Other Purposes of Public Interest (COFIP) (known as the Fund for Education and Promotion outside the Basque Country), in comparison with the previous legislation.

The COFIP is linked to the principles of education, inter-cooperation and concern for community advocated by the ICA. The amounts allocated to the COFIP must be used for a wide variety of purposes that seek to make the cooperative and the cooperative movement visible within its environment, as well as promoting collaboration among cooperatives. The activities carried out within the scope of the COFIP seek to achieve public interest purposes and the amounts allocated to the Fund are non-distributable, that is, they can only be used for these purposes. This explains its favourable treatment under the applicable tax law.

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[46] Gondra Elguezabal 2021, 164.

[47] Nagore Aparicio 2020, 275.

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The allocation and proper use of the COFIP, that is, its application in accordance with Law 11/2019, benefits from a tax advantage that involves the deductibility of the amounts allocated to the Fund for corporation tax and the application of tax advantages provided for protected and specially protected cooperatives. Any misuse of the COFIP, however, is penalised from a tax point of view, resulting in the loss of the advantages mentioned above. This involves attributing to the Public Treasury a watchdog role for the application of the substantive regulations, which is surely not its purpose.

There are some gaps in the COFIP tax regime that give rise to unfair, or at least, debatable situations. For example, it is unfounded that the allocation to the COFIP decided by the Assembly cannot be deducted in the amount that exceeds the threshold established by law or by the articles of association. An analogy could be used by resorting to Article 13 of the General Tax Regulations to argue the deductibility of the full amounts allocated to the COFIP, because the difference agreed by the Assembly also meets the same criteria; namely, it is an amount that cannot be distributed among the members and is used for public interest purposes, which justifies its deductibility.

In addition, the activities funded by the COFIP must be carried out over two financial years, that in which the amounts are allocated to the Fund and the year immediately following. The Fund may be delivered to a third party for it to carry out the activity within the legally established purposes. This option, either by voluntary choice of the cooperative or because the cooperative has not allocated the amount to its purposes within the set deadline, should not determine the tax regime applicable to the cooperative. Cooperatives should not suffer the consequences of non-compliance by a third party; thus, for example, the amount allocated to the Fund should not be imputed as income and cooperatives should not lose their tax benefits in such cases.

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