

THE MOST RELEVANT TREND LINES OF COOPERATIVE SHARE CAPITAL REGIME IN THE NEW PORTUGUESE COOPERATIVE CODE

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Abstract: This study analyses the most relevant trend lines of the cooperative share capital regime in the new Portuguese Cooperative Code. In order to ensure the sustainability of the cooperative, providing it with appropriate mechanisms to be efficient on the market, the new code introduced investor members, reduced the amount of the minimum share capital, clarified the legal regime of cooperators' contributions to share capital and extended the list of statutory limits as to the exercise of the right to reimbursement. In the modernization of the cooperative share capital regime the legislator did not abdicate from the preservation of the cooperative identity, continuing to recognize the variability of the share capital.

Key words: cooperative, share capital, reserves, cooperator, variability, investor member.

INTRODUCTION

The entry into force of the Law No 119/2005, 31th August 2015, which approved the new Portuguese Cooperative Code (*PCC*),¹ reveals trends in seemingly opposite directions regarding the evolution of the cooperative share capital regime.²

In fact, when trying to reduce transaction costs for the establishment of cooperatives and trying to prevent their escape to corporate forms with more favourable regimes, as to minimum share capital, the legislator reduced the minimum amount of share capital. Due to the application of International Accounting

¹ - The first Portuguese cooperative law was the '*Lei Basilar do Cooperativismo*' (02.07.1867). In 1888, cooperatives came to be governed by the VeigaBeirão Commercial Code. In 1980, the first Cooperative Code (Decree-Law no. 454/80 of 09.10.1980) came into effect, followed by a new Cooperative Code in 1997 (Law no. 51/96), which was, however, amended by Decree-Law no. 343/98 of 06.11.1998; Decree-Law no. 131/99 of 21.04.1999; Decree-Law no. 108/2001 of 06.04.2001; Decree-Law no. 204/2004 of 09.08.2004; and Decree-Law no. 76-A/2006 of 29.03.2006. The current Code (the *PCC*) came into effect in 2015.

² - On the role of cooperative law for the development of cooperatives, see: H. HENRÝ, *Guidelines for Cooperative Legislation*, International Labour Office, Geneva, 2012, *passim*; A. FICI, 'The essential role of cooperative law', *The Dovenschmidt Quarterly, International Review on Transitions in Corporate Life, Law and Governance*, 2014, 4, pp. 147-158; and Study Group on European Cooperative Law (SGECOL), *Draft Principles of European Cooperative Law* (draft PECOL), May 2015, available at: <http://www.euricse.eu/wp-content/uploads/2015/04/PECOL-May-2015.pdf>.

Standards (IAS) to cooperatives, the legislator has been hosting solutions that extend the limits of the right to reimbursement, in order to impart greater stability to the share capital. Recognizing that the cooperative lacks financial resources to ensure its sustainability, the legislator clarified the legal regime of cooperators' contributions to share capital and, in one of the most risky innovations of recent times, opened the cooperative share capital to outside investors to a limited extent.

Before looking at the central issues of the legal regime of cooperative share capital which were the object of reform, it should be noted that this legal regime presents many specific features, which are present in the very definition of cooperative contained in Article 2.1 of the *PCC*, that the reform maintained unchanged, and under which the cooperative is defined as an “*autonomous association of persons, united voluntarily, of variable composition and capital, which, through cooperation and mutual assistance on the part of its members and in accordance with cooperative principles, aims not at profit but at satisfying the economic, social, or cultural needs and aspirations of said members.*”

This definition is based on four distinctive features of this type of legal entity, the first two of which — variability of share capital and variability of the shareholding structure — are formal in nature and the other two — the *social object* of the cooperative (satisfaction of the economic, social, or cultural needs of members while remaining a non-profit entity) and the management methods of the cooperative (compliance with cooperative principles and cooperation and mutual assistance on the part of members) — are substantive.

It is worth noting that as cooperatives are defined, compliance with cooperative principles is mandatory under Portuguese legislation. These principles are embodied in Article 3 of the *PCC*: voluntary and open membership; democratic member control; economic participation by members; autonomy and independence; education, training, and information; cooperation among cooperatives; and concern for the community.³

The cooperative principles are thus mandatory in the Portuguese legal system, and are even enshrined in the text of the Constitution. Article 61.2 of the *Constitution of the Portuguese Republic* (*‘Constituição da República Portuguesa’ – CRP*) states that “*Everyone is accorded the right to freely form cooperatives, subject to compliance with cooperative principles.*” Article 82.4.a) of the *CRP* states that the cooperative sub-sector covers “*means of production that cooperatives possess and manage in accordance with cooperative principles.*” Hence, a disregard for cooperative principles in business operations is a cause for dissolution (Article 112.1.h) of the *PCC*).⁴

This study will therefore take into account that the legal regime of cooperative share capital is based on a particular logic resulting not only from the specific characteristics of the cooperative objective, but also from the necessary obedience to cooperative principles.

³ - See R. NAMORADO, ‘A identidade cooperativa na ordem jurídica portuguesa’, *Oficina do Centro de Estudos Sociais*, 2001, 157.

⁴ - See D. A. MEIRA, ‘O quadro jurídico-constitucional do cooperativismo em Portugal’, *Cooperativismo e Economia Social*, 2011, 33, pp. 31-46.

A MANDATORY COOPERATIVE SHARE CAPITAL DESPITE ITS NON-ESSENTIAL NATURE

In the Portuguese Cooperative Code, it remains impossible to create a cooperative without share capital.

Hence, the initial share capital must be determined in the cooperative's statutes (Article 16.1.f) of the *PCC*). Moreover, a cooperator is only considered to be a member after he or she has contributed to the share capital (Article 83 of the *PCC*).

So, contributions to share capital are an obligation to be met by members (Article 83 of the *PCC*). They are a necessary condition for becoming a member, although they may not be enough, since cooperators must also take part in the cooperative's activities (Article 22.2.c) of the *PCC*). In fact, the cooperative operates with its members, who participate in the activity carried out by the cooperative (cooperative transactions).⁵

In the case of investor members (Article 20 of the *PCC*), a member acquires membership by contributing to the share capital, but does not participate in cooperative activities, which means that, for these investor members, a subscription of share capital is enough to become a member.

Contributions to capital are, however, a mere instrument for the development of cooperatives' activity, and do not contribute towards determining the rights and duties of their co-operators.

In fact, in cooperatives, the participation of cooperators in share capital merely influences their right to compensation for capital contributions and their liability for the cooperative's debts (Article 23 of the *PCC*).

One of the peculiarities of the share capital of cooperatives is the possibility of compensation for cooperative shares referred to in Article 88 of the *PCC*, which translates into the possibility that members may obtain net compensation based on the capital underwritten as a condition of membership. The purpose of this compensation is to reward cooperators for the efforts that the shares represent, thereby simultaneously constituting an incentive for cooperators to invest more significant capital.⁶

Regarding the liability of cooperators for the debts of the cooperative, Article 23 of the *PCC* establishes that liability "is limited to the amount of the subscribed capital, notwithstanding the fact that the statutes of the cooperative may state that the liability of cooperators is unlimited, or limited for some and unlimited for others." It thus follows that the liability of cooperators will be limited to the amount of capital subscribed, so that only the assets of the cooperative will answer for its debts. Once the subscribed capital has been fully paid up, no other liability may be required of the cooperators by lenders to the cooperative. The law accepts, however, that the statutes of each cooperative may decide that the liability of cooperators, or some of them, is unlimited, and unlimited liability of cooperators will constitute an additional guarantee for non-members who contract with the cooperative, thereby increasing the means of safeguarding the creditors of the cooperative. This unlimited liability for the debts of the cooperative will

⁵ - About the concept of cooperative transactions, see Chapter 1 - Section 1.4, *Draft Principles of European Cooperative Law*, cit., p. 34 et seq.

⁶ - See D. A. MEIRA, 'O regime de distribuição de resultados nas cooperativas de crédito em Portugal. Uma análise crítica', *Boletín de la Asociación Internacional de Derecho cooperativo*, 2015, 49, pp. 106-109.

only exist if provided in the statutes. If the cooperators' liability for the debts of the cooperative is provided for in the statutes, this liability will be subsidiary to that of the cooperative and joint and several among the liable cooperators.

In all other cases, there is no relationship between economic rights and the amount of contributions to share capital; financial rights are determined by the quantity and quality of the cooperator's participation in the cooperative's transactions.

The organizational structure of cooperatives is established by taking into consideration the majority of members, and not the majority of the share capital: members of cooperative bodies are elected from among their cooperators (Article 29 of the *PCC*).

Furthermore, in the General Meeting, which is the highest-ranking body of cooperatives and is attended by all cooperators in full enjoyment of their rights (Article 33 of the *PCC*), share capital is not a quorum or majority requirement. Resolutions of the General Meeting are passed with the number of cooperators as a determining criterion, regardless of the capital that they represent (Article 40 of the *PCC*).

Even when a plural vote is given to cooperators in the statutes in accordance with Article 41, this will always be attributed on the basis of the cooperator's participation in the cooperative's transactions (Article 41.2 of the *PCC*).

Also in second-tier cooperatives (cooperative unions, federations, and confederations) a plural vote is defined by an 'objective criterion' and in accordance with the above-mentioned democratic principle (Article 83 of the *PCC*). Accordingly, plural voting in second-tier cooperatives is proportional to the number of members of each participating entity or to the volume of the cooperative's activity carried out with the cooperative, thus also signifying that share capital is still not a relevant factor.

In cooperatives, participation in surpluses is assessed in relation to members' participation in the cooperative's transactions. Surpluses are distributed to cooperators in the form of a cooperative refund and in proportion to the transactions that each member carries out with the cooperative in a given financial year, and not proportionately to the member's contributions to the share capital (Article 100.1 of the *PCC*).

Another fundamental right of cooperators is the right to participate in the cooperative's transactions, as provided for in the statutes. This participation is, however, carried out in consideration of the cooperator's economic capacity or needs rather than the cooperator's participation in the cooperative's share capital.

It should be added that the role of the cooperative's share capital as a guarantee is irrelevant when considered from the point of view of static information to non-members, because due to the *principle of voluntary and open membership*, this information is only accurate as regards the statutory minimum capital, and as we have noted below, minimum share capital is not properly protected under Portuguese law. Conversely, when considered from a dynamic point of view, it is our understanding that share capital (understood here as the amount held at a certain moment rather than the statutory minimum) has a role of guarantee. This is the case first of all because cooperators' capital contributions are not totally redeemed.

The share of capital of a cooperator who wishes to leave a cooperative is paid after settlement of the losses that appear “*in the balance sheet of the financial year in which the right of redemption originated*” (Article 89.2 of the *PCC*). Furthermore, in cooperatives, it is not possible to distribute refunds in a financial year that closes with losses. Article 100.2 of the *PCC* does not allow a distribution of surpluses among cooperators until losses from previous financial years have been compensated. In the same way, a surplus cannot be distributed if the legal reserve has been used to compensate for losses and is not yet “*at the level prior to its use*”. Furthermore, in cooperatives in which cooperators’ liability is unlimited, non-members are guaranteed not only by the assets of the cooperative, but also by the assets of those cooperators (Articles 23 and 80 of the *PCC*).

THE LEGAL MINIMUM COOPERATIVE SHARE CAPITAL: THE CLARIFICATION OF ITS REGIME VERSUS THE REDUCTION OF ITS AMOUNT

The minimum share capital principle is explicitly established in the Portuguese Cooperative Code. Accordingly, under Article 81.2 of the *PCC*, the statutes must establish the cooperative’s minimum share capital, which may not be less than 1,500 EUR, although the complementary legislation regulating each branch may impose a different minimum.

The minimum share capital of a cooperative must be included in its statutes and operate as the minimum limit for the variability of share capital in order to avoid under-capitalization, thus representing a minimum guarantee of creditors’ interests. Pursuant to Article 16.1.f) of the *PCC*, this is a mandatory provision in the statutes.

While the accounting or actual share capital of cooperatives is variable, the minimum share capital is stable, because it is public knowledge, as it is registered at the *Commercial Registry*. Cooperatives therefore guarantee to non-members that the share capital will always be at least equal or superior to that recorded at the *Commercial Registry*, regardless of the current level.

In this context, redemption of contributions cannot affect the minimum share capital. Accordingly, Article 89.3 of the *PCC* states that the statutes may provide that, when in any financial year the amount of shares to be repaid exceeds a certain percentage of the amount of share capital established in the statutes, redemption will be subject to a resolution by the Board of Directors. Reasons must be provided for a suspension of reimbursement, if any, and it is subject to ratification by the General Meeting (Article 89.4 of the *PCC*).

However, for the minimum share capital to have an adequate guarantee function, it is necessary to attribute a different legal regime to it based on the following assumptions.

First, a reduction of the share capital to an amount below the minimum share capital will lead to the cooperative's being wound up and subsequently dissolved. The *PCC* does not expressly provide for this type of winding up.⁷

Second, the Portuguese legal system does not establish the possibility for creditors of a cooperative to file a legal objection to a reduction of share capital to an amount lower than the minimum share capital based on the losses arising out of it when claiming their rights, provided that they have requested that cooperative pay their credits or an appropriate guarantee and their request has not been granted.⁸

In order to promote cooperative entrepreneurship, there is a trend towards reduction in the value of the minimum share capital. In the new Portuguese Cooperative Code, the legislator reduced the minimum share capital to 1.500 EUR. This way, under Article 81.2 *PCC*, the statutes will establish the minimum share capital of the cooperative, which may not be less than 1.500 EUR, although complementary legislation regulating each branch may set a different minimum.⁹

THE CLARIFICATION OF THE LEGAL REGIME OF COOPERATORS' CONTRIBUTIONS TO SHARE CAPITAL

As we have seen, in the Portuguese legal system, it is not possible to set up a cooperative without compulsory contributions by members

The new Portuguese Cooperative Code continues to establish that, as a rule, minimum contributions to capital, to which each cooperator subscribes, are defined in the complementary legislation applicable to the various cooperative types of the cooperative sector or in the statutes. In any case, they can never be below the equivalent to three shares (Article 83 *PCC*).

Share capital is divided in securities whose value cannot be below 5 EUR each (Article 80.1 *PCC*), and each cooperator shall have a minimum contribution of three shares.

Portuguese cooperative law does not set any maximum limit to the number of shares held by each cooperator, an omission that might be understood as a way to make the financing of cooperatives easier. Such omission, however, setting no maximum limit to the cooperator participation, carries the risk of allowing a cooperator with an excessive participating interest in the cooperative share capital to condition, not legally but actually, the decisions of the cooperative.

Cooperators' contributions to share capital may be in cash or in kind (Article 84.1 of the *PCC*).

⁷ - See Chapter 3 - Section 3.2, *Draft Principles of European Cooperative Law*, cit., p. 66 et seq.

⁸ - See M. A. MARTÍN REYES and E. OLMEDO PERALTA, 'El capital social. Concepto y funciones', in T. Vázquez Ruano (ed), *Tratado de Derecho de Cooperativas*, Tomo I, Tirant Lo Blanch, Valencia, 2013, pp. 540-550.

⁹ - On this issue, see D. A. MEIRA, 'Contributos legislativos para a criação de empresas cooperativas: a livre fixação do capital social', *CIRIEC- Revista Jurídica*, 2015, 26, pp. 27-52.

Under the terms of Article 84.4 of the *PCC*, contributions in kind are assessed by the General Meeting of Incorporators or the General Meeting following a proposal by the Board of Directors. If the value of these entries is higher than 7,000 EUR per member or 35,000 EUR in total contributions, it must be assessed by a Statutory Auditor (or by the Auditing Firm) pursuant to the terms of Article 28 of the *CSC*.

In the new Portuguese Cooperative Code, contributions in services are not permitted as contributions to share capital (Article 85 of the *PCC*). The reason for excluding them is that ‘*labour*’ is not a quantifiable amount that can easily be expressed as a money value, and therefore does not perform the guarantee role that capital does. Nevertheless — and even though contributions in services cannot be understood as a contribution to share capital — this does not mean they have no value as a contribution to the cooperative. We would therefore say that they are contributions in labour, with special characteristics, but not share capital.

With regard to honouring the duty to make contributions to capital, the law lays down that 10% of capital in cash must be paid up upon subscription (Article 84.2 of the *PCC*). Deferrals of contributions to capital in cash are admitted as long as payment is completed within a maximum of five years (Article 84.3 of the *PCC*). This possibility to defer contributions is limited to contributions in cash, and does not apply to investor members (Article 84.5 of the *PCC*).

Contributions in kind must be made at the time of the incorporation, and may not be deferred beyond that date.

Although the *PCC* is not explicit on this issue, it is our understanding that a deferral of this kind is only possible if the face value of the contributions in cash and kind initially made by the cooperators is at least equivalent to the legal minimum capital.

The percentage of contributions in cash that may be deferred is calculated in relation to each contribution and not to the total of contributions that can be deferred. This means that until the date of incorporation, each cooperator must contribute at least 10% of his or her contribution in cash.

Ownership of shares (“*títulos de capital*”) is not separable from the status as a cooperator. This explains why in cooperatives, restrictions on the free transfer of shares to persons outside the cooperative are the rule and not the exception.

Article 86 of the *PCC* provides that shares are only transferable with the permission of the Board of Directors or, if the cooperative’s statutes so require, of the General Meeting, provided that the acquirer or successor is already a cooperator or has requested admission by satisfying the required conditions.

In this way, the legislator has made the transfer of shares, whether *inter vivos* or *mortis causa*, dependent on the fulfillment of two conditions: prior authorization from the cooperative board, which is a condition of the effectiveness of the transfer; and that the acquirer must be a member of the cooperative or, if he or she is not, must request admission.

In the latter case, an application for admission may only be made if the prospective cooperator meets the conditions required for this case, which will vary according to the type of cooperative in question.

Authorization for a transfer will be given as a rule by the Board of Directors, although it will be a power of the General Meeting if the statutes so state. Purchasers who are not yet cooperators will need to request admission explicitly.¹⁰

If the transfer of the shares is requested by a cooperator, the cooperative's bodies (the Board of Directors or the General Meeting, as provided in the statutes) must act to grant or refuse authorization within 60 days, after which time the transfer is deemed to be valid and effective (Article 86.2 of the *PCC*). A refusal of consent must be substantiated, first to avoid setting an absolute rule that binds the shareholder to his or her shares and, second to understand the procedure followed by the cooperative's bodies in the exercise of control of the compliance of the transfer with the interests of the cooperative.

A transfer of shares *mortis causa* poses a number of complex problems in the case of cooperatives. With cooperatives that are structured according to contributions of labour, it is necessary for the heir or group of heirs to acquire the objective requirements for being members of the cooperative. There is a true subjective right on the part of the heirs to be shareholders and to be automatically granted the position occupied by the deceased in the cooperative. If the capacity of a cooperator cannot be attained by the heirs, one proceeds with the liquidation of the entry, under the terms of Article 89 of the *PCC*, of who takes the place of the deceased cooperator (Article 86.5 of the *PCC*).

As regards the *modus operandi* of a transfer, Article 86 of the *PCC* distinguishes between transfers *inter vivos* and *mortis causa* and, within the transfer, between titled shares and non-titled shares (shares in dematerialized format).

An *inter vivos* transfer of titled shares will operate by endorsement of the title to be conveyed signed by the transferor and the acquirer, which binds the cooperative and is recorded in the *Registry Book*. As for the transfer of non-titled shares, the transfer system of book entry securities provided for in the *Portuguese Securities Code* ('*Código dos Valores Mobiliários*') is followed, *mutatis mutandis*, operating through registration on the acquirer's account as recorded in the *Registry*.

In turn, *mortis causa* transfers proceed with the submission of documentary evidence of the capacity of the heir or legatee and are recorded in the *Registry Book* in the name of the holder. With regard to the transfer of titled shares and non-titled shares the legal regime provided for *inter vivos* transfers applies, with some adjustments.

The new Code does not deal with the transfer of shares of the investor members, an omission that is open to criticism. We consider that such transfer is not free, depending on the authorization of the Board of Directors or, if the statutes of the cooperative so require, of the General Meeting.¹¹

In the Portuguese legal system, cooperatives can only acquire their own shares free of charge (Article 87 of the *PCC*).

¹⁰ - See A. S. MARTINS, 'Ser (cooperador) ou não ser: eis a questão! Comentário ao Acórdão do Tribunal da Relação de Coimbra de 10 de setembro de 2013', *Cooperativismo e Economia Social*, 2014, 36, pp. 133-147.

¹¹ - See, in this sense, Chapter 3 - Section 3.3, *Draft Principles of European Cooperative Law*, cit., p. 74 et seq.

The *PCC* does not address the issue of the destination of shares acquired by a cooperative for free, but it is our opinion that in the absence of provisions in the statutes defining the final destination of these shares, there are several possibilities open to the cooperative: withdrawal, with the subsequent reduction of share capital by the nominal value of the shares acquired; disposal to cooperators or others; or retention in the hands of the cooperative.

It should be noted, finally, that the existence of shares must be properly communicated and publicized, and that the Board of Directors of the cooperative must register the following in the relevant annual report: a) the number of shares purchased during the financial year and the reasons for the acquisitions (provided that they must be acquisitions without consideration); b) the number of shares sold during the financial year and the reasons for the sales made; and c) the number of shares of the cooperative held by it at the end of the financial year¹².

Finally, the new Portuguese Cooperative Code now expressly prohibits, in Article 86.7, a co-operator's private creditor from executing the debtor's cooperative shares. He cannot pledge, to the satisfaction of his claims, the shares that the cooperator holds. The reason for the prohibition of pledging shares arises, at the outset, from the strictly personal character of the cooperator's participation in the cooperative. Consequently, it is necessary to avoid the possibility that, by virtue of an executive action, persons without the requirements demanded by law or by the statutes may become members of the cooperative. Furthermore, this prevents the cooperative from being placed in a position of economic hardship by the intervention of the private creditors of cooperators. That could happen if those creditors had the right to demand the liquidation of the capital contributions of the cooperator debtor and the prompt payment of the value to the creditors. However, the interest of the co-operator's private creditor can be met in part by his claim to the cooperative refunds, to the compensation of shares, to the liquidation value of the capital contributions in case of reimbursement of the same (due to the withdrawal of the cooperator or due to the winding-up or liquidation of the cooperative) or to the assets that comprise the bulk of economic management corresponding to the cooperator (unless the statutes of cooperative dispose in a different direction).

THE EXPRESS RECOGNITION OF THE VARIABILITY OF THE SHARE CAPITAL AND THE INTRODUCTION OF ATTENUATION MECHANISMS OF ITS EFFECTS.

In the new Portuguese Cooperative Code, the variability of the share capital continues to be explicitly recognized as an essential feature of the cooperative identity and it is included in the definition of a cooperative (Article 2.1 of the *PCC*).

Recognizing the cooperators' real right to resign, a consequence of the principle of voluntary and open membership (Article 3 *PCC*), the result will be the repayment of their capital contribution.

¹² - See D. A. MEIRA, 'O regime de transmissão dos títulos de capital na cooperativa', *Cooperativismo e Economia Social*, 2011, 33, pp. 283-290.

Cooperators are granted the right to withdraw, as laid down in Article 24.1 *PCC*¹³; a right that is reflected in the consequent redemption of the member's contributions to capital. As a matter of fact, Article 89.1 *PCC* states that *“the cooperator that withdraws is entitled to a refund [...] in the amount of the member contribution to share capital, on the face value of shares.”*

The cooperative is thus characterized by structural variability with regard to both cooperators and share capital (Article 81.1 *PCC*), without the need to change the cooperative's statutes. The main consequence of this variability is the reduction of the financial qualities of share capital, namely of economic and social security that share capital represents for creditors, thus eventually causing difficulties in raising external financing of cooperatives and, on occasion, leading to undercapitalisation.

All this is made worse since the legislator continues to allow cooperators to defer part of their contributions. In fact, with regard to honouring the duty of contributions to capital, the law lays down that 10% of the capital in cash must be paid up upon subscription (Article 84.2 *PCC*). In this way, deferral of contributions to capital in cash is admitted, as long as they are completed within a maximum period of five years (Article 84.3 *PCC*).

This possibility to defer contributions is, therefore, limited to contributions in cash, not applying to investor members (Article 84.5 *PCC*). So, cooperatives can begin their business with many credit claims upon the cooperators, but without the monetary resources that effectively enable them to exercise their activity.

As a consequence, the *PCC* established a group of mechanisms to lessen the effects of the cooperators' resignation as concerns the redemption of member contributions, namely:

- a) The possibility of deferred redemption for a period of time provided for in the statutes, or additionally, of not more than one year (Article 89.1);
- b) The possibility of making deductions from the right to redemption (Article 89.2), by applying deductions to the face value of the member's shares, whenever losses are attributable to the cooperator member within the financial year in which the right to redemption originated;
- c) Statutory minimum periods of membership and rules fixing due notice periods needed for withdrawal (Article 24.1); in this way, cooperators may ask to terminate their membership under the conditions established in the statutes or, when otherwise not expressly stated, at the end of a financial year by giving 30-days notice, provided that any debts and liabilities of the member are met; failure to comply with minimum periods of membership or notice periods may lead to indemnity for losses and damages;
- d) The possibility that the statutes may provide that, when in a financial year the amount of shares to be repaid exceeds a certain percentage of the amount of share capital established in the statutes, redemption will be subject to a resolution of the Board of Directors. The suspension of reimbursement, if any, must be reasoned and subject to ratification by the General Meeting (Article 89, Nos. 3 and 4, *PCC*).

¹³ - Article 24.1 of the *PCC* states that “cooperators may ask to terminate their membership under the conditions established in the statutes or, where not expressly stated otherwise, by giving thirty (30) days' notice, provided that any debts and liabilities of the member are satisfied.”

However, in Portugal, the prohibition on the use of these mechanisms to suppress the right to withdraw remains (Article 24.3 *PCC*), given the need to respect the cooperative principle of open membership.¹⁴

This legislative choice raises a problem which relates to the fact that, in the Portuguese legal system, there is no specific or differential accounting treatment of cooperatives compared to commercial companies. In fact, the *Accounting Normalization System* ('*Sistema de Normalização Contabilística*' – *SNC*)¹⁵ applies to cooperatives (Article 3.1 of the *SNC*), which has led to a critical reaction in the legal literature, since the *SNC* was conceived as specifically for conventional capital-based companies, and therefore not taking into account the specific features of cooperatives.

So cooperatives are subject to the International Accounting Standards (IAS), namely the IAS 32, with the risk of share capital being qualified, for accounting purposes, as an outside resource and not a resource in itself, because it is refundable in case of cooperator resignation. That could lead us to ask ourselves if the Portuguese legislator reflected sufficiently on the consequences of his choice. In fact, this impediment to the right to withdraw and the consequent reimbursement right rejects the solution adopted in Spanish law to prevent the classification of share capital as a liability, which encourages the introduction, by statutory clause of a duality in cooperatives' share capital, which is represented by reimbursable contributions or contributions whose repayment may be refused unconditionally by the cooperatives' management board in case of resignation of cooperators.¹⁶

The new Cooperative Code seems to have adopted the understanding that the cooperative share capital is equity (funds provided by members in exchange for membership). So, it is the property of the cooperative and not a sum borrowed from member.

The question of the accounting qualification of cooperative share capital, as a debt capital or equity, remains open in the Portuguese legal system.

THE OPENING OF COOPERATIVE SHARE CAPITAL TO INVESTOR MEMBERS

One of the most important innovations in the Portuguese legal system, due to the Cooperative Code review, was the opening of cooperative share capital to outside investors. Thus, in addition to cooperative members —cooperators— the *PCC* includes the possibility of statutes admitting investor members (Article 16.1.g) *PCC*). These investor members shall not participate in the cooperative transactions, limiting themselves to contribute financially to the cooperative.

¹⁴ - On this issue, see, D. A. MEIRA, 'As insuficiências do regime legal do capital social e das reservas na cooperativa' in *I Congresso Direito das Sociedades em Revista*, Almedina, May 2011, pp. 129-155.

¹⁵ - Approved by Decree-Law no. 158/2009 of 13.07.2009.

¹⁶ - On this issue, see D. A. MEIRA and A. M. BANDEIRA, 'A IAS 32 e os novos critérios de contabilização das entradas para o capital social das cooperativas. Uma análise contabilística e jurídica', *Revista de Ciências Empresariais e Jurídicas*, 2010, 16, pp. 145-164; and C. VARGAS VASSEROT, 'Aportaciones exigibles o no exigibles: ésa es la cuestión', *CIRIEC-España, Revista Jurídica de Economía Social y Cooperativa*, 2011, 22, pp. 75-119.

These investor members may provide the cooperative with finance on better terms than those offered by the market, if the resources brought by the cooperator members are not sufficient.¹⁷

In the name of preserving the *cooperative principles*, with particular emphasis on the *principle of democratic member control* and the *principle of autonomy and independence*, the legislator has subjected this new figure to tight mandatory limits.

In this sense, the Portuguese Cooperative Code establishes that when *investor members* are admitted to the cooperative, their admission and remuneration shall be decided by cooperator members and, if they participate in the governing bodies, the control of those bodies must be held by cooperator members.

The admission of investor members is subject to statutory provision (Articles 16.1.g); 20.1; and 41.1, *PCC*) and must be approved by the general meeting, being mandatorily proposed by the Board of Directors (Article 20.3 and 20.4, *PCC*).

Article 41.5 *PCC* requires that the statutes identify the “*conditions and criteria*” on which depends the award of the plural vote to investor members. However, there are restrictions that are mandatorily imposed: (i) no investor member can have more than 10% of the votes corresponding to the votes of cooperators and (ii) the investor members may not, in total, have voting rights greater than 30% of the total votes of the cooperators (Article 41.7 *PCC*).

It is assumed that investor members may join the board but cannot “*represent more than 25% of the number of effective elements that make up the body for which they are elected*” (Article 29.8 *PCC*). This means that 75% of the total number of members of each of the cooperative bodies must be necessarily cooperators. Thus, if the cooperative is managed by a sole Director (Articles 28.2; 45.2; and 62.2; *PCC*), he cannot, under any circumstances, be an investor member. The same is true when the supervisory body is composed of a single member (Article 51.1.a) *PCC*).¹⁸

CONCLUSION

This study has highlighted the role of the share capital in cooperatives in the context of the new Portuguese Cooperative Code.

It has emphasized a seemingly contradictory legislative tendency: to reduce minimum share capital on the one hand; and to strengthen and clarify its legal regime on the other hand.

¹⁷ - See M. L. LLOBREGAT HURTADO, ‘Régimen económico de las sociedades cooperativas en el marco de la nueva Ley General de Cooperativas de 16 de julio de 1999 (BOE de 17 de julio)’, *RdS*, 1999, 13, p. 228; G. CAPO, ‘Le società cooperative e lo scopo mutualistico’, in A. BASSI (ed.): *Società Cooperative e Mutue Assicuratrici*, UTET, Torino, pp. 37-38.

¹⁸ - On this issue, see D. A. MEIRA and M. E. RAMOS, ‘Os princípios cooperativos no contexto da reforma do Código Cooperativo português’, *CIRIEC - Revista Jurídica de Economía Social y Cooperativa*, Monograph, 2015, 77, pp. 416-422.

In the Portuguese legal system, the requirement of a minimum share capital remains mandatory despite the minor importance of cooperative share capital. Hence there is an obligation to specify the share capital in the statutes.

The contributions of cooperator members to the share capital are mere instruments for the development of cooperative transactions, and they do not contribute to determining the rights and duties of cooperator members.

The minimum share capital operates as a limit on the variability of share capital.

Under the Portuguese Cooperative Code, the variability of capital is an essential feature of cooperatives. The main consequence of this variability is the reduced financial quality of the share capital, which explains why the new law contains measures intended to ensure that cooperative share capital has a minimum of stability.

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