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Social entrepreneurship: legislative contributions

Empreendedorismo social: contributos legislativos

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ABSTRACT: This study evaluates whether the legal ecosystem related to the incorporation of cooperatives and IPSS, their governance models, the professionalization of their managers, and the transparency and access to funding favor or inhibit social entrepreneurship. The new rules on the incorporation of cooperatives and the provision of three models of management and supervision facilitate the development of social entrepreneurship. Investor members promote the diversification of cooperative funding sources. The Portuguese legal environment presents weaknesses in the professionalization of cooperative managers and in the transparency of IPSS. The "Portugal Inovação Social" Program, crowdfunding and social entrepreneurship funds are innovative ways of investing in social entrepreneurship. However, the regulatory framework of crowdfunding and social entrepreneurship funds suffers from some weaknesses that may inhibit the development of these instruments.

KEY WORDS: Social Economy; Context Costs; cooperatives; Manager Professionalization; Transparency; Funding.

RESUMO: O presente estudo avalia se o ecossistema legal dedicado à constituição de cooperativas e de IPSS, os seus modelos de governação, a profissionalização dos gestores e a transparência e acesso ao financiamento favorecem ou inibem o empreendedorismo social. As novas regras sobre a constituição de cooperativas e a previsão de três modelos de administração e de fiscalização das cooperativas facilitam o desenvolvimento do empreendedorismo social. Os membros investidores promovem a diversificação das fontes de financiamento das cooperativas. O ambiente legal português apresenta debilidades no que toca a profissionalização dos gestores de cooperativas e a transparência nas IPSS. O Programa Portugal Inovação Social, o investimento colaborativo e os fundos de empreendedorismo social são mecanismos inovadores de investimento em empreendedorismo social. Contudo, o quadro regulatório do investimento colaborativo e dos fundos de empreendedorismo social apresentam algumas debilidades que podem inibir o desenvolvimento destes instrumentos.

PALAVRAS-CHAVE: Economia social, custos de contexto, cooperativas, profissionalização dos gestores, transparência, financiamento.

SUMMARY:

Introduction

This study aims to evaluate whether the Portuguese legal ecosystem favors or inhibits social entrepreneurship, focusing on cooperatives and Private Institutions of Social Solidarity (hereinafter IPSS). The study identifies three key areas for the development of social entrepreneurship: the regulatory framework for the creation of cooperatives and IPSS, the legal environment related to the management and transparency of these entities and, finally, the legal ecosystem related to the financing.

Regulators' concerns about regulatory impacts are relatively recent[1]. The current study highlights the Regulatory Impact Assessment (RIA) and the Standard Cost Model (SCM).

According World Bank Group, RIA is understood "as an administrative obligation or an instrument of public policy analysis for identifying the costs of regulation on certain business sectors"[2].

RIA has become the standard method in the European Union (European Commission and European Parliament) and in almost all Member States[3].

The *World Bank Group* defines SCM as "a measurement methodology of administrative costs imposed by legislation to the private sector." The application of SCM is made according to the *International Standard Cost Model Manual*. RIA and SCM are distinct instruments with different objectives, but, jointly, they can develop the prospective analysis of the law, measuring the efficiency of the law, aiming to obtain the best possible result at the lowest cost.

In Portugal, the Resolution of the Council of Ministers 44/2017, of March 24, implemented a mechanism to measure the economic impact of legislative initiatives (through the identification and estimation of charges for enterprises and citizens). This resolution uses half the Standard Cost Model (SCM). Through this Resolution, the Government complies with the measure called "How much does it cost?" included in the program Simplex+2016.

This study will start by addressing the need for eliminating context costs that prevent or hinder the innovation and the sustainability of cooperatives and IPSS. The context costs correspond to negative effects resulting from legal rules, procedures, actions and/or omissions that harm the activity of the social entrepreneurs and that are not attributable to their business or organization. Potential context costs include legal requirements for the entity's incorporation, licensing, funding, the judicial system, the tax system, administrative costs, barriers to internationalization and human resources. Legal requirements that are

[1] DIOGO PRADO DE CASTRO ALFAIATE, *A Avaliação da Lei em Portugal: Standard Cost Model e Regulatory Impact Assessment — uma perspectiva*, Dissertação de Mestrado, Faculdade de Direito da Universidade Nova de Lisboa, 2014, p. 27-32.
[2] WORLD BANK GROUP, *Global Indicators of Regulatory Governance: Worldwide Practices of Regulatory Impact, Assessments*, p. 3., http://pubdocs.worldbank.org/en/905611520284525814/GIRG-Case-Study-Worldwide-Practices-of-Regulatory-Impact-Assessments.pdf (access 22th may 2019).
[3] WORLD BANK GROUP, *Global Indicators of Regulatory Governance*, cit., p. 1.

disproportionate, unreasonable or even pointless can mean context costs, inhibiting the entrepreneurial initiative[4].

This effect can occur, for example, because the legislation is outdated and does not take advantage of the new technologies, or, by virtue of inertia, it maintains requirements that prove to be useless.

In this context, considering the general objective identified above, this study intends to answer the following questions:

a) Do the legal rules on the establishment of cooperatives and IPSS boost and facilitate entrepreneurship by reducing the context costs?

b) Do the models of management and supervision of these entities meet the specificities of the object and the purpose they pursue?

c) Are there legal conditions that enable the professionalization of management and the reinforcement of the transparency of cooperatives and IPSS?

d) Do the legal systems currently in force inhibit or improve the access of the social entrepreneurs to funding and to investment?

In the context of the European dynamics in the field of entrepreneurship and social enterprises, this conceptual study, based on a legal perspective, has the general objective of ascertaining to what extent the legislation can contribute or constitute an obstacle to the creation and development of initiatives of social entrepreneurship.

1. Background

In Europe, laws on social enterprises began to emerge in the nineties of the last century, one of the important moments being the Italian Law 1991 (Law No. 381 of 1991) on social enterprises. Today, at least 18 of the Member States of the European Union have specific legislation on social enterprises, following different models[5]. Each Member State is, in fact, free to choose the model of legislation it wishes to adopt and to choose the legal regime it wishes to lay down.

The European Commission, in the Communication "Social Business Initiative" of October 2011, defines the social enterprise as "an operator in the social economy whose main objective is to have a social impact rather than make a profit for their owners or shareholders. It operates by providing goods and services for the market in an

[4] DEOLINDA MEIRA / MARIA ELISABETE RAMOS, "Contributos Legislativos para o Empreendedorismo Cooperativo", *Cadernos de Economia*, 106, 2014, pp. 26-28.
[5] ANTONIO FICI, *La nuova disciplina dell'impresa sociale: una prima lettura sistematica*, in *Impresa sociale*, 2017, 9, pp. 8-16. See also, EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, Opinion. *Social economy enterprises' contribution to a more cohesive and democratic Europe (exploratory opinion at the request of the Romanian Presidency*), Rapporteur: Alain COHEUR, INT/875. 08/04/2019.

entrepreneurial and innovative fashion and uses its profits primarily to achieve social objectives. It is managed in an open and responsible manner and, in particular, involves employees, consumers and stakeholders affected by its commercial activities." However, it is a non-binding definition that was constructed from the research work developed by EMES (International Research Network).

In the current scenario it can be said that "the universally-recognized concept of SE does not exist, nor is it foreseeable that it will emerge in the near future"[6]. What the literature shows is the coexistence of several proposals for defining or characterizing social enterprises[7].

On 23 October 2017, the European Parliament drew up the Draft Report containing recommendations to the Commission on a *Statute for Social and Solidarity Enterprises* (2016/2237 (INL)).

This European Parliament document identifies the typical features of the social enterprise as common to various legal experiences: the primacy of the individual and social objectives over capital; democratic governance by members; the conjunction of the interests of members and users with the general interest; the defense and application of the principles of solidarity and responsibility; the reinvestment of surplus funds in the long-term development objectives or in the provision of services of interest to members or of services of general interest; voluntary and free membership; management that is autonomous and independent from public authorities.

The concept of social innovation is recent, since it "developed during the second half of the 20th century and received special attention from the social sciences only in the 21st century"[8].

Likewise, the concept of social entrepreneurship is also a recent concept in the field of social sciences, although old practices can be identified with it. This concept refers to initiatives by civil society aimed at solving social problems, in particular through the creation of organizations for this purpose. Social enterprises are certainly a manifestation of social entrepreneurship.

The term social entrepreneur arises in association with the development of activities of collective interest that aim to address needs that were not fulfilled by the capitalist companies. These activities find the appropriate legal framework in the organizations that are part of the social economy sector (cooperatives, mutual societies, associations and foundations), our analysis being concentrated mainly within the scope of these entities.

In Portugal the reform of the legislation of the social economy entities is underway, which aims to fulfil the imperative of "legislative development" in Article 13 of Law 30/2013, of March 8 (Framework Law on Social Economy— LBES)[9].

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[6] ANTONIO FICI, *La nuova disciplina dell'impresa sociale, cit.*, 2017, 9, pp. 8-16.
[7] See, for instance, JOSÉ LUÍS DIAS GONÇALVES, "As empresas sociais e o seu financiamento: as sociedades e os fundos de empreendedorismo social", *Direito das Sociedades em Revista*, 11, vol. 21, 2019, p. 197-218.
[8] FILIPE ALMEIDA / FILIPE SANTOS, "Portugal inovação social: na encruzilhada dos tempos", *Revista Cooperativismo e Economía Social*, 39, 2017, pp. 443-462.

As a direct consequence of this process, one could see the reform of the Portuguese Cooperative Code (CCoop) —Law 119/2015, of August 31, which came into force on 30 September 2015 and which revoked Law 51/96, of September 7, as well as the publication of Decree-Law 172-A/2014, of November 14, which altered and republished the Statute of the Private Social Solidarity Institutions (IPSS), approved by Decree-Law 119/83, of February 25.

2. Social entrepreneurship, cooperatives and IPSS

2.1. Incorporation of cooperatives and IPSS

Regarding the context costs on the incorporation of these entities, the study will start by analyzing, in the case of cooperatives, the new features introduced by the new Cooperative Code.

An important novelty of the reform in the field of the establishment of cooperatives was to reduce the minimum number of members in the first degree cooperatives from five to three (Article 11(1) of the CCoop), retaining the possibility that the supplementary legislation relating to each branch "requires at least a higher number of cooperators".

In the case of share capital, the general rule — which followed and is maintained — is that it will not be possible to set up a cooperative without share capital, a possibility allowed in other legal systems, such as the British[10], or the Brazilian systems[11]. In the reform, the legislator felt (and rightly so) the need to reduce the minimum share capital from EUR 2500 to EUR 1500 (Article 81(2) of the CCoop) and allowed additional legislation, which regulates each of the branches, to set a different minimum[12]. However, the legislator could have gone further. Despite this reduction, we believe that the solution adopted under the PECOL principles is more appropriate to cooperative entrepreneurship, in order to enshrine a principle of free determination of minimum share capital, leaving to the will of the cooperators to fix the amount of capital in the statutes, in accordance to what they consider most appropriate to the pursuit of the cooperative object. This would avoid the risk of evasion to other legal forms of companies, in particular for a limited liability company which

[9] DEOLINDA MEIRA, "A Lei de Bases da Economia Social Portuguesa: do projeto ao texto final", *CIRIEC-España, revista jurídica de economía social y cooperativa*, 24, 2013, pp. 21-52.
[10] IAN SNAITH, "United Kingdom", in *International Handbook of Cooperative Law*, ed. DANTE CRACOGNA / ANTONIO FICI / HAGEN HENRŸ, Berlin/Heidelberg, Springer, 2013, pp. 115-151, BARBARA CZACHORSKA-JONES / JAY GARY FINKELSTEIN / BAHAREH SAMSAMI, "United States", in *International Handbook of Cooperative Law*, ed. DANTE CRACOGNA, ANTONIO FICI / HAGEN HENRŸ, Berlin/Heidelberg, Springer, 2013, pp. 759-778.
[11] ADRIANO CAMPOS ALVES, "Brasil", in *International Handbook of Cooperative Law*, ed. por Dante Cracogna, Antonio Fici e Hagen Henrÿ, Berlin/Heidelberg, Springer, 2013, pp. 271-288.
[12] DEOLINDA MEIRA, "Artigo 81º", *Código Cooperativo anotado*, coord. DEOLINDA MEIRA / MARIA ELISABETE RAMOS, Coimbra, Almedina, 2018, pp. 451-458.

has a more favorable minimum share capital scheme, the amount of which is freely set out in the statutes and the minimum value of each share of only one euro[13].

The study will also highlight the recent 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. Along the same lines, regarding the associations, reference will be made to the "Associação na hora" (On the Spot Association) (Law 40/2007 of August 24).

2.2. Governance of Cooperatives and IPSS

Likewise, conditions were created for the professionalization of the managers and the reinforcement of transparency, by expressly enshrining the duties of care and diligence of the members of the management body; the introduction of changes in terms of civil liability of the management and supervision of the cooperative, expressly foreseeing the assumptions that constitute the civil liability of the members of the management body before the cooperative, the creditors of the cooperative and the cooperators and third parties; the recasting of the terms of delegation of management and representation powers, starting by distinguishing between the regimen of the delegation of management powers and the regimen of the delegation of representation powers, listing matters that cannot be delegated.

The Cooperative Code offers three alternative models of governance of the cooperatives:

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 (Article. 28 of the CCoop)[14].

Each cooperative must choose the management and supervision model it wishes to adopt, and this choice must be molded on the cooperative's statutes (Article 16(1)(d) of the CCoop)[15].

In cooperatives with 20 or fewer members it is possible to have a sole director (Articles 28(2) and 45 of the CCoop) and a single supervisor insofar as this is provided for in the statutes (Articles 28(2), 51(1)(b) of the CCoop).

In order to reduce the difficulty in the access to funding, the Cooperative Code of 2015 foresees, in an innovative way, the figure of the investor members. These must not

[13] DEOLINDA MEIRA, "Contributos legislativos para a criação de empresas cooperativas: a livre fixação do capital social". *CIRIEC-España, Revista jurídica de economía social y cooperativa*, 26, 2015, pp. 27-52.
[14] ALEXANDRE DE SOVERAL MARTINS, "Artigo 28º", *Código Cooperativo anotado*, coord. DEOLINDA MEIRA / MARIA ELISABETE RAMOS, Coimbra, Almedina, 2018, pp. 167-173.
[15] MARIA ELISABETE RAMOS, "Artigo 16º", *Código Cooperativo anotado*, coord. DEOLINDA MEIRA / MARIA ELISABETE RAMOS, Coimbra, Almedina, 2018, pp. 100-106.

participate in the cooperative's transactions and are limited to contributing financially to the cooperative[16].

In order not to jeopardize the principle of democratic member control and the principle of autonomy and independence, this figure was subject to strict imperative limits[17].

The admission of investor members is subject to a statutory provision (Articles 16(1)(g); 20(1); and 41(1) of the CCoop) and must be approved by the General Meeting after having been proposed by the Board of Directors (Articles 20(3) and 20(4) of the Cooperative Code).

Article 41(5) of the CCoop requires that the statutes identify the 'conditions and criteria' on which the award of a plural vote to investor members depends[18].

However, some restrictions are imposed mandatorily: (i) no investor member may have more than 10% of the votes corresponding to the votes of cooperators; and (ii) investor members may not have total voting rights greater than 30% of the total votes of the cooperators (Article 41(7) of the CCoop).

The admission of investing members may be made through the subscription of equity securities or investment securities convertible into equity securities (Article 20(2) of the CCoop)[19].

3. Manager professionalization and transparency

3.1. Absence of a common system

In the Portuguese legal system, there is no legal regime dedicated to social enterprises. Neither the Basic Law of Social Economy (LBES) nor other legislation regulates social enterprises. This concept is addressed by legal doctrine and sociological literature.

If we assume that, under the Portuguese legal system, companies are owned and operated by social economy entities (Article 4 LBES), then we must conclude that the rules in force for each of these entities apply to the professionalization of managers and transparency. Therefore, the professionalization of managers and the transparency of cooperatives and IPSS are subject to different rules. It is true that the LBES establishes the democratic control of the respective bodies by its members (Article 5(c)) and transparency (Article 5(e)) as guiding principles for social economy entities. These principles are, by definition, vague and therefore insufficient to constitute a common system.

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[16] On the economic participations of the cooperative members, see DEOLINDA MEIRA, "O princípio da participação económica dos membros à luz dos novos perfis do escopo mutualístico", *Boletín de la Asociación Internacional de Derecho Cooperativo*, 2018, pp. 107-137.
[17] On these limits, see DEOLINDA MEIRA / MARIA ELISABETE RAMOS, "Artigo 41º", *Código Cooperativo anotado*, coord. DEOLINDA MEIRA / MARIA ELISABETE RAMOS, Coimbra, Almedina, 2018, pp. 235-240.
[18] DEOLINDA MEIRA / MARIA ELISABETE RAMOS, "Artigo 41º", *Código Cooperativo anotado*, *cit.*, pp. 235-240.
[19] DEOLINDA MEIRA / MARIA ELISABETE RAMOS, "A Reforma do Código Cooperativo em Portugal", *Revista Cooperativismo e Economia Social*, 38, 2016, pp. 77-108; DEOLINDA MEIRA / MARIA ELISABETE RAMOS, "Artigo 41º", *Código Cooperativo anotado*, *cit.*, pp. 235-240.

In the case of cooperatives, with regard to the professionalization of cooperative managers and the requirements of transparency, the Cooperative Code and the rules on public limited companies shall apply first, provided that the cooperative principles are not violated. This is the result of Article 9 of the CCoop. In the case of the IPSS, the Statute of Private Social Solidarity Institutions, approved by DL 172-A / 2014, dated November 14, and amended by Law No. 76/2015, of July 28, applies.

3.2. Professionalization of managers

Recruiting professional managers means that members of the management and representation body are recruited on the basis of technical competence and knowledge of the organization's activity, appropriate to their functions.

In the context of cooperatives, it is the right of the cooperators to elect and be elected to the bodies of the cooperative. (Article 21(1)(c) of the CCoop)[20]. At the same time, it is the duty of the cooperators to "accept and hold social positions for which they have been elected, unless there are legitimate reasons to be excused (Article 22(2)(b) of the CCoop)."

Article 29(1) of the CCoop regulates the recruitment base of members of the governing bodies of the cooperative, stating that "the officeholders of the governing bodies are elected in General Meeting from among the cooperators." Excluded from this criterion is the Statutory Auditor who, due to the independence requirements set forth in the Statute of the Official Chartered Accountants, cannot be a cooperator. And there are also exceptions to the investor members who, if admitted by the cooperative's statutes, may, under certain conditions, be elected to the bodies of the cooperative (Article 29(8) of the CCoop)[21].

The question arises as to what the solution to the case will be where the cooperative is made up of legal persons who have been designated as managers. The CCoop does not expressly address this issue. It must be resolved by virtue of the referral of Article 9 of the CCoop to Article 390(4) of the Commercial Companies Code[22]. In other words, in this case, if a legal person is appointed director of the cooperative, it must appoint a natural person to "carry out the position in its own name[23]. It is common doctrine in Portugal that, in this case, the director is the natural person named. This raises the question of whether such a natural person also has to be a cooperator. The answer is, in principle, affirmative[24]: the director must be a member of the cooperative.

[20] ANTONIO FICI, "Artigo 21º", *Código Cooperativo anotado*, coord. DEOLINDA MEIRA / MARIA ELISABETE RAMOS, Coimbra, Almedina, 2018, pp. 129-138.
[21] RICARDO COSTA, "Artigo 29º", *Código Cooperativo anotado*, coord. DEOLINDA MEIRA / MARIA ELISABETE RAMOS, Coimbra, Almedina, 2018, pp. 174-184.
[22] On the meaning of Article 9 of the CCoop, see DEOLINDA MEIRA, "A societarização do órgão de administração das cooperativas e a necessária profissionalização da gestão", *CIRIEC-España, revista jurídica de economía social y cooperativa,* 25, 2014, pp. 159-194; J. M. COUTINHO DE ABREU, "Artigo 9º", *Código Cooperativo anotado*, coord. DEOLINDA MEIRA / MARIA ELISABETE RAMOS, Coimbra, Almedina, 2018, pp. 69-71.
[23] Also in this sense, see DEOLINDA MEIRA, "A societarização …", cit., pp. 159-194.
[24] DEOLINDA MEIRA, "A societarização …", *cit.*, pp. 159-194.

However, this solution may prove impracticable in cases where cooperatives are constituted exclusively of legal persons. In effect, it seems that CCoop does not prohibit cooperatives from being constituted exclusively of legal persons. This is what seems to result from Article 31(3) CCoop, which presupposes, precisely, that legal persons can be cooperators and, in addition, can be elected to occupy governing positions.

It is our opinion that the principle of democratic member control would be fulfilled with the bodies occupied by a majority of members. The section 2.4. of the Principles of European Cooperative Law (PECOL) emphasizes that the governance structure of the cooperative must ensure democratic control by the members, and it is not necessary for all board members to be cooperators. Another positive aspect of section 2.4 of PECOL is the distinction between small and large cooperatives. In fact, the requirements for the professionalization of managers are 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 its 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[25].

Regardless of the size of the cooperative, CCoop does not expressly require technical competence requirements or special qualifications of the members of the management body.

In the field of CCoop, it is important to underline the importance of the cooperative principle of education, training and information for the better performance of members of the management and representation body[26]. Cooperatives have the obligation, in their activity, to ensure the education and training of their members, the members of their elected bodies, their directors and their employees. This principle is embodied in the legal imposition of a mandatory legal reserve for "cooperative education and training" and in the specific legal duty of the Board of Directors "to integrate annually in the business plan a training plan for the application of this reserve." (Article 97(4) of the CCoop)[27].

The 2015 Reform of the Cooperative Code introduced Article 46(1)(b), which states that in the exercise of their duties, the members of the Board of Directors shall "use due diligence in the exercise of their functions, namely in the monitoring of the economic and financial evolution of the cooperative and in the adequate preparation of the decisions." Some of the expressions of the care duties of cooperative managers are given here, as they are one of the internal control channels for cooperative directors, because they facilitate the scrutiny of their decisions and their performance by cooperators.

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[25] IAN SNAITH, "Chapter 2. "Cooperative Governance", in *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, G. FAJARDO-GARCÍA, A. FICI, H. HENRŸ, D. HIEZ, D. MEIRA, H. MUENKER, et al. (Authors), Cambridge, Intersentia, 2017, pp. 47-72.

[26] DEOLINDA MEIRA, "Reflexões em torno do regime jurídico da reserva de educação e formação cooperativas", in *O Pensamento Feminino na Construção do Direito Cooperativo*, coord. de M. FERRAZ TEIXEIRA E M. FERRAZ TEIXEIRa, Brasília, Vincere Editora, pp. 57-72.

[27] DEOLINDA MEIRA, "Artigo 97º", *Código Cooperativo anotado*, coord. DEOLINDA MEIRA / MARIA ELISABETE RAMOS, Coimbra, Almedina, 2018, pp. 526-531.

As in commercial companies, the technical competence, availability and knowledge of the company's activities appropriate to the functions performed in the cooperative are not requirements for the validity of the designation or election of the members of the management and representation body of the cooperative. They are "general legal duties" [28]of the members of the management and representation body of the cooperative that promote the accountability of managers in their relationship with the cooperative[29].

The Cooperative Code proclaims the supremacy of the General Meeting (Article 33). One of the manifestations of this supremacy of the General Meeting (made up of the cooperators) is the mandatory nature of its resolutions, both for the remaining bodies of the cooperative and for all its members[30].

The model of relationship between the management body and the General Meeting of the cooperative adopted by the Cooperative Code, while preserving the cooperative identity and, in particular, the principle of democratic member control, is susceptible to criticism. Vargas Vasserot criticizes the breadth of intervention of the General Meeting in matters of management of the cooperative, stressing the sporadic nature of meetings, the slowness and difficulty in making decisions, the greater possibility of challenging resolutions, the economic costs of meetings, the lack of rigor in decision making, the lack of knowledge of market requirements, and the absence of liability to third parties, among others[31].

There is a risk that excessive dependence "between the General Meeting and the Board of Directors may pose difficulties for the professionalization of the management of the cooperative"[32].

Regarding the composition of the management body of the IPSS, art. 15 of the Statute of the IPSS determines that "the management bodies [...] cannot be constituted mainly of employees of the institution." Article 21 of the Statute of the IPSS regulates the eligibility conditions of associates. This provision therefore allows qualified IPSS workers to be part of the management body and thus opens the way for the integration of professional managers. However, the imposition of non-remuneration for the functions exercised may in fact prevent the recruitment of professional managers (Article 18).

3.3. Professionalization of managers and remuneration

An important issue for the professionalization of cooperative managers is the topic of remuneration. The presumption of the non-remunerated exercise of duties by the members

[28] JORGE MANUEL COUTINHO DE ABREU, *Responsabilidade civil dos administradores de sociedades*, 2ª ed., Coimbra, Almedina, 2010, 14.
[29] See also, HARVEY J. GOLDSCHMIDT, "The fiduciary duties of nonprofit directors and officers: Paradoxes, Problems and Proposed Reforms", *Journal of Corporation Law*, Vol. 23, No. 4, Summer, 1998, pp. 631-638.
[30] DEOLINDA MEIRA, "A societarização…..", *cit*., pp. 159-194.
[31] CARLOS VARGAS VASSEROT, "La estrutura orgânica de la sociedad cooperativa y el reto de la modernidad corporativa", *CIRIEC-España, revista jurídica de economía social y cooperativa*, 20, 2009, pp. 59-82.
[32] DEOLINDA MEIRA, "A societarização….", *cit*., pp. 159-194.

of the cooperative's management body goes back to the origins of cooperatives, linked to the idea that cooperative leaders are driven mainly by a sense of social responsibility and service to members (which includes themselves, also) and not by motives of remuneration.

In addition, since the member of the management body is necessarily a cooperator, he therefore has direct interests in the result of the cooperative activity (evidenced in the promotion of the interests of the cooperators), being willing to dedicate himself to the cooperative without obtaining any compensation[33].

In accordance with Article 38(l) of the CCoop, it is the exclusive jurisdiction of the General Meeting "to set the remuneration of the members of the governing bodies of the cooperative, when not prohibited by the statutes." It may happen that the statutes of the cooperative determine the unpaid exercise of the functions or it may happen that the statutes regulate the remuneration of the managers. In the absence of any statutory provision (which means the statutes do not prevent the remuneration of managers), it would seem that the members of the board of directors are entitled to remuneration which, in order to avoid potential conflicts of interest, is the exclusive responsibility of the General Meeting[34].

The statutes of the cooperative may establish the non-remunerative nature of the cooperative manager function.

The non-remunerated exercise of the functions affects how easy it is to achieve the desired professionalization of cooperative management [35] and may even lead to less transparent remuneration solutions, as in those cases where managers of cooperatives (who exercise their duties free of charge) accumulate the status of subordinate workers, but with a significant autonomy of decision, duties for which they are duly remunerated. Setting the remuneration of a director-general is not subject to the exclusive jurisdiction of the general meeting and, therefore, will be set by the management body, with the risk of being a decision involving a conflict of interests.

In fact, in Portuguese cooperatives, the prohibition of non-members joining the management and representation body of the cooperative has been circumvented by the practice of entrusting a significant decision-making autonomy to directors-general or directors, who are not members of the management body. Eventually, in some situations, these CEOs will be de facto managers of the cooperative[36].

In the case of IPSS, Article 18 of the Statute of the IPSS imposes the non-remunerated nature of the exercise of duties, with the provision that when the volume of the financial transactions or the complexity of the management of the institutions require the extended presence of one or more members of the management bodies, there may be remuneration, but only if the statutes allow it.

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[33] DEOLINDA MEIRA, "A societarização….", *cit.*, pp. 159-194.
[34] JORGE MANUEL COUTINHO DE ABREU, "Artigo 38º", *Código Cooperativo anotado*, coord. DEOLINDA MEIRA / MARIA ELISABETE RAMOS, Coimbra, Almedina, 2018, p. 221-224.
[35] DEOLINDA MEIRA, "A societarização ….", *cit.*, pp. 159-194.
[36] JORGE MANUEL COUTINHO DE ABREU / MARIA ELISABETE RAMOS, "Artigo 72º", in J. M. COUTINHO DE ABREU (coord.), *Código das Sociedades Comerciais em comentário*, vol. I, 2ª ed., Coimbra, Almedina, 2017, pp. 892-914.

However, remuneration may not exceed four (4) times the value of the social support index (IAS) nor, in the case of social solidarity foundations, call into question compliance with the provisions of the Framework Law on Foundations, approved by Law No 24/2012, of July 9, regarding the limit of own expenses.

In addition to these maximum caps, the existence of remuneration is subject to the existence of certain assumptions regarding the economic and financial situation of the institution. Thus, the IPSS cannot present cumulatively two of the following ratios: solvency less than 50%; global indebtedness exceeding 150%; financial autonomy of less than 25%; in the last three economic years. If, in an audit ordered by the Government, it is found that two of these ratios cumulatively occur, the consequence will be the non-payment of remuneration.

3.4. Transparency

According to Article 5(e) LBES, social economy entities must observe the guiding principle of transparency. However, the LBES does not identify (nor is it its role to identify) the instruments through which transparency is achieved in each entity of the social economy.

As Hopt observes, "transparency is a very useful tool that has been used in corporate law and securities regulation in many other fields, both in the US and in Europe"[37]. However, many of the instruments that guarantee transparency in the context of commercial companies, and in particular capital markets, are inapplicable to social economy entities[38]. In social economy entities "there are typically no shareholders who could monitor the board in their own profit interest, let alone institutional investors; nor are there markets that could exercise external control on management and the board"[39]. But there are examples of "not-so-good governance in the non-profit sector"[40].

First of all, transparency takes the form of exposing a particular factual situation (for example, the assets and financial situation of a particular IPSS). In order to do so, it is necessary for the social economy entity to produce information and for such information to be disclosed and, not infrequently, published, in order to be accessible to third parties. These information flows are relevant to the decisions of various stakeholders, such as the beneficiaries of the social economy entity, associates, workers, financiers, the State, donors, potential investors, the community in general, etc. Therefore, transparency and the inherent disclosure of information allow several individuals to make informed decisions by taking advantage of the information available.

[37] KLAUS HOPT, "The board of nonprofit organizations: some corporate governance thoughts from Europe", *ECGI, Law Working Paper*, 125/2009, p. 17.
[38] S. THOMSEN "Comparative corporate governance of non-profit organizations", *European Company and Financial Law Review*, Vol. 11, n. 1, 2014, pp. 15-30.
[39] KLAUS HOPT, "The board…, *cit*., p. 3.
[40] KLAUS HOPT, "The board…, *cit*., p. 3.

In the literature on capital market transparency, it is usual to read that "sun is the best disinfectant." It is meant that opacity fosters conduct and decisions that violate the law and the norms in force. Transparency and public exposure are credited with providing a preventive effect on illegal or "unethical" practices, as they induce behaviors and decisions that respect the law and the guiding principles of the social economy. Opacity and lack of clarity, on the other hand, are conducive to less lawful practices of decisions made in situations of conflict of interest, the obtaining of illegitimate benefits for managers or people close to them, the illegal use of the resources of the social economy entity, and the mistreatment of users, etc.

Hopt emphasizes that conflicts of interest and poor governance are also observable in the non-profit sector[41]. Empirical studies suggest that "most of [the] abuses concern management and the board of the foundation and consist in disloyal behavior, or even more commonly, in mismanagement and carelessness towards the entrusted assets"[42].

Non-profit entities are characterized not by the impossibility of making a profit, but by the impossibility of distributing them to members/partners, members of the management and representation body, or to the founders[43]. This "non-distribution constraint" "could also be indirectly violated by means of acts that are particularly favorable, without reason, to those who cannot be advantaged by an SE, such as the payment of unjustifiable, above-market remunerations to employees or directors ('indirect distribution of profits'). Indeed, there are some laws that explicitly prohibit such acts in order to protect the non-distribution profit constraint or reinforce the rules on profit allocation"[44].

In Portuguese legislation, there is no transparency regime common to the various social economy entities, although the LBES identifies it as one of the guiding principles of the social economy. Thus, it is from the legal regime of each of the social economy entities that one can know the rules of transparency applicable to each one of them.

The legal imposition of transparency, while respecting the principle of proportionality, contributes to preserving the community's confidence that resources channeled to social economy organizations (whether state or private donors) are used in a healthy way and are allocated to the fulfillment of their mission[45]; that the tasks delegated or contracted with the State are being correctly fulfilled and that the institution remains faithful to the mission for which it was constituted. Information on the mission, instruments, programs and activities, officers, employees, origin of the financing, the accounting and financial situation of the entity and the nature of the goods and services rendered to the community and the conditions under which they are provided should be clear[46].

[41] KLAUS HOPT, "The board…, *cit*., p. 3.
[42] KLAUS HOPT, "The board…, *cit*., p. 3.
[43] HENRY HANSMANN, "The economics of nonprofit organizations", In K. HOPT AND T. VON HIPPEL (eds) *Comparative Corporate Governance of Non-Profit Organization*, Cambridge, University Press, 2010, pp. 60-72.
[44] KLAUS HOPT, "The board…, *cit*., p. 3.
[45] RUTE SARAIVA, "A regulação pública das entidades da economia social", *Revista Cooperativismo e Economía Social*, 39, 2017, p. 65.
[46] RUTE SARAIVA, "A regulação pública….", *cit*., p. 65.

The projected, but not yet complete, "permanent database of social economy entities" may itself also contribute to increasing transparency[47].

3.5. Transparency in cooperatives

Some of the rights of the cooperators induce transparency in the relationship between them and the cooperatives. These are the case of participation in the economic and social activity of the cooperative, participation in the General Meeting (presenting proposals, discussing and voting on the items on the agenda), the request for information from the competent bodies of the cooperative, the examination of the management report and documents of accountability (Article 21 of the CCoop)[48]. The General Meeting shall determine the remuneration of the members of the cooperative bodies, fix the interest rates to be paid to the members of the cooperative or approve the form of distribution of the surplus[49].

In turn, the incompatibilities provided for in Article 31 of the CCoop are intended to ensure the regular functioning of the cooperative bodies, preventing, in particular, that the same person is a member of the management body and the supervisory body. The enshrinement of the duties of loyalty of the members of the management body aims to avoid decision-making in situations of conflict of interest[50].

In the relationship of the cooperatives with the outside, the António Sérgio Cooperative for Social Economy (CASES) should be highlighted for its annual credential attesting to the legal incorporation and proper functioning of the cooperative, as provided for in Article 117. In addition, there is a mandatory communication to CASES, provided for in Article 116, to increase transparency and accountability, annual management reports, annual accountability and social balance sheets.

3.6. Transparency in IPSS

In the case of the revised Statute of the IPSS (EIPSS), the freedom of internal organization (principle of the autonomy of the IPSS -Article 3 of the Statute) remains in force, but requirements were added for the sake of transparency and professionalization. Strict restraints are established on the composition of the bodies and the holding of offices (Article 15), the access of workers to the management and supervision bodies is limited (in these

[47] RUTE SARAIVA, "A regulação pública….", *cit.*, p. 81.
[48] ANTONIO FICI, "Artigo 21º", *Código Cooperativo anotado*, coord. DEOLINDA MEIRA / MARIA ELISABETE RAMOS, Coimbra, Almedina, 2018, pp. 129-138.
[49] JORGE MANUEL COUTINHO DE ABREU, "Artigo 38º", *Código Cooperativo anotado*, coord. DEOLINDA MEIRA / MARIA ELISABETE RAMOS, Coimbra, Almedina, 2018, pp. 221-224.
[50] CAROLINA CUNHA, "Artigo 31º", *Código Cooperativo anotado*, coord. DEOLINDA MEIRA / MARIA ELISABETE RAMOS, Coimbra, Almedina, 2018, pp. 185-190.

bodies the workers of the institutions cannot have the majority, nor hold the post of Chairman of the Supervisory Body). The duration of the mandates of the IPSS bodies is set at 4 years, and the limitation of mandates of the IPSS Chairman (or "equivalent position") is introduced, who can only be elected/appointed for three consecutive mandates (which seeks to avoid the "outsourcing" of mandates).

In the name of transparency and professionalization of the management in the IPSS, the revised statute provides for the drawing up of internal regulations that are appropriate and the organization and elaboration of the accounting, in accordance with the law. In the case of the accounting, a set of rules is established for the disclosure of the accounts (Article 14-A.2), starting with the requirement of the mandatory disclosure of accounts on the institutional website by May 31 of the year following that to which they refer. Moreover, the subject of delegation of management and representation powers (Article 13(3)) is reformulated, and more rigorous mechanisms of supervision—internal and external—were institutionalized (Articles 34 and 35).

Although the law dictates the publication of the IPSS accounts on its website, the truth is that, in practice, that duty is not always carried out. On the other hand, the Ministry of Social Security (Article 14-A.7 of the IPSS Statute) has already ruled that IPSS accounts are confidential because they contain data of a private nature. In the meantime, the Committee on Access to Administrative Documents has issued opinions to the effect that IPSS accounts are public. It seems to be the understanding of Access to Administrative Documents Commission that this best suits the Statutes of IPSS.

In regard to the functioning of the administrative and supervisory bodies, Article 17(5) of the IPSS Statute determines that is void the member's vote (not a resolution) on a matter directly related to him and in which he is interested, as well as his/her spouse, a person with whom he lives in conditions analogous to those of spouses and the corresponding ascendants and descendants, as well as any relative or next of kin in a straight line or in the second degree of the collateral line.

Article 21-B of the IPSS Statute, on impediments, is aimed at avoiding situations of conflicts of interest. Provision is made to prevent the vote of the holder of the body on a resolution dealing with matters that concern him or her directly and persons who are close to him; the legal prohibition to contract directly with the institution (No 2); the prohibition of exercising activity conflicting with that of the institution managed.

With regard to contracting, Article 23(1) of the IPSS Statute establishes the prohibition of carrying out works by direct administration of a value greater than 25 thousand euros, when financed by public entities. It is a "limitation on the freedom of self (organization) which is not parallel to any public administration entity and also emerges in a 'counter-cycle' with the

highlighted 'strategic autonomy' which the Directive 2014/24/EU recognizes to non-profit private institutions in general"[51].

4. Funding the social entrepreneurs: main initiatives

4.1. Social entrepreneurship and access to financing

In 2011, the European Commission chose to improve access to financing as one of the "key actions to be launched before the end of 2012" to promote social entrepreneurship.

Philanthropy, and the donations in which it takes shape, play a relevant role in the financing of social economy entities. They are, in many cases, part of corporate social responsibility policies which, on a voluntary basis, allocate part of their resources to the support of social economy entities. Neither should the role of volunteering in meeting the manpower needs of social economy institutions be ignored.

However, donations from philanthropy can be sporadic, episodic and insufficient to guarantee the day-to-day and regular functioning of social economy entities.

Social innovation, social entrepreneurship funds and crowdfunding are part of an international trend to innovate and diversify sources of funding for the social economy sector. Social investment arises that "seeks to promote the sustainability and growth of social innovation projects, while achieving some return, associated with the generation of measurable social or environmental impact[52].

Examples of impact economics include the *Social Impact Bonds* — SIB. They emerge as a brand new model that separates the traditional funding based on funding only the activities and products from the funding based on specific results. This model seeks to attract funding to help to solve social problems through services that aim to bridge specific necessities.

4.2. The pioneering nature of the *Portugal Social Innovation* initiative

The initiative "Portugal Inovação Social (PIS)" (*Portugal Social Innovation*), within the scope of Portugal 2020, set up by the Resolution of the Council of Ministers 73-A/2014, of 16 December 2014, created a structure of mission—the Structure of Mission Portugal Social

[51] LICÍNIO LOPES, "Breves Nótulas sobre o "novo estatuto" das Instituições Particulares de Solidariedade Social no Direito nacional e no Direito da União Europeia", *Revista Cooperativismo e Economía Social*, 37, 2015, pp. 39-164.
[52] FILIPE ALMEIDA / FILIPE SANTOS, "Portugal inovação social….", *cit*., pp. 443-462.

Innovation—with the role of ensuring its technical management and coordination of implementation[53].

For this purpose, the program established aimed at the three sectors of activity, namely public entities, private profit-making organizations and entities who are members of the social economy sector, with initiatives in the field of innovation and social entrepreneurship, which can use four funding instruments, namely:

- "Fundo para a Inovação Social" — wholesale funding with shared funds to support initiatives and investments in innovation and social entrepreneurship in the process of consolidation or dissemination through the granting of loans, interest subsidy, provision of guarantees or quasi-equity;
- "Títulos de impacto social" —repayable contributions established in partnership for the funding of innovative solutions in the provision of public services, aimed at achieving results and reducing costs;
- "Programa de Parcerias para o Impacto" — non-reimbursable grants to social economy entities, in particular, foundations and charities, to support the high-impact innovation and social entrepreneurship initiatives which are at an embryonic or exploratory stage;
- "Programa de Capacitação para o Investimento Social" — training vouchers given to the recipients, to strengthen their skills in the design and implementation of innovation and social entrepreneurship projects.

With regard to "Parcerias para o Impacto", 35 projects were approved, representing a total investment of around € 10 million. Of these, about € 3 million is provided by Social Investors (half by public investors and half by private investors in the private sector and in the cooperative and social sector)[54].

Regarding social impact certificates, "in the first application period, which ended in November 2016, three innovative projects were supported (...) [which] corresponded to a potential payment of around € 1.5 M"[55].

4.3. Crowdfunding and social entrepreneurship

In the definition provided by Article 2 of Law No. 102/2015, "collaborative financing is the type of financing of entities, or of their activities and projects, through their registration in electronic platforms accessible through the Internet, from which they collect investment parcels from one or several individual investors."

[53] CRISTINA PARENTE / VANESSA MARCOS / CARLOTA QUINTÃO, "Portugal Inovação Social. Anotação à Resolução do Conselho de Ministros n.º 73-A/2014, de 16 de dezembro de 2014", *Revista Cooperativismo e Economía Social*, 37, 2015, pp. 397-405.
[54] FILIPE ALMEIDA / FILIPE SANTOS, "Portugal inovação social….", *cit.*, pp. 443-462.
[55] FILIPE ALMEIDA / FILIPE SANTOS, "Portugal inovação social….", *cit.*, pp. 443-462.

In turn, Article 3 of Law No. 102/2015 identifies the four modalities of collaborative financing: a) through a donation; b) with a return; c) of capital; d) on loan. The first two modalities of collaborative financing are aimed at initiatives of solidarity or the promotion of social, cultural or artistic projects; the latter two are designed for investment in for-profit projects[56].

In collaborative funding by donation or reward there is no financial investment of the invested capital; the investor does not seek, through his/her investment, to obtain a financial return. It is therefore justified that in these cases Law 102/2015 does not provide for a maximum investment ceiling to be applied by each.

The essentiality of the electronic platform for the characterization of collaborative financing is manifested, on the one hand, in the legal definition itself contained in Article 2 of Law 102/2015, and, on the other hand, in several regulatory aspects, such as ownership (Articles 4 and 12), the duties of platform managing entities (Articles 5, 15 and 16), the requirements on which a platform is validly adhered to (Article 6), who may use platforms (Article 7) and the prevention of conflicts of interest (Article 21)[57].

Among legal persons who may be holders of crowdfunding platforms we may find *for-profit subjects* such as commercial companies (civil, commercial and civil in commercial form) or *non-profit subjects* such as associations or cooperatives [58].

Collaborative funding platforms are subject to registration. The platform that is dedicated to the collaborative financing through donation or reward (exclusively or in addition to other forms of collaborative financing) must first communicate its activity to the Directorate-General for Consumer Affairs (integrated structure in the direct administration of the State, in the Ministry of Economy) — Article 12(1) of Law 102/2015. In the case of collaborative equity financing or loans, the electronic platform management entities are subject to prior registration with the Portuguese Securities Exchange Commission (CMVM) (Article 15 of Law 102/2015).

The subjects involved in the crowdfunding operations / initiatives are: a) the holders of collaborative funding platforms (Article 4 of Law No. 102/2015) and the managing entities of such platforms (Articles 5, 15 and 16); b) the beneficiary of the collaborative financing (Article 7(1)); c) the investors (people who, through the application of resources, compete for collaborative financing[59]).

Nothing prevents social economy organizations, as beneficiaries, from using collaborative funding to obtain resources necessary for the development of initiatives or projects, namely, in the modalities of collaborative financing through donation and reward.

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[56] JOÃO VIEIRA SANTOS, "Crowdfunding como forma de capitalização das sociedades", *Revista Electrónica de Direito*, 2, 2015, pp. 1-39.
[57] MARIA ELISABETE RAMOS, "A economia social e crowdfunding em Portugal. Notas a propósito da Lei n.º 102/2015, de 24 de agosto", *Revista Cooperativismo e Economía Social*, 38, 2016, pp. 345-356.
[58] For a critical appreciation, LUÍS GUILHERME CATARINO, "Crowdfunding e crowdinvestment: regresso ao futuro?", In PAULO CÂMARA (Ed), *O novo direito dos valores mobiliários — I Congresso sobre valores mobiliários e mercados financeiros,* Coimbra, Almedina, 2017, pp. 321-389.
[59] LUÍS GUILHERME CATARINO, "Crowdfunding e crowdinvestment…", *cit.*, pp. 321-389.

Some doctrine calls for the revision of Law 102/2015, and in addition to other criticisms, considers it lacking in important aspects of the regime. As conflicts of administrative competence can arise between the Directorate-General for Consumer Affairs and the CMVM (in cases where the platforms decide to pursue more than collaborative financing), and because the said Law is silent regarding the rules of territorial application, the type of legal persons that can exploit e-platforms should be limited[60].

4.4. Social Entrepreneurship Funds

Law 18/2015 of 4 March guarantees the implementation, in the internal legal order, of Regulation (EU) No. 346/2013 of the European Parliament and of the Council of 17 April on European Entrepreneurship Funds[61] and has designated the Securities Exchange Commission as the competent authority for the supervision of the entities managing European social entrepreneurship funds or EuSEF (see Articles 1(1)(b), 2 and 3 of Law 18/2015)[62].

According to Article 4(1) of Law 18/2015, "it is considered an investment in social entrepreneurship the acquisition, for a limited period of time, of own capital instruments and foreign capital instruments in companies that develop adequate solutions to social problems, with the objective of achieving quantifiable and positive social impacts." It is this investment in social entrepreneurship that should constitute the main object of social entrepreneurship companies (Article 4(2)), assuming they can "manage social entrepreneurship funds, including European social entrepreneurship funds designated EuSEF, under the terms and for the purposes of Regulation (EU) No 346/2013, of the European Parliament and of the Council of 17 April" or manage other social entrepreneurship societies (Article 4(6) of Law 18/2015).

According to Law 18/2015, the two vehicles for social entrepreneurship are "social entrepreneurship companies" and "social entrepreneurship funds", including European social entrepreneurship funds designated EuSEF, under the terms and for the purposes of Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April.

Legally, the social entrepreneurship company is a legal person; social entrepreneurship funds are autonomous assets "which can be managed by social entrepreneurship companies, venture capital companies and investment fund management companies" (Article 4(5) of Law 18/2015)[63].

This law applies the techniques of risk capital to social entrepreneurship. The social entrepreneurship companies/social entrepreneurship funds acquire social investments (equity capital) from companies that "develop adequate solutions to social problems, with the objective of achieving quantifiable and positive social impacts." The law allows social

[60] LUÍS GUILHERME CATARINO, "Crowdfunding e crowdinvestment…", *cit.*, pp. 321-389.
[61] This Regulation was amended by Regulation 2017/1991 of the European Parliament and of the Council of 25 October 2017. It will enter into force on 1.3.2018.
[62] This law was amended by Decree-Law 56/2018 of 9 July.
[63] See JOSÉ LUÍS DIAS GONÇALVES, "As empresas sociais e o seu financiamento…", *cit.*, pp. 197-218.

entrepreneurship companies/social entrepreneurship funds to use outside capital instruments (for example, loans). In the first case, the investor (social entrepreneurship/social entrepreneurship fund) becomes a partner in the company in which he invests, and the corporate participation (for example, the shares he holds) is part of his assets. In the second case (investment by means of third-party capital instruments), the investor (social entrepreneurship company/social entrepreneurship fund) becomes a creditor of the company in which he invested and of the investor's assets[64].

Social entrepreneurship companies and social entrepreneurship funds are intended to invest (either through equity instruments or through third-party capital instruments) in "companies that develop adequate solutions to social problems, with the objective of achieving quantifiable and positive social impacts." (Article 4(1) of Law 18/2015). The investor will be remunerated through the dividends generated by the corporate participation, and especially through the capital gains that will be made at the time of the disposal of such shareholdings. In the case of foreign capital, the investor shall be remunerated under the conditions established in the contract concluded between him and the debtor company (for example, through interest).

If we pay close attention, Law 18/2015 avoids using the label "social enterprise," preferring the descriptive formula "companies that develop adequate solutions to social problems, with the objective of achieving quantifiable and positive social impacts" (Article 4(1) of Law 18/2015). This caution is understood, since the Portuguese legal order does not expressly regulate "social enterprise." However, indirectly, this concept is relevant to the application of Law 18/2015. It should be noted that Article 8(1) of the CMVM Regulation 3/2015 also considers that "companies which, by developing appropriate solutions to social problems, in accordance with Article 4(1) of the Legal Regime, fulfil the conditions laid down in Article 3(d) of Regulation (EU) No. 346/2013, are eligible to join company assets and social entrepreneurship funds." The latter conditions are demanding[65], one of which is that the eligible company is a "social enterprise."

It should also be noted that investment in social entrepreneurship is, in accordance with Article 4(1) of Law 18/2015, addressed to "companies." This excludes, it seems, the investment, in particular through third-party capital, in the social economy entities provided for in Article 4(a) to (g) of the LBES.

It seems, on the other hand, that "companies that develop adequate solutions to social problems with the objective of achieving quantifiable and positive social impacts" are for-profit companies. This raises the question whether "companies that develop adequate solutions to social problems with the objective of achieving quantifiable and positive social impacts" can be considered as social economy entities (Article 4 LBES). At the moment, the

[64] ALEXANDRE MOTA PINTO, "Artigo 243.º", In J. M. COUTINHO DE ABREU (Ed.), *Código das Sociedades Comerciais em comentário*, vol. III, 2ª ed., Coimbra, Almedina, 2016, pp. 637-656; MARIA ELISABETE RAMOS, "A economia social e crowdfunding em Portugal. Notas a propósito da Lei n.º 102/2015, de 24de agosto", *Revista Cooperativismo e Economía Social*, 38, 2016, pp. 345-356.
[65] ALEXANDRE SOVERAL MARTINS, "Sociedades de Empreendedorismo social e fundos de empreendedorismo social: a Lei n.º 18/2015, de 4 de março", *Revista Cooperativismo e Economía Social*, 38, 2015-2016, pp. 375-386.

answer to this question is doubtful, because it depends on how, in the future, Article 4(h) LBES will be implemented. We will know this only when the "social economy database" is created.

On November 20, 2018, the Securities Exchange Commission announced that the Mustard Seed Maze — Sociedade de Empreendedorismo Social, S.A., had been registered. This is the first social entrepreneurship company registered in Portugal, and it will manage the first social entrepreneurship fund called Mustard Seed Maze Social Entrepreneurship Fund I. Other Member States such as Germany, France, the United Kingdom and Finland already have registers of social entrepreneurship funds[66].

It is doubtful whether the Portuguese legal ecosystem is sufficiently prepared to foster the development of social entrepreneurship companies and social entrepreneurship funds. On the one hand, there is no legal regime regulating social enterprises, nor is it clear what the companies are "that develop adequate solutions to social problems, with the objective of achieving quantifiable and positive social impacts." On the other hand, there are difficulties related to the evaluation of the assets of social entrepreneurship companies and of social entrepreneurship funds. Article 6(1) of the Regulations of the CMVM on the "Valuation of the assets of the social entrepreneurship and social entrepreneurship funds" provides that "In the evaluation of the assets that integrate the assets of the funds and social entrepreneurship companies, the fair value method is applied according to the best practices in force in the social investment sector, taking into account the quantifiable positive impact or social impact of the investments made."

5. Conclusions

The Cooperative Code and the IPSS Statute have been amended by virtue of the imposition of "legislative development" enshrined in Article 13 LBES.

The Cooperative Code requires that members of the bodies are cooperators, thus fulfilling the cooperative principle of democratic member control. However, this rigid solution, the dependence of management on the General Meeting, the traditions of non-remuneration hinder the professionalization of managers, which is vital, especially in large cooperatives.

In the Revised IPSS Statute, IPSS qualified workers are allowed to join the Board of Directors and, therefore, the way is open for the integration of professional managers. However, the imposition of non-remunerated duties and wage ceilings may in fact hinder the recruitment of professional managers.

66 https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_eusef# (access in February 2019).

Doubts about the public character of the IPSS accounts and the failure to disclose the accounts on the institutional website have undermined the necessary transparency of these social economy entities.

The Portuguese legal ecosystem has incorporated innovative instruments of investment in social entrepreneurship, such as "Portugal Inovação Social", crowdfunding, companies and investment funds in social entrepreneurship. The legal ecosystem suffers from some weaknesses in terms of crowdfunding and investment in social entrepreneurship, which may constrain its development.

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