

HOUSING AND CONSTRUCTION COOPERATIVES IN PORTUGAL. STATE-OF-THE-ART AND LINES OF REFORM

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Abstract: In Portugal, housing and construction cooperatives are governed by the provisions of Decree-Law no. 502/99 of 19 November and, in the absence of such provisions, by the provisions of the Cooperative Code, which was extensively modernised in 2015. The sectoral legislation on housing and construction cooperatives needs to be reformed, taking into account the innovations introduced in the revision of the Cooperative Code. In this future revision of the sector's legislation, two fundamental aspects must be taken into account. With regard to operations with third parties, the obligation to consider such operations as complementary should be eliminated. Of particular note is the need to review the classification of the act of transferring housing under the individual property regime, changing the solution provided for in current legislation, which qualifies this act as a purchase and sale. The adjudication regime is the most appropriate solution for this act of transfer.

Keywords: right to housing, cooperative law, housing and construction cooperatives, individual ownership, collective ownership.

1. Introduction

The right to housing is a constitutionally enshrined fundamental right with an unquestionable personal and community dimension. This right is the foundation from which citizens build the conditions that allow them to access other rights such as education, health and employment. In this sense, Article 65 of the Constitution of the Portuguese Republic enshrines the fundamental principle that everyone has the right, for themselves and their family, to housing of an adequate size, in conditions of hygiene and comfort, that preserves personal intimacy and family privacy, and it is the State's responsibility to promote and enact all the political measures that allow this constitutional right to become a reality. These policies and measures include encouraging and supporting "initiatives by local communities and populations aimed at solving their housing problems and fostering the creation of housing cooperatives and self-building."¹

Guaranteeing access to safe, decent and affordable housing is also part of the Sustainable Development Goals (SDGs) set by the United Nations' 2030 Agenda. To fulfill the SDGs, the role and performance of cities is essential. Currently, half of humanity lives in cities, and by 2030, this percentage is expected to reach 60 per cent. Although it cuts across all the SDGs, the 2030 Agenda sets a specific goal for urban development — "Goal 11 – Sustainable cities and communities" — which aims to make cities more inclusive, safe, resilient and sustainable,

¹ See ANA AFONSO, "A proteção do direito à habitação na Carta Social Europeia e no direito português", *Lex Social - Revista Jurídica de Derechos Sociales*, Monográfico 1, 2017, pp. 334-336.

which means ensuring everyone has access to decent housing.²

The International Cooperative Alliance (ICA) has made it a strategic priority to involve cooperatives around the world in helping to achieve the United Nations 2030 Sustainable Goals.³ The ICA believes that its various sectoral organisations can contribute to achieving the SDGs, highlighting the role that housing cooperatives can play in reducing poverty and inequality and, therefore, in achieving many SDGs.⁴

In 2015, the National Housing Strategy (ENH) has been approved in Portugal, with the aim of bringing the national regulatory framework closer to public policies in the field of housing, as well as building appropriate responses to the financial, economic and social changes that pose increased difficulties in guaranteeing access to decent and affordable housing. In 2018, Decree-Law 37/2018 of 4 June was approved, establishing the *1st Right - Support Program for Access to Housing*, which recognises the central role of housing and rehabilitation in improving people's quality of life, in revitalising and making cities more competitive, and in social and territorial cohesion.

The legislation produced under this new generation of housing policies recognises the central role that housing and construction cooperatives can play in promoting this fundamental right, as they are based on a collective and non-speculative ownership model, promoting inclusive and sustainable communities.

Housing cooperatives provide access to affordable housing. In addition, they play an important role in promoting a housing stock in which the owners participate and determine how it is developed through democratic, participatory management that is open to the community. Housing cooperatives have been involved in important sustainable construction, urban regeneration and social rental management projects. In addition to housing, housing cooperatives are responsible for designing, producing and managing a diverse network of social facilities and services to support families, such as childcare centres, kindergartens, social centres, home support centres, retirement homes, sports facilities and cultural and leisure facilities.⁵ Moreover, housing cooperatives have recently been called upon to respond to new projects aimed at addressing a new generation of social realities and needs, such as housing problems for young people, relocated students, young couples or adults, vulnerable groups such

² Available at <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>.

³ See ICA, "BluePrint for a Cooperative Decade", 2013, available at https://www.ica.coop/sites/default/files/media_items/ICA%20Blueprint%20-%20Final%20version%20issued%207%20Feb%2013.pdf.

⁴ On the contribution of cooperatives to meeting the SDGs, see ADORACIÓN MOZAS MORAL, Contribución de las cooperativas agrarias al cumplimiento de los objetivos de desarrollo sostenible. especial referencia al sector oleícola, CIRIEC-España, Centro Internacional de Investigación e Información sobre la Economía Pública, Social y Cooperativa, 2019, *passim*.

⁵ See IVO BALMER/JEAN-DAVID GERBER, "Why are housing cooperatives successful? Insights from Swiss affordable housing policy", *Housing Studies*, no. 33(3), 2018, pp. 361-385, <https://doi.org/10.1080/02673037.2017.1344958>; GUERRA, PAULA; MATOS, FÁTIMA; MARQUES, TERESA & SANTOS, MÓNICA: "As cooperativas e as modalidades contemporâneas de direito à cidade", *Cooperativismo e Economia Social*, no. 35, 2013.

as the elderly and disabled.⁶ These challenges and opportunities include collaborative housing or cohousing, which is booming in Europe, with housing cooperatives considered to be one of the legal forms that best fits the specificities of these initiatives.⁷

All the above are attributed to the ability of cooperatives to combine a strong social dimension with an economic dimension, which is reflected in the satisfaction of their members' interests. As early as 1935, George Fauquet, in his work "The Cooperative Sector. An Essay on the Place of Man in Cooperative Institutions and their Place in the Economy", highlighted this dual aspect of the cooperative, stating that "a social and an economic element must be distinguished in the cooperative institution since it is: 1. an association of people who recognise, on the one hand, the similarity of certain needs and, on the other hand, the possibility of satisfying them better through a common enterprise than individually; 2. and a common enterprise whose particular objective responds precisely to the needs to be satisfied."⁸

In this context, this study aims to reflect on the legal regime of housing and construction cooperatives in Portugal, considering the novelties brought about in 2015 by the changes to the Portuguese Cooperative Code. Defining a legal regime adapted to the Cooperative Code is now necessary. It is also important to provide the legal framework for housing and construction cooperatives with mechanisms that respond to the current concerns and challenges surrounding their activity.

2. Regulatory framework of housing and construction cooperatives

The Portuguese Cooperative Code (PCC)⁹ Article 4(1)(h) mentions the branch of housing and construction cooperatives. The legal framework for housing and construction cooperatives is set out in a separate law, Decree-Law no. 509/99 of 19 November (RJCHC). As for the legal regime that applies to them, Article 1 of this law states that housing and construction cooperatives (of the first degree and their higher degree organisations) are governed by "the provisions of this law" and, where it does not apply, "the provisions of the Cooperative Code". Therefore, in the areas not covered by the regulations contained in Decree-Law no. 509/99 of 19 November, the more general rules of the Cooperative Code will apply directly.

There is, therefore, no systematic autonomy of Decree-Law no. 509/99 of 19 November from the Cooperative Code, admitting a plurality of source laws for regulating housing and construction cooperatives. This means that, in terms of the legal regime, housing and

⁶ See EDUARD CABRÉ/ARNAU ANDRÉS, "La Borda: a case study on the implementation of cooperative housing in Catalonia", *International Journal of Housing Policy*, no. 18(3), 2018, pp. 412-432. <https://doi.org/10.1080/19491247.2017.1331591>.

⁷ See DARINKA CZISCHKE, "Collaborative housing and housing providers: towards an analytical framework of multi-stakeholder collaboration in housing co-production", *International Journal of Housing Policy*, no. 18(1), 2018, pp. 55-81. <https://doi.org/10.1080/19491247.2017.1331593>; SARA LOUREDO CASADO "Las cooperativas de viviendas en régimen de cesión de uso como cauce jurídico para los nuevos modelos habitacionales", *CIRIEC. Revista Jurídica de Economía Social y Cooperativa*, no. 37, 2020, pp. 167-206.

⁸ GEORGE FAUQUET, *O setor cooperativo. Ensaio sobre o lugar do homem nas instituições cooperativas e destas na economia* (translated by F. Pinto), Livros Horizonte, Lisboa, 1980, p. 26.

⁹ Law no. 119/2015, of 31 August, as amended by Law no. 66/2017, of 9 August.

construction cooperatives have benefited from the reform of cooperative legislation that has taken place in recent years. A new Cooperative Code was approved in Portugal in 2015 (Law no. 119/2015, of 31 August). The process of reforming the Cooperative Code resulted from a requirement contained in the Basic Law on the Social Economy (Law 30/2013, of 8 May). Article 13 of this law, relating to “legislative development”, required the approval of “legislative acts that implement the reform of the social economy sector” in the light of the provisions of this law and, in particular, the “guiding principles” set out in Article 5 of the Social Economy Framework Law.¹⁰

The 2015 reform of the Portuguese Cooperative Code introduced changes to important issues in the legal system of cooperatives. In terms of membership, investor members are now permitted. It also enshrined the possibility of plural voting (for cooperators and investor members) in first-degree cooperatives. The minimum legal number of cooperators required to set up a 1st-degree cooperative was reduced to three. In terms of administration and management, three alternative models for the administration and supervision of the cooperative were established. In terms of the economic regime, the minimum share capital was reduced, the liability regime for cooperators was clarified, and new solutions were adopted for cooperative reserves. Although the variability of share capital continues to be recognised as an essential feature of cooperative identity, in order to mitigate its effects and give greater stability to the cooperative share capital, the list of statutory limits on the exercise of the right to reimbursement was extended.¹¹

Since 2015, the urgently needed revision of cooperative sector legislation has been awaited in order to bring it into line with the changes introduced in the Cooperative Code, as well as to respond to the main problems and challenges facing the various branches of the cooperative sector, by creating appropriate legal frameworks.¹²

As we know, the regulatory framework can favour or inhibit entrepreneurship and innovation in cooperatives. It is, therefore, essential for the affirmation and development of the housing and construction cooperative sector that the legal requirements that preserve the cooperative identity are maintained and that those that prove to be disproportionate or useless are amended.¹³

3. Concept, object and purpose of the housing and construction cooperative.

Cooperatives are defined by the PCC as “autonomous legal persons, freely constituted, with variable capital and composition, which, through the cooperation and mutual help of their

¹⁰ See DEOLINDA MEIRA, “A Lei de Bases da Economia Social Portuguesa: do projeto ao texto final”, *CIRIEC-España, revista jurídica de economía social y cooperativa*, no. 24, 2013, pp. 21-52.

¹¹ See DEOLINDA MEIRA & MARIA ELISABETE RAMOS, “A Reforma do Código Cooperativo em Portugal”, *Cooperativismo e Economia Social*, no. 38, 2016, pp. 77-108

¹² See DEOLINDA MEIRA, “Uma análise crítica do projeto de alteração do regime jurídico dos ramos do setor cooperativo em Portugal”, *CIRIEC-España, Revista Jurídica de Economía Social y Cooperativa*, nº 44, 2023, pp. 259-285. DOI: <https://doi.org/10.7203/CIRIEC-JUR.44.27638>

¹³ See DEOLINDA MEIRA/MARIA ELISABETE RAMOS, *Governança e regime económico das cooperativas. Estado da arte e linhas de reforma*. Porto: Vida Económica, 2014, passim.

members, in compliance with cooperative principles, aim, on a non-profit basis, to satisfy their economic, social or cultural needs and aspirations” (Article 2, n.1, PCC).

This definition means that cooperatives must operate according to the “cooperative principles” set out in Article 3 of the PCC, which reproduces the cooperative principles in the exact wording provided by the International Cooperative Alliance (ICA) in 1995 at its Manchester Congress. There are seven principles: 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.

These principles constitute the most important distinctiveness of the cooperative identity. Cooperatives are organisations of an atypical business nature, evidenced by the primacy of individual and social objectives over capital; by democratic governance by members; by combining the interests of members with the general interest; by defending and applying the values of solidarity and responsibility, by reinvesting surplus funds in long-term development objectives or in providing services of interest to members or services of general interest; by voluntary and open membership; by autonomous and independent management.¹⁴ It also follows from this definition that the scope of cooperatives is the “satisfaction of the economic, social or cultural needs and aspirations” of their members (mutualistic scope).

Article 2 of the RJCHC specifies the needs that cooperators aim to satisfy through housing and construction cooperatives, stating that their main purpose is the development, construction or acquisition of houses for their members, as well as their maintenance, repair or remodeling. They also aim to improve the housing quality of the areas in which they operate, promoting the treatment of the areas surrounding the developments for which they are responsible, including leisure areas, and ensuring the permanent maintenance of good living conditions in the buildings. In line with Article 2 of the PCC, it is clear from this rule that, primarily, housing and construction cooperatives pursue a mutualistic purpose.¹⁵

In fact, the housing and construction cooperative is created to eliminate the speculator intermediary in the sense that the cooperators directly take over the corporate function, thus relegating the social entity (the cooperative) to the role of a simple instrument for articulating and activating a certain group (the cooperators), to obtain a good - housing - under more favourable conditions than it would be obtained with the intervention of intermediaries.¹⁶ This instrumentality of the housing and construction cooperative is based on the idea that the cooperative’s social activity is necessarily orientated towards its members, who are the main

¹⁴ See DEOLINDA MEIRA, “Cooperative Governance and Sustainability: An Analysis According to New Trends in European Cooperative Law”, In: Tadjudje, W., Douvitsa, I. (eds) *Perspectives on Cooperative Law*, Springer, Singapore, 2022, pp. 223-230. https://doi.org/10.1007/978-981-19-1991-6_21.

¹⁵ See ANTONIO FICI, “El papel esencial del derecho cooperativo”, *CIRIEC. Revista Jurídica de Economía Social y Cooperativa*, no. 27, 2015, pp. 23-33; DEOLINDA MEIRA, “O princípio da participação económica dos membros à luz dos novos perfis do escopo mutualístico”, *Boletín de la Asociación de Derecho Cooperativo*, no. 53, 2018, pp. 107-137. DOI: <http://dx.doi.org/10.18543/baidc-53-2018>, pp. 107-137

¹⁶ See, in this sense, CUNHA GONÇALVES, *Comentário ao Código Comercial Português*, volume I, Empresa Editora J. B., Lisbon, 1914, p. 541; and SÉRVULO CORREIA, “Elementos de um regime jurídico da cooperação”, *Estudos Sociais e Cooperativos*, no. 17, Ano V, Março 1966, p. 162.

beneficiaries of the economic and social activities it carries out. The housing and construction cooperative is constituted “by and for the members”, with whom it operates within the scope of the activity addressed to them and in which they participate by cooperating (called cooperativised activity by Spanish legislation and doctrine).¹⁷ This participation will take the form of a reciprocal exchange of services between the cooperative and the cooperators, services that are specific to the cooperative’s corporate purpose.

As a result of the cooperative’s mutualistic scope, a complex legal relationship is established in which, on the one hand, the obligation assumed by the cooperator to participate in the cooperative’s activity and, on the other hand, the consideration provided by the cooperative stands out. Thus, the cooperator, unlike the member of a commercial company, will not only be subject to the obligation to contribute to the cooperative’s share capital (an obligation regulated by Article 6 of the RJCHC, which establishes a capital contribution of no less than 100 euros, although the articles of association may require a higher contribution) but also to the obligation to participate in the cooperative’s activities. In this sense, Article 22(2)(c) of the PCC establishes that cooperators must “participate in general in the activities of the cooperative and provide the work or service that is incumbent upon them, under the terms established in the articles of association”. The statutes of the cooperative must include provisions on the participation of cooperative members in the activity of the cooperative, in particular with regard to the minimum extent and/or level of this participation.¹⁸

In short, the aim of a cooperative is not to make a profit and then share it but to give its members direct advantages in their individual economies.

4. Operations with third parties in housing and construction cooperatives

The teleological link between the cooperative and its members should not be understood in an absolute way, i.e. the cooperative should not be considered a closed organisation focused solely on its members. Thus, the mutualistic scope pursued by the cooperative, which distinguishes it from other social types, does not imply that it only operates with its members but that it can also operate with third parties, a possibility that already existed in the Rochdale cooperative.¹⁹ These contractual relations with third parties show, from the outset, the affirmation of the sociability demanded by the cooperative: the cooperative will, first of all, satisfy the interests

¹⁷ We have adopted the concept of cooperative activity defended by CARLOS VARGAS VASSEROT, *La actividad cooperativizada y las relaciones de la Cooperativa con sus socios y con terceros*, Monografía asociada a RdS, n.º 27, 2006, p. 67, according to which this activity takes the form of a set of operations in which three circumstances are met: they must be internal operations, i.e. they must take place within the cooperative; they must be carried out by the cooperator with the cooperative or vice versa; and they must be closely linked to the pursuit of the cooperative’s corporate purpose.

¹⁸ See ANTONIO FICI, “Chapter I - Definition and objectives of cooperatives”, In GEMMA FAJARDO, ANTONIO FICI, HAGEN HENRÏ, DAVID HIEZ, DEOLINDA MEIRA, HAINS-H. MÜNKNER & IAN SNAITH (Authors), *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Intersentia, Cambridge, 2017, pp. 73-96. DOI: <https://doi.org/10.1017/9781780686073.005>

¹⁹ See CHARLES GIDE, *Consumers’ Cooperative Societies*, Manchester, Cooperative Union Limited, 1921, p. 49 et seq.

of its members to housing and, at the same time, it *will* spread outwards, expanding its services also in favour of those who, although not being members of the cooperative, have the same needs as the latter, and in this way new memberships can be generated. Therefore, cooperatives that operate with third parties must offer them the chance to become cooperative members and must inform them of this possibility.²⁰

Although the law does not define what is meant by a third party, it seems to be a settled doctrine that, in the wake of Rui Namorado's teachings: "Third parties, from a cooperative point of view, are all those who maintain relations with a cooperative that fall within the pursuit of its main object, as if they were its members although they are not."²¹ In other words, operations with third parties cover the activity between cooperatives and non-cooperative members (third parties) for the supply of goods, services or labour of the same type as those supplied to cooperative members. This means that the activities with third parties referred to by the legislator will refer to activities of the same type as those carried out with cooperators.²²

In a nutshell, third parties are all those who acquire houses in the cooperative without being cooperators. This non-exclusive mutual profile will allow cooperatives to become more competitive by increasing their financial capacity. As a result, article 2.2 of the PCC established that "cooperatives, in pursuit of their objectives, may carry out operations with third parties, without prejudice to any limits set by the laws specific to each branch". In this way, the Cooperative Code eliminated the compulsory complementary nature of the activity with third parties that existed in previous legislation (Decree-Law 454/80 of 9 October), which stated that cooperatives could "also, on a complimentary basis, carry out operations with third parties", although it is accepted that the articles of association may prohibit carrying out operations with third parties.

In housing and construction cooperatives, the legislator has taken particular care of these operations with third parties. In fact, Article 14(1) of the RJCHC provides for the possibility of the cooperative carrying out operations with non-cooperators, but, unlike the Cooperative Code, it continues to enshrine the mandatory complementary nature of these operations, emphasising that they must not distort the cooperative's purpose or jeopardise the positions acquired by the cooperators.

Positive results from operations with third parties are profits, and, for this reason, the Portuguese cooperative legislator has prevented these results from being distributed among the cooperators, either during the life of the cooperative or at the time of its dissolution (Articles 99, 100, no. 1 and 114 of the PCC), being transferred in their entirety to indivisible reserves.²³

²⁰ See ANTONIO FICI, "Chapter I - Definition and objectives of cooperatives", cit.

²¹ - RUI NAMORADO, *Cooperatividade e Direito Cooperativo. Estudos e pareceres*, Almedina, Coimbra, 2005, pp. 184-185.

²² On this subject, see DEOLINDA MEIRA, "Às operações com terceiros no Direito Cooperativo Português (Comentário ao Acórdão do Supremo Tribunal de Justiça de 18 de dezembro de 2007)", *RCEJ - Revista de Ciências Empresariais e Jurídicas*, no. 17, 2010, pp. 93-111.

²³ See DEOLINDA MEIRA, "O regime da distribuição de resultados nas cooperativas de crédito e m Portugal. A critical analysis", *Boletín de la Asociación Internacional de Derecho Cooperativo*, no. 49, 2015, pp. 83-113.

In fact, the admissibility of operations with third parties generates a variety of economic results, which is why the cooperative will have to adopt separate accounting that makes it possible to clearly distinguish surpluses — resulting from operations with cooperators — from profits — resulting from operations with third parties. These separate accounts will allow the cooperative to account for divisible and non-divisible assets without any risk of confusion.

In this sense, Article 14(1) of the RJCHC states that the amount resulting from the operations with non-cooperators must be recorded separately from the amount realised with the cooperators and that this amount, under the terms of paragraph 2 of the same rule, must revert to the legal reserve. This is the only rule in Portuguese cooperative legislation that addresses the issue of separate accounting of results.

5. The specificities of the cooperator's participation in the activity of the housing and construction cooperative

How does the cooperator participate in the activity of a housing and construction cooperative? And how is the cooperative's counterpart realised?

Cooperators participate in the housing and construction cooperative activity, integrating themselves into a housing program, which the general meeting decides under the terms of Article 9 of the RJCHC. The cooperator is obliged to subscribe to certain bonds, called participation bonds, by Article 20, which are only amounts for the payment of a house to be acquired by one of the means provided for in the RJCHC.²⁴ These amounts, handed over to the cooperative, are intended to finance the housing program's development costs (architectural projects, licences, land acquisition, construction work, financial charges with banks, etc.).

Regarding the cooperative's fulfilment of its purpose, this is achieved by allocating housing to the members.

In housing and construction cooperatives, there can be two systems of ownership of the houses: (i) individual ownership (the right of ownership is transferred to the cooperator by the cooperative through a purchase and sale contract); (ii) collective ownership (the cooperative retains ownership of the houses) (Article 16 of the RJCHC).²⁵ In the case of collective ownership, and by the provisions of Article 18, the dwellings are transferred to the cooperators in one of two ways: granting a right to housing²⁶ or under the cooperative tenancy system (i.e. through a rental contract).

In the individual property regime, housing pricing is subject to a set of special rules. Therefore, and because the cooperative has a mutual and non-profit purpose, the price of the house cannot

²⁴ See, in this regard, the Lisbon Court of Appeal Judgement of 30/10/2014 (www.dgsi.pt).

²⁵ The most common form has been individual ownership. See GUERRA, PAULA; MATOS, FÁTIMA; MARQUES, TERESA & SANTOS, MÓNICA: "As cooperativas e as modalidades contemporâneas de direito à cidade", *Cooperativismo e Economia Social*, no. 35, 2013, p. 79, cit.

²⁶ Article 1484(1) of the Civil Code defines the right of use as the "right to use a certain third party's property and to obtain the fruits thereof, by the needs of both the holder and his family". Paragraph 2 characterises the right of habitation as a type of right of use. Thus, when this right of use "refers to dwelling houses, it is called a right of habitation").

exceed the cost, so the cooperator will acquire the house at a price lower than that which would be set on the market. In this regard, Article 17 of the RJCHC states that “the cost of each house corresponds with the sum of the following values: a) Cost of the land and infrastructure; b) Cost of studies and projects; c) Cost of construction and complementary equipment when integrated into the buildings; d) Administrative costs of carrying out the work; e) Financial costs of carrying out the work; f) Amount of licences and fees until the house is delivered in a condition to be inhabited; g) Construction fund, to be established in the articles of association, in an amount not exceeding 10% of the sum of the values referred to in subparagraphs a) to f) of this article.”

When the price is paid in installments, the cooperative can reserve ownership of the house until it is paid in full or transfer it under the resolutive condition of non-payment of three successive or six interpolated installments. However, Article 26(2) and (3) rule out the application of Articles 781 and 934 of the Civil Code. Thus, failure to pay one of the installments does not imply that all of them are due. In turn, non-payment of a single installment that does not exceed one eighth of the price does not give rise to the termination of the contract, nor, whether or not there is a reservation of ownership, does it result in the loss of the benefit of the term concerning subsequent installments, without prejudice to any agreement to the contrary.

In this regime of individual ownership, the legislator sets limitations on the cooperator’s ability to dispose of the property. In fact, under the terms of Articles 22 and 23 of the RJCHC, the property can only be transferred to cooperators. Thus, the user cooperator may dispose of the housing right by *the inter vivos* act, provided that the purchaser can be admitted as a member of the cooperative and the general meeting gives its agreement. On the other hand, *mortis causa* transfers of the right of habitation can take place without the need for any authorisation, provided that the heir registers as a cooperative member and cannot be refused admission. If, in the event of the death of the user cooperator, the successor does not wish to be or cannot be admitted as a cooperator, the right of habitation will be returned to the cooperative, and the successors will be reimbursed the sums to which the cooperator would have been entitled in the event of resignation. In addition, under the terms of Article 28 of the RJCHC, although it is accepted that the cooperators can sell their property to third parties once the price has been paid in full, the cooperative has the right of first refusal for thirty years from the date of first delivery of the dwelling, if the houses have been built with financial support from the State.

These limitations on the price of the house and on the possibility of disposing of the property under the individual ownership regime are based on the mutualist purpose of the cooperative and, in our opinion, constitute an important argument to rule out the contractual classification of the transfer of ownership of the property from the cooperative to the cooperator as a sale and purchase.

This question of the legal classification of the act of transferring housing under the individual property regime is one of the most debated issues in Portuguese doctrine and jurisprudence,²⁷

²⁷ See RAUL GUICHARD, “A capacidade das cooperativas. Relações entre cooperativas e cooperadores”, In *Jurisprudência cooperativa comentada* (coord. de Deolinda Meira), INCM, Lisbon, 2012, pp. 521-527.

and clarifying legislative intervention is needed when revising sectoral legislation of housing cooperatives.

Doctrine and case law are divided between two theses. On the one hand, some share the “dualist” or “contractual” thesis, according to which the transfer of housing by the cooperative to the cooperator would be external to the cooperative relationship, deserving its own qualification in the specific case — purchase and sale contract — subject to the corresponding regime, with the cooperator appearing in the dual position of cooperator and contracting party (the so-called “dual quality”).²⁸ On the other hand, some share the “monist thesis”, according to which the act of transfer of the house by the cooperative to the cooperator would be part of the cooperative relationship, being a “dimension” of it and would therefore correspond to statutory rights and duties, and would therefore be subject in the first instance to the cooperative rules contained in the law, the statutes, the internal regulations, and the decisions of the governing bodies. This monist thesis is close to the legal category of the “cooperative act,”²⁹ provided for in Latin American legislation, as it is a legal construction that covers the operations of cooperatives with their members and with third parties, in pursuit of their corporate purpose.³⁰

Taking into account this last legal construction, when the cooperative transfers the house to its members, this act has the formal structure of a purchase and sale contract but has specificities that differentiate it from a mere purchase and sale contract. These specificities derive from the aforementioned mutualistic scope of the cooperative, which is based on the assumption that there is no opposition of interests between the cooperators and the cooperative, which rules out the contractual nature of the relationship underlying the transfer of ownership. As stated in the Lisbon Court of Appeal ruling of 16 December 1999, “the cooperative does not sell dwellings, it only transfers them to the cooperative members included in the housing programme, through purchase and sale, which functions as a legal expedient to put an end to the collective property built”. In the same vein, the Porto Court of Appeal, in its ruling of 22 January 2001, considered that “since it was decided at the general meeting of a housing cooperative that the cooperative members would be obliged to bear the difference between the estimated cost and the actual cost of the development, with the latter being obliged to pay the remainder of the price”, what was

²⁸ In Portuguese doctrine, defending this position, see MAFALDA MIRANDA BARBOSA, “Breves notas acerca da natureza jurídica do ato de transmissão da propriedade de um imóvel de uma cooperativa de habitação e construção para um cooperador”, *Cooperativismo e Economia Social*, no. 38, 2016, pp. 135-162. In case law, the Lisbon Court of Appeal ruling of 15 April 2008. On this judgement, see PAULO VASCONCELOS, “Reembolso das entradas em cooperativa de habitação. Acórdão do Tribunal da Relação de Lisboa de 15 de Abril de 2008”, *Cooperativismo e Economia Social*, no. 31, 2009, pp. 261-266.

²⁹ On the “cooperative act” notion, see DANTE CRACOGNA, “O acto cooperativo”, *Pensamento Cooperativo-Revista de Estudos Cooperativos*, no. 3, pp. 175- 189.

³⁰ See GEMMA FAJARDO, “La no mercantilidad del suministro de bienes entre cooperativa y cooperativistas”, *Revista de Derecho Mercantil*, no. 240, 2001, pp. 949-950; DEOLINDA MEIRA, *O regime económico das cooperativas no direito português*, Vida Económica, Porto, 2009, p. 228; and ANA AFONSO, “O problema da responsabilidade de cooperativa de habitação pelos defeitos de construção de fogo vendido a cooperador. Anotação ao Acórdão da Relação de Lisboa de 1 de Outubro de 2009”, *Cooperativismo e Economia Social*, no. 32, 2010, pp. 294-304.

at stake was the fulfillment of an obligation resulting from the decision and not from a purchase and sale contract. Also worth mentioning, the Lisbon Court of Appeal's ruling of 2 February 2006 states that "What is at issue is not a purchase and sale contract, but the allocation of dwellings to the cooperative members, which is carried out under the guise of a purchase and sale contract". The higher court adds that there is no profit motive, on the one hand, and that there is no full contractual freedom, either in terms of the choice of subjects, the price or the possibility of later disposing of the property."

Remember that a housing and construction cooperative is set up to satisfy a need of the cooperator, so the transfer of ownership (in the case of individual ownership) or the use of the dwelling (in the case of collective ownership) is an internal act to fulfill the cooperative's mutual purpose. We are, therefore, not dealing with a purchase and sale contract but an act of allocating dwellings to cooperators. The system of adjudication, which is enshrined in Spanish law, seems to be the most appropriate solution to fit this act of transfer into the system of individual ownership of housing cooperatives.³¹ This adjudication is the recognition of the individual right of each cooperator and results from the division of the co-ownership hitherto exercised by the cooperative. The moment of the award will be the moment when the cooperator takes ownership of the house, at which point the mutualist purpose of the cooperative is fully realised.

It is, therefore, imperative that the future revision of the sector's legislation takes this understanding into account.

6. Members of the housing and construction cooperative

The creation of a cooperative depends on a bureaucratic process whose acts are legislatively defined. One of the aims of the reform was to ensure that the formalities required were necessary and appropriate, avoiding excessive and pointless transaction costs. Legal requirements that are disproportionate, unreasonable or even pointless can lead to context costs that inhibit the cooperative initiative.

A relevant novelty of the 2015 reform in terms of setting up cooperatives was the reduction of the minimum number of cooperators in first-degree cooperatives from five to three (Article 11(1) of the PCC), while maintaining the possibility of complementary legislation for each branch "requiring a higher number of cooperators as a minimum", which is not the case for housing and construction cooperatives. Therefore, the minimum number of cooperators to set up a housing and construction cooperative is three. The reduction of the minimum number of cooperators may promote cooperative entrepreneurship in the housing and construction sector. The question of the minimum number of cooperators is justified by the mutualistic scope of the cooperative, which is poorly reconciled with a restricted social base. A broad membership base

³¹ See ANA LAMBEA RUEDA, "Adjudicación y cesión de uso en las cooperativas de viviendas: usufructo, uso y habitación y arrendamiento", CIRIEC-España, *Revista Jurídica de Economía Social y Cooperativa*, n° 23, 2012, pp. 139-178.

in the cooperative will be a necessary condition for the realisation of the mutualistic aim.³² However, this minimum number could not be so high as to prevent cooperatives from taking on projects that require a very limited number of persons for them to be viable.³³ Since the need for a minimum cooperative structure is unquestionable, the prevailing view was that this minimum number could not be less than three so that a majority could be formed against a minority (two against one), citing the fact that the cooperative is recognised in legislation as an entity whose democratic substratum is an internal requirement, incompatible with an organisation of just two cooperators, let alone a single cooperator.³⁴

Since the 2015 reform, cooperative members can fall into two categories: cooperator members and investor members.

Cooperators are the reference members of cooperatives. They are referred to in the definition of a cooperative in Article 2(1) of the PCC and the RJCHC. As already mentioned, the cooperative was created to satisfy the housing needs of its cooperators, who will participate in the cooperative's activity. Candidates for cooperative membership must apply for admission to the cooperative's management body (Article 19(1) of the PCC).

The legislator has established that the statutes of each cooperative must contain the "conditions for admission" of members [Article 16(2)(a) of the PCC]; and if a candidate fulfills these conditions, the proposal for admission must also be the subject of a decision by the management body and/or the general meeting [Articles 38(k) and 47(d) of the PCC]. This decision will be constitutive in acquiring the status of a cooperator. Admission or refusal is communicated to the candidate within the time limit laid down in the articles of association or alternatively within a maximum of 180 days (Article 19(2) of the PCC).

In the specific case of housing and construction cooperatives, Article 8 of the RJCHC states that they can make the admission of new members conditional on the existence of housing programmes in which the candidates can be integrated. If they are not admitted on this basis, they must be registered in their book in the order in which they submit their applications, and this order must be respected when admitting new cooperators. The legislator adds that no housing and construction cooperative may use this option for more than three consecutive years. This limitation is intended to respect the principle of voluntary and open membership.

As a rule, therefore, there is no real subjective right to be admitted as a cooperative member. This involves a simple legal expectation, understood as an active position that, although possessing legal relevance, does not benefit from the guarantee mechanisms afforded to subjective rights.³⁵ In any case, reasons must be given for refusing admission (Article 19(2) of

³² See, in this sense, ANTONIO FICI, "Chapter I - Definition and objectives of cooperatives", cit.

³³ See, in this regard, CARLOS VARGAS VASSEROT / ENRIQUE GADEA / FERNANDO SACRISTÁN SOLER, *Derecho de las sociedades cooperativas, Introducción, constitución, estatuto del socio y órganos sociales*, LA LEY, Madrid, 2015, p. 152.

³⁴ See, in this regard, FRANCISCO VICENT CHULIÁ, *Ley General de Cooperativas, Comentarios al Código de Comercio y legislación mercantil especial* (coord. de Sánchez Calero / Manuel Albaladejo), Tomo XX, Vol. 1, Editorial Revista de Derecho Privado / Editoriales de Derecho Reunidas, Madrid, 1994, p. 174.

³⁵ See DEOLINDA APARÍCIO MEIRA, *O regime económico das cooperativas no Direito Português: o capital social*, cit., p. 108.

the PCC).

In addition to cooperative members, the Cooperative Code provides for investor members (members who do not participate in the cooperative's activity but only have a financial interest in it through their investment), one of the most important new features of the 2015 reform. These investor members can provide the cooperative with financing on better terms than those offered by the market when the resources brought in by the cooperative members are insufficient.

The legislator has subjected the figure of investor members to strict mandatory limits. The admission of investor members will always result from a decision by the cooperators. Therefore, when the cooperative is set up, the articles of association must necessarily set out the "conditions and limits for the existence of investor members, if any" [Article 16(1)(f) of the PCC]. Article 20(1) states that "the articles of association may provide for the admission of investor members". This means that investor members cannot be founding members of the cooperative.

In addition to the provisions of the articles of association, the admission of investor members also depends on a proposal from the management body to be submitted for approval at the general meeting (Art. 20 (3 and 4) of the PCC). Once admitted, investor members may participate, albeit to a limited extent, in the cooperative's decisions, but under no circumstances may they represent more than 25% of the number of effective members of the (management or supervisory) body to which they are elected (Article 29(8) of the PCC). This system is based on the need to safeguard the principles of democratic management and autonomy and independence. Investor members can be admitted by subscribing to equity securities or investment securities convertible into equity securities (Article 16(2) of PCC).³⁶

7. The organisational structure of the housing and construction cooperative

Let us now focus on the organisational structure of housing and construction cooperatives.

Since the 2015 reform, the legal bodies of Portuguese housing and construction cooperatives include the general meeting, the management body and the supervisory bodies (Article 27(1) of the PCC) and, if the articles of association so provide a "Cultural Council", with powers delegated by the management body to plan, promote and carry out actions to boost associations and cooperative education and training (Article 10 of the RJCHC).

The general meeting, attended by all cooperators (Article 33 of the PCC), is the supreme body of the cooperative, and its decisions are binding on the other bodies (Article 33(1) of the PCC). In the Cooperative Code, the term "supreme body" of the cooperative has a threefold meaning: (i) the most important and decisive matters in the life of the cooperative fall within the remit of the general meeting (Article 38 of the PCC); (ii) the members of the governing bodies are elected by the general meeting from among the cooperative members (Article 33(2) of the

³⁶ On the figure of investor members, see MARIA ELISABETE RAMOS, "Membros investidores e processo fundacional da cooperativa", *CIRIEC-España, Revista Jurídica de Economía Social y Cooperativa*, nº 44, pp. 317-348. DOI: <https://doi.org/10.7203/CIRIEC-JUR.44.27640>

PCC); (iii) the members of the governing bodies are elected by the general meeting from among the cooperative members (Article 33(2) of the PCC). (iv) the decisions of the general meeting are binding on the other bodies and all members (Article 33(1) of the PCC).³⁷

In the general meetings of first-level cooperatives, the rule is that all members have equal voting rights (article 40 of the PCC). However, it is possible for the articles of association to enshrine plural voting in first-level cooperatives, subject to certain mandatory legal limits (Article 41(1) of the PCC), which can be attributed to cooperators or investor members. If given to cooperators, it will always be based on the cooperator's activity in the cooperative (Article 41 of the PCC) and never on the shareholding. The Cooperative Code refers to the articles of association to define the conditions and criteria on which the allocation of plural voting rights to investor members depends (Article 41(5) of the PCC).

In the name of the principle of democratic member control and the principle of autonomy and independence, the Cooperative Code enshrines, in mandatory legal rules, limits on the allocation of plural voting (art. 41 of the PCC): a) limits on the size of the cooperative - plural voting is prohibited in cooperatives with fewer than 20 cooperators; b) limits on certain branches - plural voting is prohibited in worker production, craft, fishing, consumer and social solidarity cooperatives, whereas it is allowed in housing cooperatives; c) limits on the number of votes to be allocated to each cooperator/investor member - three in cooperatives with up to 50 cooperators, and five in cooperatives with more than 50 cooperators; d) limits on the matters to be decided by the general meeting - in resolutions provided for in paragraphs g), h), i) and j) of Article 38 of the CCoop, each cooperator/investor member has only one vote (the general rule in Article 40(1) of the PCC therefore applies exclusively); e) finally, limits for investor members - each cooperator may not have voting rights of more than 10% of the total votes of the cooperators and investor members may not, in total, have voting rights of more than 30% of the total votes of the cooperators (art. 41, no. 7 of the PCC).³⁸

Cooperative management and supervision models must always ensure cooperative autonomy and member control.

Under the terms of Article 28 of the PCC, the administration and supervision of the cooperative can be structured in one of the following ways: a) board of directors and supervisory board (traditional structure); b) board of directors with audit committee and statutory auditor (anglo-saxon structure); c) executive board of directors, general and supervisory board and statutory auditor (dual structure).³⁹

Each cooperative must necessarily choose the management and supervisory model it will adopt, and this choice must necessarily be set out in the articles of association (Article 16(1)(d) of the PCC).

³⁷ See COUTINHO DE ABREU, "Artigo 33.º", In *Código Cooperativo Anotado*, coord. de Deolinda Meira & Maria Elisabete Ramos, Almedina, Coimbra, 2018, pp. 197-200.

³⁸ See DEOLINDA MEIRA/ MARIA ELISABETE RAMOS, "Artigo 41.º", In *Código Cooperativo Anotado*, coord. de Deolinda Meira & Maria Elisabete Ramos, Almedina, Coimbra, 2018, pp. 235-240.

³⁹ See ALEXANDRE SOVERAL MARTINS, "Artigo 28.º", In *Código Cooperativo Anotado*, coord. de Deolinda Meira & Maria Elisabete Ramos, Almedina, Coimbra, 2018, pp. 167-173.

The members of the management and supervisory bodies are elected by the general meeting (Article 38(a) of the PCC) from the cooperators or, to a limited extent, from investor members (Article 29(1) and (8) of the PCC). According to the cooperative doctrine, this mechanism was designed by the legislator to ensure that the members of the cooperative's bodies would focus their actions on promoting the interests of the members. This mechanism, by allowing the interests of the cooperators to be directly represented on the management and supervisory bodies, has the advantage that the members of these cooperative bodies, due to their experience from their dual role as beneficiaries and managers, are permanently aware of the interests of the cooperators and do not deviate from the main purpose of the cooperative.⁴⁰

8. The economic regime of housing and construction cooperatives

We now examine the central issues of the economic regime for housing and construction cooperatives, taking into account the issues that were the subject of reform provisions in 2015. The general rule - which goes back a long way and remains the same - is that it is not possible to set up a cooperative without share capital. Therefore, the initial share capital must necessarily be determined in the cooperative's articles of association (Article 15, paragraph 1, subparagraph f) of the PCC). In addition, the cooperator can only become a member by contributing to the share capital, which cannot be less than three shares (Article 83 of the PCC) and which, in the case of housing and construction cooperatives, cannot be less than 100 euros. However, the articles of association may set a higher amount (Article 6 of the RJCHC). Joining the share capital is a necessary but never sufficient condition for becoming a cooperator since, as we have seen, it is compulsory to take part in the cooperative's activities.

In the reform, the legislator felt the need (and rightly so) to reduce the amount of the minimum share capital, lowering it from 2,500 euros to 1,500 euros (Article 81(2) of the PCC), while the complementary legislation that regulates each of the branches may set a different minimum, which is not the case with the RJCHC.

The variability of share capital continues to be expressly recognised by the legislator as an essential characteristic of the cooperative identity, forming part of the very definition of a cooperative (Article 2(1) and Article 81(1) of the PCC). The variability of the share capital is a consequence of the right to reimbursement, which stems from the recognition of a genuine right of resignation for cooperators, as stated in Article 24(1) of the PCC.⁴¹ This right cannot be suppressed under any circumstances due to the need to respect the voluntary and free membership principle. However, it is recognised that the articles of association may set limits and conditions for its exercise. The economic consequence of this right to resign will be the reimbursement of the capital contribution. Article 89(1) of the PCC states that "in the event of

⁴⁰ See HANS-H. MÜNKNER, *Cooperative Principles and Cooperative Law*, 2nd revised edition, Wien, Zurich, Lit Verlag GmbH & Co. KG, 2015.

⁴¹ Article 24(1) of the PCC states that "Cooperators may request their resignation under the conditions laid down in the articles of association or, if these are silent, at the end of a financial year, with 30 days' notice, without prejudice to their responsibility for fulfilling their obligations as members of the cooperative".

repayment of the capital securities, the resigning cooperator shall be entitled to the amount of the capital securities paid up according to their nominal value, within the period established by the articles of association or, alternatively, within a maximum period of one year.”

An important specificity of housing and construction cooperatives should be highlighted concerning the right to reimbursement. As we have seen, taking part in the economic activity of this type of cooperative involves handing over the funds needed to build the house. Article 24 of the RJCHC established that, in housing and construction cooperatives, in the event of resignation or exclusion, the cooperator will be entitled to the reimbursement provided for in the Cooperative Code (reimbursement of capital securities), plus the value of the participation securities paid in to amortise the house, with the respective interest. The statutes may allow this repayment to be made in installments, with or without interest. However, “under no circumstances shall the sums paid as the price of the right to housing be reimbursed”. This prohibition should mean that the cooperative will withhold these sums until another person (a substitute cooperator or a new cooperator) steps into the position of the outgoing cooperator. Until this happens, or if it does not happen, the cooperative will keep the amounts already provided by the outgoing cooperator.⁴²

Article 88 of the PCC deals with the remuneration of equity securities, stipulating that, by means of a statutory clause, interest may be paid on equity securities, with the total amount of interest not exceeding 30 percent of net annual profits. This is a special feature of the share capital of cooperatives, which is the possibility for cooperators and investor members to obtain a net remuneration for the capital subscribed as a condition of membership, a circumstance prohibited in commercial companies. The fact that cooperatives are not profit-making does not prevent them from remunerating, within certain limits, the capital subscribed by cooperators and investor members. In the case of cooperative members, the purpose of this remuneration will be to compensate them for the effort that their capital contributions represent while at the same time providing an incentive for cooperative members to make more significant capital contributions.⁴³

It should be noted, however, that the Portuguese legal system, unlike other legal systems, does not specifically set maximum limits for the interest to be paid to members but only for the overall amount of interest to be paid (30 percent).⁴⁴ Concerning the cooperative member’s financial obligations, it should be noted that the cooperative’s statutes may require, in addition to the obligation as mentioned above to contribute to the share capital, the payment of an admission fee, payable in one lump sum or in periodic installments (Article 90(1)). This is a non-refundable contribution, without the cooperator receiving any rights in return, and

⁴² See PAULO VASCONCELOS, “Reembolso das entradas em cooperativa de habitação. Acórdão do Tribunal da Relação de Lisboa de 15 de Abril de 2008”, cit., pp. 261-266.

⁴³ - See, in this regard, PILAR GÓMEZ APARÍCIO, “Algunas consideraciones sobre la remuneración del capital social en las sociedades cooperativas”, *REVESCO*, no. 72, 3.^{er} Cuatrimestre, 2000, p. 89.

⁴⁴ For an in-depth analysis of this specificity of the cooperative, see DEOLINDA MEIRA, “O regime de distribuição de resultados nas cooperativas de crédito em Portugal. A critical analysis”, *Boletín de la Asociación Internacional de Derecho cooperativo*, no. 49, 2015, pp. 83-113.

constitutes a form of financing for the cooperative.

In fact, unlike contributions to the share capital, the cooperator does not receive any remuneration for the admission fee. Furthermore, in the financial structure of the cooperative, the admission fee enters the assets of the cooperative and not the share capital, so the cooperator will not be entitled to recover it in the event of resignation. Article 90(2) of the PCC stipulates that the amount of membership fees “shall revert to compulsory reserves, as laid down in the articles of association, within the limits of the law”. A minimum of 5 percent of the value of the fees will revert to the legal reserve (Article 96 (2 and 3) of the PCC). The remaining value of the fees must go to the reserve for cooperative education and training (Article 97(2)(a) of the PCC).

The fee demanded when a cooperator joins will function as: (i) a non-refundable contribution, demanded from each cooperator and motivated by the costs involved in joining, which will be borne by the cooperative (installation costs for new work tools, increased maintenance costs, etc.); (ii) a way of partly compensating for the contribution made by previous cooperators to the cooperative’s common assets.⁴⁵

The legislator adds the possibility that the general meeting may decide on other forms of financing that are not part of the share capital and that may take the form of investment securities and bonds (Article 90(3) of the PCC).

About the liability of the cooperative and the cooperators towards the cooperative’s creditors, the rule is that only the cooperative’s assets will be liable to creditors for the cooperative’s debts, so each cooperator limits their liability to the amount of the share capital subscribed, without prejudice to a clause in the articles of association to the contrary. However, the statutes may stipulate that cooperators are liable for the cooperative’s debts. In this case, the liability is subsidiary in relation to the cooperative and joint and several between the cooperators responsible (Articles 23 and 80 of the PCC).

At this point, we shall focus on the legal regime of reserves, which are the cooperative’s best financial resource, acting as a counterweight to the variability of share capital and providing long-term financial resources of their own for the operation of the cooperative enterprise. The Cooperative Code provides for the existence of five types of reserves: the legal reserve; the reserve for cooperative education and training; the reserves provided for in the complementary legislation applicable to each of the branches of the cooperative sector; the reserves provided for in the statutes; and the reserves set up by resolution of the general meeting.

The legal reserve is a reserve that must be set up by law and is considered one of the most important components of the cooperative’s financial structure, which is essentially due to its purpose (to cover possible losses in the financial year) and its non-reportable nature (Article 99 of the PCC). Its sources are: admission fees (Article 90.1 of the PCC) and net annual surpluses (Article 100 of the PCC), in a percentage set by the articles of association or, if these are omitted, by the general meeting, and this percentage “may not be less than 5% (Article 96.2 of

⁴⁵ See, in this regard, GEMMA FAJARDO, *La gestión económica de la cooperativa: responsabilidad de los socios*, Tecnos, Madrid, 1997, pp. 59-60.

the PCC).⁴⁶

The reserve for education and training is also a reserve that must be set up by law and is indivisible (art. 99 of the PCC), set up to ensure the “cooperative education and cultural and technical training of cooperators, cooperative workers and the community” (Article 97(1) of the PCC). The following go into this reserve: the part of the admission fee that is not allocated to the legal reserve; at least 1% of the annual net surplus from operations with cooperators (this percentage may be higher if the articles of association or the general meeting so decide); donations and subsidies that are specially earmarked for the purpose of the reserve; and the annual net profits from operations with third parties that are not allocated to other reserves (Article 97 (2) of the PCC).⁴⁷

In turn, Article 98 of the PCC provides for the existence of three other types of reserves: the reserves provided for in the complementary legislation applicable to each branch of the cooperative sector, the reserves provided for in the articles of association, and the reserves set up by resolution of the general meeting.

Reserves of the first type may or may not be compulsory, depending on the provisions of the law from which they arise. The other two types of reserves are voluntary or free, as they depend on the collective will of the cooperators embodied in the articles of association or a resolution of the general meeting.

Housing and construction cooperatives must set up a reserve fund for conservation and repair and another reserve fund for construction (Article 12 of the RJCHC). The first is intended to finance conservation, repair and cleaning work on the property owned by the cooperative, and the articles of association must determine the form of integration. The second is intended to finance the construction or acquisition of new dwellings or social facilities for the cooperative. Article 13 of the RJCHC also provides for the possibility of creating a voluntary reserve, called social reserve, which will be used to cover the risks of life and permanent invalidity of cooperators and to provide other benefits of a social nature, provided that the cooperative has the technical, economic and financial capacity to do so. In cooperatives where this social reserve has been created, it will be compulsory to create an individualised account for it, as this is the only way to determine “the share of the distributable reserves” to which the cooperator will be entitled when he/she resigns from the cooperative.

The compulsory reserves (legal reserve, cooperative education and training reserve, conservation and repair reserve fund and construction reserve fund), as well as the reserves created with profits from operations with third parties, cannot be shared in any way between cooperators and investors members (article 99 of the PCC). This applies both during the life of the cooperative and when it is dissolved.

⁴⁶ See DEOLINDA MEIRA, “Artigo 96.”, In *Código Cooperativo Anotado*, coord. Deolinda Meira & Maria Elisabete Ramos, Almedina, Coimbra, 2018, pp. 520-525.

⁴⁷ See DEOLINDA MEIRA, “Projeções, conexões e instrumentos do princípio cooperativo da educação, formação e informação no ordenamento português”, *Boletín de la Asociación Internacional de Derecho Cooperativo*, no. 57, 2020, pp. 71-94.

When the cooperative's assets are liquidated, Article 114(1) of the PCC stipulates that the amount of the legal reserve — not allocated to covering losses for the year and which cannot be used for any other purpose — “may be transferred for the same purpose to the new cooperative entity that is formed as a result of the merger or split-up of the cooperative in liquidation”. However, under the terms of paragraph 3 of the same article of the PCC, it was established that “when any new cooperative entity does not succeed the cooperative in liquidation, the application of the balance of mandatory reserves shall revert to another cooperative, preferably in the same municipality, to be determined by the federation or confederation representing the cooperative's main activity”. Paragraph 4 goes even further by stating that “the reserves constituted under the terms of Article 98 of this Code shall be subject to the provisions of paragraphs 2 and 3 of this article, in terms of liquidation and if the articles of association make no provision for this”, which means that this regime could also cover voluntary reserves if the articles of association fail to do so.

This impossibility of distributing the residual assets in the event of liquidation derives from the social function that the cooperative is called upon to fulfill and which implies that its destination, after liquidation, is the promotion of cooperativism (the so-called Principle of disinterested distribution).⁴⁸

Finally, in the context of the economic regime, another important specificity of housing and construction cooperatives is the return of surpluses. Surpluses are the positive results that arise from the cooperative's pursuit of its mutual purpose. The cooperative surplus corresponds to the difference between the revenues and the costs of the operations that the cooperative carries out with its cooperators. It is an amount provisionally paid more by the cooperators to the cooperative or paid less by the cooperative to the cooperators in return for their participation in the cooperative's activity.

The rule in the Cooperative Code is that surpluses can be returned to the cooperators (Article 100(1) of the PCC). The return of surpluses will function as an *a posteriori* correction, through which the difference between the price charged and the cost, or the difference between the net income and the labour advances paid, will be returned to those who made the surplus, the difference being determined precisely at the end of each financial year.

The distribution of the return among the cooperators will be proportional to the transactions made by each of them with the cooperative in that financial year. Since the surplus is the result of the cooperative's transactions with its members, it is understandable that when the return occurs, it will correspond to the volume of these transactions and not to the number of shares held by each member.

However, there is no subjective right to the return of surpluses. The *principle of members' economic participation* (Article 3 of the PCC) points to three possible uses for surpluses: 1st - “development of their cooperatives”; 2nd - “support for other activities approved by the

⁴⁸ For a detailed analysis of this *principle*, see MARÍA LUISA LLOBREGAT HURTADO, *Mutualidad y empresas cooperativas*, Bosch, Barcelona, 1990, pp. 374 et seq.; DEOLINDA MEIRA, “Artigo 114.º”, In *Código Cooperativo Anotado*, coord. de Deolinda Meira & Maria Elisabete Ramos, Almedina, Coimbra, 2018, pp. 607-610.

members”; 3rd - “distribution of surpluses for the benefit of members in proportion to their transactions with the cooperative.” Cooperative legislation does not, therefore, impose an obligation on cooperatives to return surpluses to cooperators.⁴⁹

In this context, housing and construction cooperatives are prohibited from returning surpluses. In fact, Article 15 of the RJCHC states that “the surpluses from each financial year, resulting from transactions with members, shall be applied to the reserves that the cooperative must set aside under the terms of the law or the articles of association”. This legislative option thus contributes to better cooperative self-financing.

9. Conclusions

The right to housing is a fundamental right with an unquestionable personal and community dimension. It is the foundation from which citizens build the conditions that allow them to access other rights such as education, health and employment, contributing to social and territorial cohesion. Housing and construction cooperatives play a central role in promoting this fundamental right.

In Portugal, housing and construction cooperatives are governed by the provisions of Decree-Law no. 509/99 of 19 November and, in the absence of such provisions, by the provisions of the Cooperative Code. They therefore benefited from the reform of cooperative legislation in 2015, which introduced changes to important issues in the legal framework of cooperatives, such as the reduction in the minimum number of members, the introduction of investor members, the possibility of plural voting in first-degree cooperatives, the establishment of three alternative models of management and supervision of the cooperative, the reduction of the minimum share capital, the clarification of the liability of cooperators, the adoption of new solutions regarding cooperative reserves, as well as the widening of the list of statutory limits on the exercise of the right to reimbursement.

Essentially, in Portugal, housing and construction cooperatives benefit from an adequate legal regime. In fact, the legislator enshrines two housing ownership regimes - individual ownership and collective ownership - and regulates them exhaustively.

However, in a future revision of the sector’s legislation, two fundamental aspects must be taken into account.

With regard to operations with third parties, the compulsory complementary nature of such operations should be eliminated. Operations with third parties, as well as allowing cooperatives to become more competitive by increasing their financial capacity, are an expression of the sociability demanded by the cooperative. For these reasons, in 1996 the Portuguese legislator eliminated the compulsory complementary nature of operations with third parties from the Cooperative Code, even though it prevents the distribution of the profits derived from these

⁴⁹ See DEOLINDA MEIRA, “The distinction between cooperative surplus and corporate profit as an evidence of the non-profit purpose of cooperatives”, In H. Henrÿ & C. V. Vasserot (Ed.), *Una visión comparada e internacional del derecho cooperativo y de la economía social y solidaria. Liber Amicorum Profesor Dante Cracogna*, Madrid: Editorial Dykinson, pp. 95-109.

operations.

Taking into account the doctrinal and jurisprudential debate on the classification of the act of transfer of dwellings under the individual property regime, the solution provided for in the legislation in force, which qualifies this act as a purchase and sale, should also be amended. The adjudication regime is the most appropriate solution for this act of transfer. The legislator must consider that there is no opposition of interests between the cooperators and the cooperative, which excludes the contractual nature of the relationship underlying the transfer of ownership.

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