



LEGAL FRAMEWORK ANALYSIS

NATIONAL REPORT: PORTUGAL

ICA-EU PARTNERSHIP



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National Experts: Deolinda Meira and Maria Elisabete Ramos

I. Introduction

Cooperatives benefit from regulations that acknowledge their specificities and ensure a level playing field with other types of business organisations. This research falls within the scope of the knowledge-building activities undertaken within the partnership for international development signed in 2016 between the European Commission and the International Cooperative Alliance (ICA), which aims to strengthen the cooperative movement and its capacity to promote international development worldwide. It demonstrates that the absence of a supportive legal framework for cooperatives, or the presence of a weak or inadequate legal framework, can negatively impact cooperatives and their evolution. In contrast, the existence of supportive regulations can foster cooperatives' creation and strengthening, acting as a driver of sustainable development. For this reason, further knowledge and evaluation of cooperative legislation will become a tool for ICA members, cooperators worldwide, and other key stakeholders such as policymakers and cooperative legal scholars. With greater knowledge and access to a global, country-based legal framework analysis, ICA members can advance their advocacy and recommendations on the creation or improvement of legal frameworks, document the implementation of cooperative legislation and policies, and monitor their evolution.

The main objectives of the legal framework analysis are to:

- provide general knowledge of the national cooperative legislation and of its main characteristics and contents, with particular regard to those aspects of regulation regarding the identity of cooperatives and its distinction from other types of business organisations, notably the for-profit shareholder corporation.
- to evaluate whether the national legislation in place supports or hampers the development of cooperatives, and is therefore “cooperative friendly” or not, and the degree to which it may be considered so, also in comparison to the legislation in force in other countries of the ICA region (or at the supranational level).
- to provide recommendations for eventual renewal of the legal frameworks in place in order to understand what changes in the current legislation would be necessary to improve its degree of “cooperative friendliness”, which is to say, to make the legislation more favourable to cooperatives, also in consideration of their specific identity.

This report was prepared by Deolinda Meira and Maria Elisabete Gomes Ramos.

Deolinda is an Associate Professor at the Porto Accounting and Business School (ISCAP) of the Polytechnic of Porto (IPP), where she is Director of the Master “Management and Legal-Business Regime of the Social Economy”. She is a researcher at the Center for Social and Organizational Studies of the Polytechnic of Porto (CEOS.PP), where she is responsible for a research group on the Social Economy. Her main fields of research include Cooperative Law and Social Economy Enterprises, where she has published three books, two edited books, and more than 140 articles and chapters in journals and books. She is a co-author of the Principles of European

Cooperative Law: Principles, Commentaries and National Reports, Cambridge, Intersentia, 2017.

Elisabete is an Assistant Professor at the Faculty of Economics of the University of Coimbra where she teaches cooperative law. She is a researcher at the Centre for Cooperative Studies and Social Economy of the University of Coimbra. She is the author of several studies published in national and international journals dedicated to cooperative law.

Together, Deolinda and Elisabete received the Cooperation and Solidarity António Sérgio for Social Economy Award in 2015, were members of the Committee for the Revision of the Portuguese Cooperative Code and Co-Editors of the Annotated Cooperative Code, Coimbra, Almedina, 2018.

II. National cooperative law: Portugal

i. General Context

Portuguese cooperative law is based on four fundamental pillars: a) **the Constitution of the Portuguese Republic**; b) **the Social Economy Basic Law**; c) **the Cooperative Code**; and d) **legislation specifically regulating the cooperative branches**.

The Constitution of the Portuguese Republic and the Cooperative Code apply to cooperatives of any branch. In addition to these general rules, some cooperative branches are regulated by specific legislation. Considering this legislative model for regulating cooperatives in Portugal, the report considers the four pillars (as well as considering other rules that are relevant to the understanding of the legal regulation of cooperatives in Portugal).

Cooperatives are specifically regulated in Portugal. The main source of Cooperative law is the **Cooperative Code (PCC)**, approved by the Law No. 119/2015, published in 31.08.2015 and that entered into force on 30.09.2015.

According to Portuguese Law, cooperatives are granted a separate legal status by the **Constitution of the Portuguese Republic** (*'Constituição da República Portuguesa'* – CRP), which dedicates more than a dozen articles to them, scattered throughout the constitutional text but nevertheless properly articulated by a set of structuring principles. They include the principle of coexistence of the three sectors, namely the public sector, the private sector, and the cooperative and social sector (Article 82); the principle of freedom of cooperative initiative (Article 61); the principle of protection of the social and cooperative sector (Article 80); the principle of the obligation of the State to encourage and support the creation of cooperatives (Article 85); and the principle of compliance with the ICA cooperative principles (Article 61.2 in fine).

In the Portuguese legal system, the cooperative principles are mandatory and are enshrined in the Constitutional text (Articles 61.2., 82.4.a). Notably, in the definition of a cooperative, compliance with the cooperative principles is mandatory for the Portuguese legislator. These principles are embodied in Article 3 PCC: voluntary and open

membership; democratic member control; member economic participation; autonomy and independence; education, training, and information; cooperation among cooperatives; and concern for the community. Hence, a disrespect for the cooperative principles in business operation can be a cause for dissolution (Article 112.1.h) PCC).

Company Law must also be considered, particularly the provisions regarding joint-stock companies. Specifically, Article 9 PCC provides for the complementary application of company law, particularly of those sections that regulate joint-stock companies, providing cooperative principles are respected.

According to Article 4.1 PCC, there are currently twelve types of cooperative in Portugal: consumer, trade, agricultural, credit, housing and building, worker, crafts, fishing, cultural, services, education, and social or solidarity. These can be examined in the table below.

António Sérgio Cooperative for Social Economy (CASES)¹, a public interest cooperative, is responsible for overseeing the use of the cooperative format in compliance with the cooperative principles and rules concerning their incorporation and operation (article 115.1, 2. PCC).

¹ António Sérgio Cooperative for Social Economy (CASES) was created by Decree-Law No. 282/2009 of 7 October 2009. It exercises some of the typical powers that characterise a regulator in practice because its duties are to monitor and supervise the cooperative sector and its modes of operation.

Table 1: Regulations applicable to cooperatives in Portugal

Regulation	Sector	Elements to note
Constitution of the Portuguese Republic, approved by Decree n.º 10/04 of 1976	N/A	The Constitution of the Portuguese Republic dedicates more than a dozen articles to cooperatives. The cooperative principles are mandatory and are enshrined in the Constitutional text (Articles 61.2., 82.4.a).
Social Economy Framework Law, approved by the Law No.30/2013, published in 8.5.2013	N/A	This law recognises cooperatives as entities of the social economy (Article. 4.º a)
Cooperative Code approved by the Law No. 119/2015, published in 31.08.2015, as amended by Law n.º 66/2017, published in 9.8.2017	N/A	The main source of cooperative law in Portugal.
Commercial Companies Code, approved by the Law n.º DL n.º 262/86 , published in 02/09 ²	N/A	Article 9 of the Cooperative Code provides for the complementary application of company law to cooperatives
Decree-Law No. 335/99, 20.08.1999, as amended by Decree-Law nº 23/2001, of 30 January	Agricultural cooperatives	Article 1 of this Decree-Law states that agricultural cooperatives (first degree and their higher degree organisations) are governed " <i>by the provisions of this law</i> " and, in case of omission, " <i>by the provisions of the Cooperative Code</i> ". **
Decree-Law No. 523/99, 10.12.1999	Trade cooperatives	Article 1 of this Decree-Law states that trade cooperatives (first degree and their higher degree organisations) are governed " <i>by the provisions of this law</i> " and, in case of omission, " <i>by the provisions of the Cooperative Code</i> ". **
Decree-Law No. 522/99, 10.12.1999	Consumer cooperatives	Article 1 of this Decree-Law states that consumer cooperatives (first degree and their higher degree organisations) are governed " <i>by the provisions of this law</i> " and, in case of omission, " <i>by the provisions of the Cooperative Code</i> ". **
Decree-Law No. 24/91, 11.01.1991, as amended by Decree-Law No. 230/95 of 12.09.1995, Decree-Law No. 320/97 of 25.11.1997, Decree-Law No. 102/99 of 31.03.1999 and Decree-Law No. 142/2009 of 16.06.2009	Credit unions	Article 2 of this Decree-Law states that: " <i>For any matters not covered by this statute, Credit Unions are governed, depending on the matter, by the Legal Framework of Credit Institutions and Financial Companies and other rules governing credit institutions and by the Cooperative Code and other legislation applicable to cooperatives in general</i> ".
Decree-Law No. 313/81, 19.11.1981	Cultural cooperatives	Article 1 of this Decree-Law states that cultural cooperatives (first degree and their higher degree organisations) are governed " <i>by the provisions of this law</i> " and, in case of omission, " <i>by the provisions of the Cooperative Code</i> ". **

² Since its publication, the Commercial Companies Code has been amended 50 times. The last amendments were introduced by Law No. 49/2018, of 14/08.

Decree-Law n° 303/81, of 12.11.1981	Craft Cooperatives	Article 1 of this Decree-Law states that craft cooperatives (first degree and their higher degree organisations) are governed " <i>by the provisions of this law</i> " and, in case of omission, " <i>by the provisions of the Cooperative Code</i> ". **
Decree-Law No. 441-A/82, 06.11.1982	Education cooperatives	Article 1 of this Decree-Law states that education cooperatives (first degree and their higher degree organisations) are governed " <i>by the provisions of this law</i> " and, in case of omission, " <i>by the provisions of the Cooperative Code</i> ". **
Decree-Law No. 502/99, 19.11.1999	Housing and building cooperatives	Article 1 of this Decree-Law states that housing and building cooperatives (first degree and their higher degree organisations) are governed " <i>by the provisions of this law</i> " and, in case of omission, " <i>by the provisions of the Cooperative Code</i> ". **
Decree-Law No. 312/81, 18.11.1981	Fisheries cooperatives	Article 1 of this Decree-Law states that fisheries cooperatives (first degree and their higher degree organisations) are governed " <i>by the provisions of this law</i> " and, in case of omission, " <i>by the provisions of the Cooperative Code</i> ". **
Decree-Law No. 309/81, 16.11.1981	Worker cooperatives	Article 1 of this Decree-Law states that worker cooperatives (first degree and their higher degree organisations) are governed " <i>by the provisions of this law</i> " and, in case of omission, " <i>by the provisions of the Cooperative Code</i> ". **
Decree-Law No. 323/81, 04.12.1981	Services cooperatives	Article 1 of this Decree-Law states that services cooperatives (first degree and their higher degree organisations) are governed " <i>by the provisions of this law</i> " and, in case of omission, " <i>by the provisions of the Cooperative Code</i> ". **
Decree-Law No. 7/98, 15.01.1998	Social/ solidarity cooperatives	Article 1 of this Decree-Law states that social solidarity cooperatives (first degree and their higher degree organisations) are governed " <i>by the provisions of this law</i> " and, in case of omission, " <i>by the provisions of the Cooperative Code</i> ". ** The rights, duties and benefits (including tax benefits and access to credit) under the Statute of the Private Institutions of Social Solidarity, regulated by Decree-Law No. 119/83 of February 25, amended and republished by Decree-Law No. 172-A/2014 of 14 November, are extended to social solidarity cooperatives.
Decreto-Lei n° 31/84, de 21 de janeiro	Public interest cooperatives ('régie cooperativa)	Article 2 of this Decree-Law states that public interest cooperatives are governed " <i>by the provisions of this law</i> " and, in case of omission, " <i>by the provisions of the Cooperative Code</i> ". **
Tax Benefit Statute (Estatuto dos Benefícios fiscais-EBF)	Tax Benefit Statute	Article 66-A provides tax benefits for cooperatives.

** Therefore, in areas not covered by the regulation contained in the numbered Decree-Law, the (more) general norms of the Cooperative Code will be directly applied.

ii. Specific elements of the cooperative law

a) Definition and objectives of cooperatives

A cooperative is defined in Article 2.1 PCC as an “*autonomous association of persons, united voluntarily, of variable composition and capital, which, through cooperation and mutual assistance of its members and in accordance to cooperative principles aims not at profit but at satisfying economic, social, or cultural needs and aspirations of the said members.*” According to the above definition, the objective of cooperatives is to “*meet the needs and economic aspirations*” of members.

This definition is based on four distinctive features of this type of legal entity, the first two of a formal character — the variability of the share capital³ and the variability of the shareholding structure — and the other two of a substantive nature — the social object of the cooperative (the satisfaction of the economic, social, or cultural needs of cooperative members, though remaining a not-for-profit entity) and the way of management of the cooperative (compliance with cooperative principles, cooperation and mutual assistance of members). These characteristics distinguish cooperatives from both for-profit companies and non-profit organisations.

Regarding cooperatives’ legal personality, the law states that cooperatives are legal entities, i.e., they have a legal personality distinct from that of their members. This stems from Article 2.1 PCC, which recognizes cooperatives as ‘autonomous legal persons’, i.e., as separate legal entities distinct from the legal personality of their members, and from Article 17 PCC, which states that the cooperative acquires a legal personality at the moment of registration of its incorporation. Therefore, the legal personality of cooperatives implies autonomy regarding cooperative assets and cooperative assets are distinct and independent from the assets of the respective cooperative members.

Concerning the **transactions between the cooperative and the cooperator-members**, the cooperator has an obligation to participate in the cooperative transactions, for which the legislator does not use a specific term⁴. Article 22.2.c) PCC states that cooperator members should “*participate in the general activities of the cooperative and provide work or service incumbent assigned to them.*”

To achieve the cooperative objective, it is therefore necessary that the cooperator members supply goods or products to the cooperative (as in an agricultural cooperative); produce goods or provide services within the cooperative (as in worker cooperatives); or

³ According to art. 81 PCC, “*The share capital resulting from the contributions subscribed at each moment is variable*”. The share capital is variable because “*in case of redemption of the securities, the cooperator who presents his dismissal has right to the amount of the securities held according to their nominal value, within the period established by the statutes or, additionally, within the maximum period of one year*” (art. 89 PCC). Consequently, share capital is variable because its amount depends on the admissions and the requests of termination of Membership. Shareholder structure is variable because new members can be admitted, or some members may request the termination of membership.

⁴ The PCC includes the possibility of statutes admitting investor members [Article 16.1.g) PCC]. Differently from cooperator members, these investor members shall not participate in the cooperative transactions, limiting themselves to contribute financially to the cooperative.

pay for goods or services received from the cooperative (as in the case of consumer or housing cooperatives).

Nevertheless, the cooperative can carry out **transactions with non-members**. Article. 2.2 PCC states that *“in the pursuit of their purpose, the cooperatives are allowed to conduct business with third parties, without prejudice to any limits laid down by the applicable laws for each [cooperative] branch”*. For instance, an education cooperative may admit non-cooperator teachers; or a consumer cooperative may sell its goods to consumers who are not cooperator members.

With regard to cooperatives pursuing objectives other than member-promotion, it is noted that in Portugal, in 1998, Decree-Law No. 78/98, January 15th, was published, which regulates **“social solidarity cooperatives”** whose activities are concentrated in the area of social services, and whose objective consists in assisting situations of social and economic vulnerability. In fact, social solidarity cooperatives assist families, children, young people, seniors, disabled, unemployed and other vulnerable groups, in view of their professional integration, education, training, occupational and residential care.

These types of cooperatives are more oriented to addressing not just the needs of their members, but primarily of the entire community, as they put more emphasis on the dimension of general interest rather than on mutualistic goals.

Overall, according to Article 7.1 of PCC, cooperatives can freely carry out any economic activity *“while complying with the law and the cooperative principles.”*

b) Establishment, cooperative membership and governance

ESTABLISHMENT

In Portugal, there is no specific register for cooperatives. The incorporation of primary cooperatives must be conducted in writing and may also involve more stringent formalities (*‘forma mais solene’*), if required, for the transmission of the assets that represent the cooperative’s initial share capital (Article 10 PCC). The incorporation of a cooperative is decided by a meeting of its founding members (Article 12 PCC). The board of the founders’ meeting shall write the minutes, which must mention its social object, assets, rights, work, or services contributed by the cooperative members (Article 13 PCC). The secondary degree cooperatives (cooperative unions, federations and confederations) are governed by *“applicable provisions to the primary cooperatives”* (Articles 101 and 107, PCC).

The importance of using words or expressions indicating the entity’s cooperative nature is made explicit in Article 15.1 PCC, which states that *“the name adopted shall always be followed by the expressions “cooperative”, “union of cooperatives”, “federation of cooperatives”, “confederation of cooperatives” and also “limited liability” or “unlimited liability”, or the respective abbreviations, as appropriate.”* But the use of the word ‘cooperative’ (as well the abbreviation ‘coop’) is not freely available. On the contrary, it is *“exclusively reserved for cooperatives and their higher-level organizations, and its adoption by others is punishable under the applicable legislation.”* Finally, No. 3 of the same Article states, *“the name shall be registered in the National Registry of Legal Persons.”*

The cooperative acquires legal personality with the registration of its incorporation based on Article 17 PCC and Article 4 of the Commercial Registration Code. The incorporation act is published on a public access internet site [Article 70.1.b) Commercial Registration Code]. This registration is not exclusive for cooperatives. The cooperatives must also comply with the legal obligation to register the incorporation act with '*Cooperativa António Sérgio para a Economia Social*' (CASES) according to Article 115.1, 2. PCC, "1".

COOPERATIVE MEMBERSHIP

In addition, according to Article 11 PCC, the **number of members** of a cooperative is variable and unlimited but shall not be less than three in primary cooperatives and two in the upper-level cooperatives. However, further legislation concerning each branch may require, as a minimum, a higher number of cooperators.

If, during the life of the cooperative, the number of members is less than the legal minimum, the cooperative is subject to dissolution. However, dissolution can only occur if the reduction in the number of cooperators falls below the legal number for more than twelve months and if such reduction is not temporary or occasional.

Regarding the admission of new members, Article 19 PCC applies. The cooperative is obligated to accept third parties as members if they comply with the 'admission requirements' of members [Article. 16.2.a) PCC]. The statutes of each cooperative must contain the admission requirements of members [Article 16.2.a) PCC]. The candidate must apply for admission to the Board of Directors of the cooperative [Articles 19.1 and 47.d), PCC].

If a candidate meets those conditions, the proposed admission remains subject to approval by the Board of Directors [Article 47.d) PCC]. This resolution is mandatory for the acquisition of membership. The General Meeting will act as an appeal body as to the admission or rejection of new members [Article 38.k) PCC].

The PCC includes the possibility of statutes admitting **investor members** [Article 16.1.g) PCC]. These investor members shall not participate in the cooperative transactions, limiting themselves to contribute financially to the cooperative. The admission of investor members is subject to statutory provision [Articles 16.1.g); 20.1 PCC] and must be approved by the general meeting, after a proposal by the board of directors (Article 20.c and 20.d, PCC). Plural vote may be assigned to investor members, in the conditions and criteria to be laid down by the statutes (Article 41.5, PCC).

Overall, members are granted the right to leave or resign, as follows from Article 24.1 PCC. The legislator provides for the possibility of establishing rules and conditions for the exercise of the right of resignation in the statutes [Article 16 (2) (a) PCC], which may limit but never abolish the right of resignation [Article 24 (3) of the PCC].

VOTING RIGHTS

In terms of **voting rights**, the rule is "*each cooperator has one vote*", "*regardless of its participation in the respective share capital*" (Article 40.1 PCC). In cooperatives of first degree, the plural vote will always have an exceptional character, and its admission will always be subject to mandatory rules. In fact, the plural vote (of cooperators and investor members) is not allowed in worker, handicraft, fishery, consumer or social solidarity

cooperatives (Article 41.1 PCC). This prohibition is justified because in these cooperative branches, the cooperators tend to have a balanced participation in the cooperative activity. In any other sector, it can only be accepted in cooperatives with more than twenty cooperators (Article 41.1 PCC).

Moreover, the plural voting of cooperators can only be allocated based on the cooperator activity in the cooperative and not on the basis of participation in the share capital. Cooperatives of up to 50 cooperators shall not be assigned more than three votes per cooperator (or member investor) and cooperatives with more than 50 cooperators shall not be assigned more than five votes each.

In second degree cooperatives (cooperative unions, federations and confederations), the Portuguese cooperative legislator admits the plural vote, if expressly and statutorily provided for, based on terms of “objective criteria” and in accordance with the democratic principle (Article 104 PCC)⁵. The plural voting rights may be also adopted by cooperatives (a new legal entity) resulting from the association of cooperatives, or between cooperatives and legal persons of public law (Article 8.3 PCC)⁶.

INTERNAL STRUCTURE OF ADMINISTRATION/GOVERNANCE

Concerning the internal structure of administration, pursuant to Article 27.1 PCC, the cooperative bodies are the General Meeting, the Board of Directors, and the Supervisory Board.

The **General Meeting** is the highest body of the cooperative, whose decisions are binding on all other bodies (Article 33.1 PCC) and it is considered the supreme body of the cooperative, composed of all the members. Its resolutions are compulsory for all bodies of the cooperative and to all its members (Article 33.1 PCC). All cooperators and investor members may participate in the General Meeting as long as they fully enjoy their rights (Article 33.2 PCC). The cooperators do not fully enjoy their rights in the case of a temporary suspension of rights, according to Article 25.c) PCC.

Pursuant to Article 34 PCC, the General Meeting normally meets twice a year and may meet extraordinarily whenever a meeting is convened by those in charge (by initiative of the Chairman or at the request of the Board of Directors or of the Supervisory Board, or upon request of at least 5% of cooperative members, in a minimum of three. Given the personal nature of the cooperative, all members have the inalienable right to attend or to be represented at General Meetings, and if necessary, can vote by proxy (Article 43 PCC).

⁵ The article 104.1 PCC states that “*the statutes may allocate to each one of the cooperatives a number of votes determined whether it is based on the number of his cooperators or due to any other objective criterion that in accordance with the democratic principle gets the approval of the majority of the members of the union*”.

⁶ According to Article 8 PCC, titled “Association of cooperatives with other legal persons” “*1- The cooperatives are allowed to associate with other legal persons, as long as the association complies with the cooperative principles of autonomy and independence. 2- For the purposes set out in the preceding paragraph, the association can take place even if this association does not lead to the incorporation of another legal person. 3- In cooperatives that result exclusively from the association between cooperatives, or between these and legal persons under public law or other entities of the Social Economy, the voting regime could be the one adopted by the higher-degree cooperatives.*”

According to Article 28 PCC, the **management** and **supervision** of the cooperative can be structured according to one of the following ways:

- a) a board of directors and a supervisory board
- b) a board of directors with an audit committee and a statutory auditor
- c) an executive board of directors, a general and supervisory board and a statutory auditor

Each cooperative must choose the model of management and supervision to adopt and this choice has, perforce, to be molded on the cooperative statutes [Article 16.1.d) PCC]. In cooperatives that have up to 20 members the possibility of a sole director is admitted (Articles 28.2 and 45.2 PCC) and a sole supervisor, insofar as this is statutorily provided.

In the model laid down in Article 28.1.a) PCC, the management board is composed of the **Board of Directors** or a sole Director (Article 45.2 PCC). The Board of Directors is the executive body of the cooperative, having, as such, powers of management and representation of the cooperative (Article 47 PCC).

In the model laid down in Article 28.1.b) PCC, the management board is the Board of Directors, which includes the Audit Committee. Therefore, members of the Audit Committee are both directors and supervisors. This model does not admit a sole director (regardless of the number of members).

In the model laid down in Article 28.1.c) PCC, the management board is the Executive Board of Directors. This management model allows, if the cooperative has no more than 20 members, the management to be entrusted to a sole director who will be necessarily a cooperator [Article 62.1.b) PCC].

Article 63 PCC imposes — in terms of the Executive Board of Directors' relations with the General and Supervisory Board — the Executive Board of Directors to provide the General and Supervisory Board:

- a) at least once a year, information about the management policy that it intends to follow, as well as the facts and issues that fundamentally determine their options;
- b) every three months, information about the situation of the cooperative and the evolution of its activity;
- c) a full annual report on the previous year, for the purpose of issuing an opinion to be submitted at the general meeting (Article 63.1 PCC).

This model assures that the election of members of the management board will always be carried out by the General Meeting, in order to respect the principle of democratic member control.

In elected bodies with multiple persons, the rule of an odd number of members will be enforced. Such will be the case with the Board of Directors (Article 45.3 PCC), with the Supervisory Board [Articles 51.1.a) and 51.2, PCC], with the Audit Committee (Article 56.2 PCC), with the Executive Board of Directors [Article 62.1.a) PCC] and with the General and Supervisory Board (Article 65 PCC). The authors believe however, that in cooperatives, the principle of democratic member control does not prevent the Board of Directors from being composed of

an even number, although it must be admitted that this solution could lead to deadlock situations.

The members of the governance bodies are elected among the cooperators (Article 29.1 PCC). However, the Statutory Auditor must be neither an investor member nor a cooperator. The investor members are subject to restrictions (Article 29.1, 29.8 PCC). Most notably, investor members may join the board but cannot “*represent more than 25% of the number of effective elements which form part of the body for which they are elected*” (Article 29.8 PCC). Thus, if the cooperative is managed by a sole Director (Articles 28.2; 45.2; and 62.1.b) PCC), he/she cannot, under any circumstances, be an investor member. The same is true when the supervisory body is composed of a single member [Article 51.1.b) PCC].

In the Portuguese legal system, the cooperative must have a supervisory body, be it the Statutory Auditor/Supervisory Board, the Audit Committee or the General and Supervisory Board, depending on the adopted model (Articles 28.1, 51, 56, 65 et seq., PCC).

In cooperatives with more than 20 members, supervision will be the responsibility of a supervisory board consisting of a chairman and two members [Article 51.1.a) PCC]. For the cooperatives forced to implement statutory auditing — Article 43 of Law 140/2015, of 7 September 2015, which approved the Statute of the Statutory Auditor — the supervision will be entrusted to a supervisory board and to a Statutory Auditor who is not part of the supervisory board [Article 51.1.c) PCC]. In the models provided for in Article 28.1.b) and c), PCC, the Statutory Auditor will always exist and will not be part of the supervisory body, having the functions that are described in Article 70 PCC.

The PCC provides for the duties of members of the supervisory board (Article 52), particularly a duty of care and loyalty. Duty of care means that members of the supervisory board should “*Use the due diligence to the exercise of its functions, namely in the monitoring of the economic and financial evolution of the cooperative and in the adequate preparation of the decisions*” (Article 46.1.c)., 2 PCC).

The supervisory board members are recruited from among the cooperators (and optionally investor members) for a period of four years (Article 29 PCC). The statute may include limitations to the number of times a member can be re-elected.

c) Cooperative financial structure and taxation

In the Portuguese legal system, it is not possible to form a cooperative without **share capital**. Hence, the initial share capital must necessarily be determined in the cooperative statutes [Article 16.1.f) PCC]. Moreover, the cooperator is only considered a member after contributing to the share capital (Article 83 PCC).

Share capital is divided in shares (*títulos de capital*), whose value cannot be below 5 EUR each (Article. 82.1 PCC), and each cooperator shall have a minimum contribution of three shares. There are some limitations applicable to investor members. According to Article 20.1. PCC, “*The statutes may provide for the admission of investor members, whose total sum of the entries may not exceed 30% of the entries made in the cooperative*”.

The PCC provides solely for mandatory contributions to share capital, those which are a requirement for the acquisition of membership. In this way, the PCC does not distinguish between mandatory and voluntary contributions. Nevertheless, by reference of Article. 9 PCC to Article. 287 CSC, it is possible, to our understanding, that cooperative statutes impose upon some or all cooperators the obligation to make more contributions (accessory contributions) apart from the mandatory ones, as long as the essential elements of such duties are set, and as long as statutes specify if such contributions are free of charge or acquired for a price.

Under Portuguese law, some cooperatives have mandatory contributions in capital and labour (Article. 85. PCC). Such is the case of crafts cooperatives (art. 5 of DL No. 303/81, of 12 November), of worker cooperatives, (Article. 7 of DL No. 309/81, of 16 November), and of services cooperatives (Article. 7 of DL No. 323/81, of 4 December). In the above rules, it states that contributions in labour are the provision of the cooperator's professional services to the cooperative, according to the rules set up by the General Meeting or the Board of Directors. Only members who "*after having joined the cooperative become incapable of work because of accident, illness, or age*" are exempt from this mandatory contribution of labour. In these cooperatives, acquiring and keeping membership is dependent on the member's contribution to the cooperative in capital and in labour. This contribution in labour is part of the legal act through which the acquisition of membership is carried out, and is, thus, an element necessary to the acquisition of membership.

The cooperator who resigns is entitled to a reimbursement of cooperative shares, allocated according to their nominal value within the period specified by statutes or, complementarily, within one year.

In case of cooperative dissolution, the cooperator shall only be entitled to recover his or her share capital and corresponding interest (Article. 114 PCC).

SURPLUS ALLOCATION

Concerning the **surplus allocation**, Article 100 PCC, when referring to the distribution of surplus, merely states that these may "*return to the cooperators*" without specifying the specific criteria of such distribution. Therefore, based on the above article, the cooperative surplus may return to cooperators as patronage refunds in proportion to the business performed by each of them with or for the cooperative, during that financial year. Moreover, the legislation applicable to the different cooperative types does not prescribe for any explicit criteria for the distribution of surplus, but only general guidelines.

The economic surplus arising from transactions with non-members may not be shared by the cooperators (Article. 100.1 PCC), as well as any other extra cooperative results, being necessarily allocated to indivisible reserves (Article. 99 PCC), as they are legally regarded as profits. A percentage of the cooperative surplus of the financial year, in transactions with the cooperators, will be allocated to the legal reserve [Article. 96.2.) PCC] and the reserve for cooperative education and training [Article. 97.2.b) PCC] as well as for the payment of interest by shares (Article. 88 PCC). Only after these allocations and payments are made can the patronage refunds be determined (Article. 100.1 PCC).

The legislator prevents the distribution of surplus when and to the extent that it is necessary to cover accumulated losses or to reconstitute the legal reserve (Article. 100.2 PCC).

Article 88 PCC provides the possibility for members to obtain a net compensation on the capital underwritten as a condition of membership. When interest is paid, its total amount should not exceed 30% of the annual net results, as stated in Article 88.2 PCC. However, this compensation will be dependent on the fulfilment of two conditions: its statutory provision and the existence of positive results. Article 100.1 PCC, states that:

“the annual net surpluses, except those arising from transactions carried out with third parties that are left after the possible payment of interests on securities and allocations to the several reserves, may return to the cooperators.”

However, the distribution of cooperative surplus among cooperator members (and, reflexively, the payment of interest on shares) may only be made after *“compensated the losses of the previous financial years or, having used the legal reserve to compensate those losses, before the reserve has been rebuilt to the level prior to its use”* (Article 100.2 PCC).

FINANCIAL INSTRUMENTS

Furthermore, the cooperative may issue **financial instruments** such as investment securities and bonds. Investment securities are financial instruments inspired by the figure of “participating shares”. As stated in Article 91.1 PCC, the General Meeting is the competent body to decide whether to issue investment securities, as well as to determine *“the purposes and conditions in which the Board of Directors can use the corresponding product.”* The legislator stipulates in Article 92 PCC, that the General Meeting is also incumbent of determining their interest rate, imposing a nominative character and their transferability, as well as establishing the terms that are binding on the shares. The compensation of these investment securities is mixed, i.e. it consists of a fixed and a variable rate compensation, distinguishing them in this way from bonds, whose compensation consists of a fixed part only.

Concerning the depreciation of investment securities, the legislator established, on behalf of the financial stability of the cooperative, that they will only be reimbursed *“in the case of liquidation of the cooperative and only after payment to all the other creditors of the cooperative, or if the cooperative decides to do so, after the expiry of at least five years since its completion, on the conditions established for the issue”* (Article 91.3 PCC).

DISSOLUTION OR CONVERSION

Concerning the cooperative **dissolution** or **conversion** into another type of business organisation, the remaining assets will be shared according to the provisions of Article 114.1 PCC. Once the expenses of the liquidation process are paid, the surplus will be applied immediately and in the following order:

- a) payment of wages and benefits due to employees of the cooperative
- b) payment of remaining debts of the cooperative, including the redemption of investment securities, bonds and other potential benefits of cooperative members

c) redemption of capital contributions.

Upon liquidation of the assets of the cooperative, Article 114.2 PCC stipulates the amount of the legal reserve — unaffected to cover losses of the financial year and not susceptible to a different application — *“can be transferred, with identical purpose, to the new cooperative entity formed as a result of the merger or division of the cooperative in liquidation”*. However, Article 114.3 PCC establishes that *“when after the cooperative in liquidation it does not appear any new cooperative entity, the application of the balance of mandatory reserves shall be paid back to another cooperative, preferably from the same municipality to be determined by the federation or confederation representing the main activity of the cooperative.”*

In the case of the **winding-up** of the cooperative, the cooperator shall only be entitled to recover his or her contributions to the share capital [Article 114.1.c) PCC].

TAXATION

Concerning the **tax treatment** of cooperatives in Portugal, they are taxed on income under corporate tax, under the same section as companies, thus under the same rules and processes of calculating taxable profit. Cooperative surplus is considered taxable income.

Agricultural, consumer, cultural, housing and building and social/solidarity cooperatives are exempt from corporate tax for the income derived from their transactions with their members, whereas this does not apply to the income that derives from transactions with third parties (non-cooperator members) and extra-cooperative activities.

Craft, trade, credit, education, work, fishing and service cooperatives are exempt from Corporate Tax on all income, provided that they meet the following two criteria:

- a) 75% of the persons that work for the cooperative are members;
- b) 75% of members' work for the cooperative.

Income derived from activities or operations not directly or indirectly related with the cooperative object are never exempt.

Expenses incurred with cooperative education in application of the cooperative principles are allowed to be deducted for the purpose of calculating taxable income.

Concerning cooperative members and particularly when they enter active transactions (sales) with cooperatives, the corresponding taxation and other values received by cooperative members vary according to the type of cooperative and operation. For example, in agricultural cooperatives, any revenue received by members from cooperatives when they “sell” or deliver their products to the cooperative is treated as normal income from sale of agricultural products. Revenue received by craft, fishing, education, cultural and work cooperatives is treated as labour revenue and thus taxed under Personal Income Tax.

As for Value Added Tax (VAT), cooperatives do not benefit from any specific exemption regarding their cooperative nature.

Cooperatives benefit from all VAT exemptions *“for certain activities in the public interest”* provided for in Article 132 of the EU VAT Directive (Council Directive 2006/112/EC),

transposed by Article 9 of the Portuguese VAT Code: health, education, culture, social services, etc.

In addition, cooperatives are exempt from the following taxes:

- a) Municipal tax on onerous transmissions of real estate: this tax is levied on the transmission of real estate properties for which some amount is paid in consideration (sale, exchange, etc.). However, the tax exemption covers only the immovable properties that are effectively used by the cooperative for their cooperative activities.
- b) Municipal tax on immovable property: this is an annual tax levied on the ownership of immovable properties. The tax exemption also covers only the immovable properties that are effectively used by the cooperative for their cooperative activities.
- c) Stamp tax: this is a tax levied on a wide range of operations, including the sale of immovable property but also a wide range of contractual and formal juridical acts. The application of this exemption to cooperatives is unconditional.

iii. Other specific features

d) Cooperative internal and external control and cooperation among cooperatives

In the Portuguese legal system, cooperatives are subject to two levels of control: internal and external. Internal control is exerted by members and bodies of cooperatives; external control is exercised by courts, administrative authorities (regulators and supervisory bodies) and auditors.

In the Portuguese legal system, there is no control prior to the incorporation and registration of the cooperative. However, the incorporation and functioning of agricultural credit banks must be authorised beforehand by the Bank of Portugal and depend on a special registration in the same Bank based on a set of acts (Articles 4 to 10, of Decree-Law 24/91, 11 January 1991).

In addition to the registration referred to in Article 17 PCC, conferring legal personality, the cooperative is subject to other records. As such, cooperatives shall send CASES a copy of all documents referring to their incorporation (Article 116(a) PCC). CASES will issue an annual credential attesting the legal incorporation and proper functioning of the cooperative (Article 117.1 PCC).

The PCC attributed a very important role to the cooperators in the control of their cooperative:

- a) through their participation at general meetings (through the exercise of voting rights)
- b) giving them a broad right to information
- c) establishing the obligation of the members of the bodies to be cooperators

In addition to the duty to prepare accounting documents and records, the members of the Board of Directors are bound to submit those documents to the competent bodies of the cooperative, namely the general meeting and the Supervisory Board, Audit Committee or a General and Supervisory Board.

In the Portuguese legal system, cooperatives are not required to submit the management report and accounts for the financial year to the Commercial Registry. Cooperatives are instead required to submit the management report and accounts to CASES after obtaining approval by the respective General Meeting, as well as the Social Report⁷, which is a prerequisite for obtaining a credential attesting to the legal incorporation and regular functioning of cooperatives (Articles 116 and 117, PCC).

The PCC does not provide for an external audit of the cooperative.

⁷ The Social Report is a document on human resources used by the cooperative. It is elaborated from the "information about the social activity" regulated by the Ministerial Order No. 119/2015, of 31 August. This Ministerial Order regulates the content and the deadline for the employer to submit information on the company's social activity to the Labor Conditions Authority (*Autoridade para as Condições do Trabalho*). This legal obligation is not exclusive to cooperatives, as it covers private companies as well.

For the cooperatives that are subject to statutory auditing — v. Article 43 of Law 140/2015, of 7 September 2015, which approved the Statute of Statutory Auditor — the supervision will be entrusted to a Supervisory Board and to a Statutory Auditor who does not join the Supervisory Board [Article 51.1.c) PCC]. In the models provided for in Article 28.1, b) and c), PCC, a Statutory Auditor will always exist, but he/she will not join the Supervisory Board.

Under the Portuguese legal system, there are no regulatory authorities of the cooperative sector or of the social economy sector in general. Although CASES cannot be qualified as a regulatory authority, in practice it exerts some of the typical powers that characterise a regulator because its duties are to monitor and supervise the cooperative sector and its modes of operation.

In accordance with Article 118.1 PCC, CASES should request in the courts, through the Public Prosecutor, the winding-up of cooperatives which do not comply with Cooperative Principles in their functioning. These cooperatives may systematically use unlawful means for the pursuit of their purpose and resort to the cooperative form to unduly achieve tax advantages or other advantages provided by public authorities. CASES should also apply to the Commercial Registry through the administrative procedure for the winding-up of cooperatives whose activity does not coincide with the purpose stated in the statutes.

COOPERATION AMONG COOPERATIVES

With regard to **cooperation among cooperatives**, the PCC allows various forms of cooperation or association between cooperatives or between cooperatives and other legal persons: the multi-sector cooperatives (Article 4.2 PCC)⁸, the merging of cooperatives (Articles 109 to 110, PCC), the incorporation of cooperatives of a higher degree or of the second degree (Articles 101 to 108, PCC) and the association of the cooperative with other legal persons (Article 8 PCC). Higher grade cooperatives must respect the cooperative principles. The creation of these cooperatives gives practical expression to the cooperative principle of cooperation among cooperatives and it is one of the ways in which the growth of the cooperative sector is facilitated.

According to Article 8.1 of the PCC, cooperatives can associate with two categories of legal persons: legal persons of a cooperative or non-cooperative nature (associations, foundations, civil companies, commercial companies, and others); and their association may or may not result in the creation of another legal person. If not resulting in the creation of a legal person, then it is merely limited to a contractual relationship.

⁸ Multi-sector cooperatives are those whose cooperative activity covers several cooperative branches of the cooperative sector.

III. Degree of ‘cooperative friendliness’ of the national legislation

One of the difficulties experienced in Portugal is the **complex tax regime** applied to cooperatives. Some branches are exempt: agricultural, cultural, consumer, housing and building, and social/solidarity). In other branches (commercialisation, credit, worker production, crafts, fisheries, education and services), exemption from corporate income depends on the fulfilment of various requirements. Some tax rules applicable to cooperatives are complex and difficult to interpret.

In general, the subject of cooperatives is not studied (or is sparsely studied) in Portuguese universities. This academic invisibility of cooperatives has impoverished the cooperative experience, because their legal regime is not properly studied and, for that reason, the particularities of the regime are not properly understood, when compared with the commercial companies’ regime.

Furthermore, the **public procurement** rules can be an obstacle to the development of cooperatives in Portugal.

In addition, the **accounting tools** used to compile accounts by cooperatives are considered as inadequate. Specifically, in preparing their accounts, cooperatives are necessarily subject to the Accounting Normalization System (*‘Sistema de Normalização Contabilística’ – SNC*). The application of the *SNC* in the accounts of cooperatives introduces some difficulties because it is an accounting model geared towards commercial companies and does not address the specificities of cooperative transactions.

On the other hand, according to *SNC*, the information provided shall be necessary and sufficient to evaluate the performance of an entity, in particular its profitability. This proves inadequate to the actual information needed by cooperatives and their users, since cooperatives aim primarily to meet the economic and social needs of their members (mutuality) and not simply returning a profit.

Furthermore, in the *SNC*, the privileged user of the information disclosed in the financial statements is clearly the investor. The information prepared is based on assumptions heavily conditioned by the logic of profitability and results distributed to investors, which proves inadequate to the cooperative logic, based on a mutualistic scope, and where the distribution of cooperative surplus is made in proportion to operations performed by each member.

Finally, the income statement is dedicated to the economic and financial performance of the corporate entity, at the expense of economic and social performance of the cooperative, not facilitating the capture of all objectives of cooperatives, which are so often alien to the logic of profit.

One additional issue is the fact that under Article 2(1) of the Competition Law, Law No. 19/2012, of May 8, **the competition legal regime** applies to cooperatives. This rule does not refer to other social economy entities, indicated in Article. 4 of the Basic Law of Social Economy.

Whether cooperatives and other entities of the social economy are subject to the national and European Union rules on competition, depends on whether the entity is considered an "enterprise" or "association of enterprises" for the purposes of competition law.

The EU concept of "undertaking" (used in Articles 101 and 102 of the TFEU) has been intensified by the case law of the courts of the European Union. Currently, this concept is embodied in Article 3 of the Portuguese Competition Law - "*any entity engaged in an economic activity consisting of offering goods or services on a given market, irrespective of its legal status and method of financing*". On the other hand, under the terms of Article 3, paragraph 2, of the Competition Law, corporate groups are considered as a single company. There is an economic unit, and as such only one "undertaking" for the purposes of competition law enforcement.

Cooperatives (and, possibly, other entities of the social economy), if they are considered "undertakings", then they will be subject to the competition rules, both national and those of Articles 101 and 102 of the TFEU. The more favorable legal-constitutional regime granted to cooperative enterprises does not exempt them as such from the application of the competition regime.

In Portugal, the Competition Authority has already encountered cases in which cooperatives were involved. The doctrine, case law and decision-making practice of the Competition Authority consolidate that there is nothing in general that prevents the application of competition rules to cooperatives.

Cooperatives or other social economy entities, which are considered "enterprises" for the purposes of competition law, are prevented from adopting practices that restrict competition or abuse a dominant position and are also subject to the legal obligation of the prior notification of concentrations.

The submission of cooperatives to competition law should not be considered an obstacle to their development in Portugal. However, the competition law regime applicable to cooperatives is legally complex and is not easily apprehensible to its addressees. This lack of clarity causes unfamiliarity on the part of cooperators and cooperative managers. This lack of knowledge of the competition rules applicable to cooperatives may lead to illegal competition practices or unlawful decisions.

Secondly, the competition rules do not expressly and clearly recognise the specific features of cooperatives, which may have an impact on the application of competition rules (social mission, solidarity etc.).

In short, the complexity, the lack of clarity of competition rules applicable to cooperatives and the absence of a legal regime which takes into account the specific characteristics of cooperatives can be obstacles to their development.

However, it may also be the case that the cooperative or another social economy entity does not engage in "economic activity". The case law of the courts of the European Union has distinguished between organisations which follow the principle of solidarity and

therefore do not exercise economic activity, and those which offer goods and services on the market and are therefore subject to competition law.

According to the EESC, in its opinion '*Towards an appropriate European legal framework for social economy enterprises (own-initiative opinion)*'⁹, "All enterprises – be they cooperatives, mutuals, social enterprises or associations – that undertake financially viable activities and in certain cases produce surpluses, are equated with capitalist-type, for-profit companies. However, SEEs do not pursue the objective of maximisation of profits or return on capital, but rather a social objective¹⁰".

The EESC recognises that "Limited profitability should also become a concept in competition law, without prejudice to the rules applicable to services of general economic interest under Article 106(2) TFEU and its supplementary and interpretive texts"¹¹ Consequently, EESC invites the European Commission to "*draft an interpretative communication on Article 54 of the TFEU and on the Treaty articles relating to competition law, in order to clarify the concept of "not-for-profit" in EU law*"¹².

An additional obstacle for cooperative development is relevant to Article 29(1) of the PCC that regulates the recruitment base of members of the governing bodies of the cooperative, stating that "*the holders of the governing bodies are elected in General Meeting among the cooperators.*" This rule is a legal obstacle to **managers' professionalisation**. The PCC does not make the distinction between small and large cooperatives. In fact, the need for the professionalisation of managers is very different depending on whether it is a small or a large cooperative. If it is accepted that the management of small cooperatives can be carried out directly by their members, large cooperatives (operating cooperative enterprises of significant size) need to provide their management and representation bodies with technically qualified persons who can manage them, in professional terms.

Although there may be room for improving the Portuguese cooperative legislation, overall it is considered to be significantly cooperative friendly. Within the framework of the law, which provides legal-constitutional support to enshrine the cooperative principles, the authors note the existence of best practices. In addition, the Portuguese legal framework for cooperatives has served as a reference for the construction of the Principles of European Cooperative Law (PECOL).

The Principles of European Cooperative Law are a set of norms that are presented as "ideals" in the regulation of European cooperatives and which reflect their most characteristic features. These standards were developed by a small team of legal scholars (Study Group on European Cooperative Law or SGECOL), following a

⁹European Economic and Social Committee, INT/871 European legal framework/social economy enterprises, Opinion, '*Towards an appropriate European legal framework for social economy enterprises*', (own-initiative opinion), Rapporteur: A. Coheur, 2019

¹⁰ Ibid, para 2.2.6

¹¹ Ibid, para 3.2.2.1

¹² Ibid, para 3.2.1.3

comparative investigation of cooperative law and best practice in seven European legal systems (Germany, Spain, Finland, France, Italy, Portugal and the United Kingdom).

Regarding best practices, Article 85.1 CRP stipulates the state's commitment and support to the creation and the activity of cooperatives, when it says that "*the state shall stimulate and support the creation and activities of cooperatives*" and when, in Article 85.2 CRP, it makes sure that "*the law shall define the fiscal and financial benefits to be enjoyed by cooperatives, as well as preferential terms and conditions for obtaining credit and technical assistance*". The stimulus will result mainly from legislative measures that raise interest in the cooperative activity, while the support will be the result of administrative measures aiming at facilitating the specificities of that activity.

This constitutional rule establishes the principle of protection of the social and cooperative sector, which shall lay the foundation for the adoption of distinct solutions in the areas of taxation, access to credit, technical assistance or others for cooperatives.

Regarding the context costs on the incorporation of cooperatives, the authors highlight the creation of the "*Cooperativa na hora (On the Spot Cooperative)*" (Decree-Law 4/2017 of June 2), making it possible for the citizens and the legal entities to create a cooperative on the same day, in a single moment and at a single counter.

IV. Recommendations for the improvement of the national legal framework

To address the previously raised legal obstacles, the national experts make the following suggestions for the improvement of the Portuguese cooperative legislation:

- a) the simplification of the current tax system that could promote a friendlier legal environment for cooperatives,
- b) the differentiated application of competition law to cooperatives,
- c) the re-adjustment of accounting tools for cooperatives,
- d) enabling large cooperatives (operating cooperative enterprises of significant size) to provide their management and representation bodies with technically qualified persons who can manage them, in professional terms.

V. Conclusions

The authors highlight the following points to conclude:

- a) The Portuguese legal regime dedicated to cooperatives has legal-constitutional support that enshrines the cooperative principles;
- b) Therefore, in Portugal, the Cooperative Principles enunciated by the International Cooperative Alliance are not mere guidelines, but principles with legal-constitutional dignity;
- c) The Portuguese Cooperative Code was reformed in 2015, in order to adapt the Portuguese legislation to the new demands regarding cooperative governance and economic regime, without abdicating the cooperative identity as defined by the International Cooperative Alliance;
- d) Specific legislation on cooperative branches needs urgent and adequate reform. It is necessary that this complementary legislation be reviewed and updated, taking into account the new demands of cooperatives in the 21st century;
- d) It is also necessary to review the cooperative tax regime, giving it more coherence and fulfilling the constitutional command of a more favourable treatment of cooperatives;
- e) There is an urgent need to link the cooperative movement with universities so that cooperative law is studied, debated and this debate contributes to the improvement of cooperative practices.

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Contact: legalresearch@ica.coop

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