Social Enterprises and Benefit Corporations in Portugal

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Contents

This publication is one of the results of the UAL-FEDER R+D+i Project, within the framework of the ERDF Andalusia 2014–2020 operational programme entitled "Corporate Social Innovation from Law and the Economy" (UAL2020-SEJ-C2085).

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H. Peter et al. (eds.), *The International Handbook of Social Enterprise Law*,
https://doi.org/10.1007/978-3-031-14216-1_36

1 Introduction

The Public Procurement Code presents a legal definition for social enterprise, which has a sectoral scope in Portugal. The Basic Law of the Social Economy (approved by Law No. 30/2013 of May 8, 2013) does not have any provision expressly dedicated to social enterprises. Portuguese legislation does not offer a general legal definition for social enterprises of general scope.

There is no specific law governing *benefit corporations* nor any known draft legislation under preparation to regulate this business model.

Contrary to Italian laws on social enterprises[1] and "Società Benefit",[2] Portuguese law does not include these forms of corporation, which are aimed at the distribution of profits to shareholders and the pursuit of "general interests" or "common benefits".[3] The absence of a general regime on social enterprises and the silence of the Portuguese legal system regarding benefit corporations raise the question of which legal instruments entrepreneurs can use if they intend to pursue a general interest purpose or common benefit in the course of a given profitable economic activity.

2 Sources and Legislation Features

The Constitution of the Portuguese Republic (CRP) structures the economic organization around the principle of coexistence of the public sector, the private sector and the cooperative and social sector in Article 81(b) of the CRP. According to the constitutional model of Portuguese economic organization, the private sector aggregates for-profit organizations, geared towards obtaining and distributing profits (Article 82(3) CRP). The cooperative and social sector is a heterogeneous reality that gathers all sorts of organizations: cooperatives, means of production owned and managed by local communities, self-management undertakings by workers from external companies (*meios de produção objeto de exploração coletiva por trabalhadores*) and "means of production held and managed by not-for-profit legal persons whose primary objective is social solidarity, particularly entities of a mutualist nature" (Article 82(4) CRP).

In this context, profit-oriented business models are part of the private sector, and business models designed to promote "common benefits" are part of the cooperative

[1] Legislative Decree 112/2017 (D.Lgs. 3 July 2017, no. 112 (Official Gazette 19 July 2017, no. 167), which regulates the legal status of Italian social enterprises.

[2] LEGGE 28 dicembre 2015, n. 208, Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge di stabilita' 2016), Commi 376-384, Gazzetta Uff. 30 dicembre 2015, n. 302, S.O.

[3] These are defined by the "Società Benefit" regime as one or more positive effects or the reduction of negative effects on people, the community, territories, the environment, cultural and social goods and activities, entities and associations and other stakeholders. See Commi 376, 378 of Legge 28 dicembre 2015, n. 208.

and social sector. However, this distinction is not clear-cut. The private sector of for-profit organizations cannot ignore collective interests, such as those relating to the environment, sustainability, gender equality, transparency, workers and all other business stakeholders. On the other hand, the entities that make up the cooperative and social sector are not prevented from making profits but are subject to specific regimes for the application of profits.

In the private sector of for-profit organization, companies stand out. In Portugal, the Commercial Companies Code (CSC) provides for the different organizational models that commercial companies may adopt (the so-called legal forms of commercial companies).[4] In the cooperative and social sector, cooperatives abound. They benefit from formally autonomous regulation in the Portuguese Cooperative Code (PCC), approved by Law 119/2015, 31 August.

Another important legislative framework is the Social Economy Basic Law. This law "establishes, in the development of the provisions of the Constitution regarding the cooperative and social sector, the legal regime for the social economy, as well as measures to encourage its activity in accordance with its own principles and purposes" (Article 1). The social economy is described as a "set of economic and social activities, carried out freely by the entities referred to in article 4 of this law". The following entities are part of the social economy as long as they are covered by the Portuguese legal system: (a) cooperatives; (b) mutual associations; (c) mercies (*Misericórdias*); (d) foundations; (e) private social solidarity institutions not covered by the preceding paragraphs; (f) associations for altruistic purposes operating in the cultural, recreational, sports and local development fields; (g) entities covered by the community and self-managed subsectors, integrated under the Constitution into the cooperative and social sector; (h) other entities with legal personality, which respect the guiding principles of social economy provided for in the Basic Law and which are included in the social economy database (Article 4 of the Social Economy Basic Law).[5] The various social economy organizations pursue the "general interest of society, either directly or through the pursuit of the interests of its members, users and beneficiaries, when socially relevant" (Article 2(2) of the Social Economy Framework Law).[6]

It is also possible to distinguish between social economy entities *ex lege* and social economy entities by "concession" in the Portuguese legal system. The first group includes the entities mentioned in paragraphs a) to g) of Article 4 of the Social Economy Basic Law. Social economy entities "by concession" are those that, although not being ex lege, are endowed with a legal personality and are included in the Social Economy database. Concerning the latter, the legislator expressly refers, in Article 4(h), to the need to comply with the guiding principles of the social economy.[7]

[4] See Maia (2015), pp. 13–36; Ramos (2018), pp. 162–168; Abreu (2021), pp. 65–86.

[5] The database of social economy organizations is not yet completed.

[6] Meira (2017a), p. 121, ff.

[7] Ver Meira (2013b), p. 32, ff.

3 Social Enterprises in Portugal

3.1 The Legal Notion for Public Procurement Purposes

Historically, the first reference to social enterprises was about social enterprises of insertion,[8] which the Resolution of the Council of Ministers No. 49/2008, of 6 March, regarding the National Mental Health Plan (2007–2016), designated as "social enterprises". This regulatory act of the Portuguese government did not define social enterprises, and no relevant legal consequence could be drawn from such qualification.

Exclusively for public procurement, Article 250-D, 7, of the Public Procurement Code[9] provides: "social enterprises are considered those engaged in the production of goods and services with a strong component of social entrepreneurship or social innovation, and promoting integration into the labour market, through the development of research, innovation and social development programmes" in the areas of health, social, educational and cultural services.

The legal notion of Article 250-D, 7, is legally consequential. The Public Procurement Code allows social enterprises to be reserved for the supply of health, social, educational and cultural services, provided that they meet the legal requirements for forming such contracts.

For the purposes of public procurement, both profit-making and non-profit entities may be considered social enterprises.[10]

3.2 Social Enterprises and the Social Economy: The Persistent Legal Ambiguity

The Draft Social Economy Basic Law No. 68/XII, of 16 September 2011,[11/12] proposed a generic definition of a social enterprise. In Article 13(2)(c) of the aforementioned project, it was stated that the legislative reform of the social economy sector would involve "the creation of the legal framework of social enterprises, as entities that develop a commercial activity with primarily social purposes, and

[8] Regulated by Ministerial Order 348-A/1998, of 18 June, which was revoked by Article 25(m) of Decree-Law 13/2015.

[9] Decree-Law No. 18/2008, of 29 January, amended and republished by Decree-Law No. 111-B/2017, of 31 August (rectified by rectification statements No. 36-A/2017, of 30 October and No. 42/2017, of 30 November).

[10] See Meira and Ramos (2019), pp. 1–33.

[11] See Official Gazette of the Assembly of the Republic II series A No. 31/XII/1 2011.09.19 (pp. 24–29).

[12] The text of the draft project can be consulted at https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=36468.

whose surpluses are, essentially, mobilised for the development of those purposes or reinvested in the Community". This proposal did not succeed, and the current text of the Basic Law of the Social Economy does not, expressly and immediately, foresee the legal notion of social enterprise.

The Basic Law on Social Economy text is deliberately ambiguous with regard to social enterprises. While, on the one hand, the legislator did not accept the proposal to provide for them, on the other hand, the content of Article 4(h) is sufficiently vague and ambiguous to allow for future legislative decisions that integrate social enterprises in the perimeter of the social economy.

This political-legislative position determines that, for the time being, the legal effects associated with social enterprises in Portugal are scarce. On the other hand, the relationship between social enterprises and commercial companies is not clear from a legislative point of view. This issue has been discussed within the legal doctrine, and opinions are divided between those who defend that social enterprises cannot be companies[13] and those sustaining that, under certain requirements, companies may be considered social enterprises.[14]

4 Definition and Aim of Social Enterprise and B-Corps

In Portugal, the definition of a social enterprise applies exclusively for the purposes of public procurement, and there is no legal regulation on B-Corps.

5 The Activity

For the Public Procurement Code, social enterprises are characterised not by their legal form but, in part, by their activity, more specifically by the exercise of health, social, educational and cultural services.

As stated before, Portuguese legislation does not regulate B-Corps. The Portuguese business experience shows that B-Corps adopt different legal forms.

As a rule, companies are entitled to engage in any profitable economic activity. Associations may, under certain legal requirements, engage in economic activity, but they are prevented from distributing profits. Cooperatives are intended to meet the needs of their members and, in their statutory activity, may engage in economic activity but may not distribute profits.

[13] See Abreu (2015), pp. 369–376.

[14] Farinho (2015), pp. 247–270; Meira and Ramos (2019), pp. 26–29.

6 Forms and Incorporation of Social Enterprises and B-Corps

There is no rule in the Portuguese legal system imposing a specific legal form for social enterprises. In particular, the Portuguese legal system does not foresee any norm expressly dedicated to the incorporation of social enterprises.

Although not expressly stated in Portuguese law, the current state of the Portuguese legal doctrine allows us to argue that social enterprises in Portugal are included in the perimeter of social economy entities.[15]

Under Portuguese law, there are no specific ways of creating B-Corps. The applicable rules depend on the legal person to be set up. Entrepreneurs who wish to create B-Corp-like models in Portugal can set up a company and, through statutory clauses, within the limits of the law, accommodate some social concerns or social responsibility. It seems to us that, in Portugal, such entrepreneurs may resort to companies to fulfil their purpose.

7 Financial Profiles of Social Enterprises and B-Corps

The Portuguese law does not foresee any regulation specifically dedicated to financing social enterprises. Article 250-D of the Public Procurement Code discriminates positively regarding social enterprises, which has financial impacts. On the other hand, social economy entities benefit from positive discrimination in taxation, access to credit and technical support.

The Portuguese legal system does not provide specific rules on the financing of B-corps. The legal rules on financing depend on the selected organizational form.

8 Organizational Profiles

8.1 Commercial Companies' Way

The companies (commercial, civil in commercial form and civil), as a rule, aim to obtain the profits intended to be distributed to the shareholders (Article 980 Civil Code). The company is "the entity which, consisting of one or more subjects (shareholders), has an autonomous asset for the exercise of economic activity, in order to (as a rule) make profit and distribute it to the partners—becoming subject to losses".[16]

[15] Abreu (2015, passim); Meira and Ramos (2019, passim).

[16] Xavier (1987), p. 7; Abreu (2021), p. 40; Ramos (2018), p. 146.

Although the Commercial Companies Code does not expressly state this, there seems to be no doubt that commercial and civil companies in commercial form are also designed to make profits to be distributed as dividends to their shareholders. Exceptionally, and only in the cases permitted by law, non-profit corporations are lawful. At the same time, it is understood in the Portuguese legal system that shareholders can freely choose the corporate purpose (i.e. the economic activities performed by the company), but establishing non-profit companies by statutory definition is not lawful. Profit making is regarded as an imperative requirement for companies in Portuguese doctrine.[17]

Although partners are not allowed to create non-profit companies, they may, subject to mandatory legal limits, adapt corporate by-laws to their business projects. Company by-laws may incorporate the interests of other stakeholders. Consider, for example, statutory clauses concerning the attribution of profits to workers[18] or the statutory consecration of social responsibility measures implemented, namely through corporate-sponsored foundations.[19] The directors are responsible for respecting the statutory clauses, and, therefore, they are required to fulfil the vision and mission stated in the by-laws.

Article 64(1)(b) of the Commercial Companies Code concerning the duties of loyalty requires the directors to act in the "interest of the company". As in other civil law countries, managers of Portuguese profit companies can take into account the interests of various stakeholders,[20] as laid down in Article 64(1)(b) of the Commercial Companies Code. This provision states that "the company's managers or directors shall comply with (. . .) their duty to be loyal to their interests, serving their long-term customers and creditors while ensuring the sustainability of the company".[21] Similar provisions can be found in other legal systems. Consider, for example, Article 154 of the Brazilian Corporation Law; section 172 of the *Companies Act* 2006, entitled "Duty to promote the success of the company"; § 70 (1) of the Austrian *Aktiengesetz*; or Article 2:129(5) of the Dutch Civil Code.

Article 64(1)(b) of the Commercial Companies Code sets forth that managers, in the exercise of their functions, must consider the interests of workers, customers and creditors. In Portuguese doctrine, we doubt the effectiveness of this rule since the

[17] Abreu (2021), pp. 31–33.

[18] About these measures, see Gomes (2011), pp. 513–521.

[19] About corporate-sponsored foundations as an indirect model for corporate philanthropy, see Serens (2014), p. 585.

[20] In the United States, the legislation on benefit corporations was created to protect directors and officers in their pursuit of a social mission. That is, the shareholder value doctrine requires directors and officers to maximize shareholder value; otherwise, they will be found to violate fiduciary duties and, consequently, be subject to civil liability. By having legislation that allows directors and officers to incorporate the interests of various stakeholders into their decisions, a legal basis is provided that makes it possible for directors and officers to serve the interests of other stakeholders.

[21] This standard was introduced into Portuguese law in 2006 through DL 74-A/2006 of 29 March, and since then the interpretations that have been made have been very discrepant. For the various interpretations of this standard, see Ramos (2010), pp. 103–126.

law does not provide any sanction for the directors who, in their performance, do not consider the interests of these subjects. In addition, the law is not clear as to what and who may be sanctionable. The doctrine highlights the perplexity caused by the reference to the interests of creditors, who are relevant subjects for the sustainability of the company. In fact, the interests of creditors are safeguarded by the fulfilment of the legal duties incumbent upon the company.

Reference to the interests of customers who, through various legal rules, are themselves the object of legal protection also creates a sort of perplexity.[22] However, as organic representatives of the company, managers are bound by the various legal rules intended for the company.[23]

The interests of workers are also reflected in Article 64(1)(b) of the Commercial Companies Code. Workers are mainly interested in business decisions that help maintain jobs, promote fair remuneration, ensure the best working conditions, tackle social support concerns, etc. In Portugal, workers do not participate significantly in corporate management, ergo the interpretation that the reference in Article 64(1)(b) CSC to the interests of workers is "a norm of almost zero positive content".[24]

Article 64(1)(b) CSC does not provide for any legal mechanism that protects the interests of workers, nor does it provide for compensation for damages caused by the decisions taken by directors against the workers. The duty of loyalty of managers is to the company.[25] Article 64(1)(b) may have a limited protective effect on directors as, in some cases, it might allow for the elimination or limitation of the liability of directors to the company.[26]

There is no explicit reference in Article 64(1)(b) to corporate social responsibility but only an implicit reference to "the interests of other relevant subjects for the sustainability of the company". It is necessary to distinguish corporate social responsibility of a voluntary nature from the legal duties (general and specific) of directors, which are binding.

Corporate social responsibility is, according to the definition proposed by the European Commission in 2001,[27] "a concept whereby companies voluntarily integrate social and environmental concerns into their operations and their interaction with other stakeholders".[28]

In 2011, the European Commission proposed a new definition for corporate social responsibility: "the responsibility of enterprises for their impacts on society". Respect for applicable legislation and for collective agreements between social partners is a prerequisite for achieving that responsibility. "To fully meet their corporate social responsibility, enterprises should have a place to integrate social,

[22] Abreu (2021), pp. 286–288.

[23] On the duty of legality of directors, see Ramos (2014), p. 131.

[24] Abreu (2021), p. 289.

[25] Ramos (2010), p. 118.

[26] Ramos (2010), p. 118, and also see Costa and Dias Figueiredo (2017), p. 792.

[27] Commission of the European Communities (2001), p. 5.

[28] Commission of the European Communities (2001), p. 5.

environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders."[29]

No wonder the European Commission is so focused on and committed to the strategy for corporate social responsibility. At a time when the social responsibility of the State is receding, the European Commission calls for corporate social responsibility.

The flexibility of company types, whether in governance, profit allocation or financing, allows entrepreneurs to shape company statutes to incorporate non-partner interests. However, the profit purpose cannot be denied. The articles of association may limit the periodic distribution of profits or partially allocate them to non-partners.

8.2 The Cooperative Way

Within the Portuguese cooperative sector, social solidarity cooperatives, which are part of a movement to reinvent the cooperative model that began in Italy in 1990, with the Italian social cooperatives, a movement that led to the emergence of cooperatives with an objective focused predominantly or exclusively on the pursuit of purposes of general interest, have been identified by doctrine as the cooperative branch that is closest to the European concept of social enterprise. These cooperatives regulated by Decree-Law No. 78/98, of 15 January, are cooperatives whose activities are clearly focused on the area of social services. Their social object is a clear mission to support situations of economic and social vulnerability based on a welfare paradigm of social intervention for families, children, the youth, the elderly, the disabled, the unemployed and other vulnerable categories with a view to their professional integration, education, training, and occupational and residential care.

Portuguese social solidarity cooperatives pursue, as their main or exclusive purpose, a disinterested or altruistic mutualistic purpose, which the legislator refers to as "social solidarity purposes".[30]

The areas of impact measured by B certification—"Community", "Environment", "Customers", "Governance" and "Workers"—seem to be inspired by the values and principles that integrate the concept of cooperative identity, defined by the International Cooperative Alliance (ICA) in Manchester in 1995—based on a set of seven principles (the Cooperative Principles[31]), a set of values (the Cooperative Values[32])

[29] Commission of the European Communities (2011), p. 6.

[30] See Meira (2020), pp. 221–247.

[31] These Principles are as follows: Voluntary and Open Membership, Democratic Member Control, Economic Participation of Members, Autonomy and Independence, Education, Training, and Information, Cooperation among Cooperatives, Concern for the Community. See Namorado (1995), *passim.*

[32] Cooperatives base themselves on the values of self-help, self-responsibility, democracy, equality, equity, and solidarity. In the tradition of their founders, cooperative members believe in the ethical

that shape those principles and a definition of cooperative.[33/34] This concept is strongly present in Portuguese cooperative legislation. Indeed, in the Portuguese legal system, the ICA cooperative principles are mandatory[35] and are even enshrined in the Portuguese Cooperative Code (PCC).[36]

Like cooperatives, B-Corps also seek to combine a social dimension with an economic one in their purpose.

In cooperatives, the link between these two dimensions is a consequence of the internationally accepted definition of cooperative—under which the object of the cooperative will result in the fulfilment, without profit, of the economic, social and cultural needs of its members by reference to a method of management of the cooperative, which relies on compliance with the cooperative principles and on mutual help and the cooperation of their members.

In fact, cooperatives are organizations characterized by the following: the primacy of individuals and social objectives over capital, the combination of the interests of the members and the general interest, the defence and implementation of values of solidarity and responsibility, the reinvestment of surplus funds in long-term development goals or in providing services that are of interest to the members or of a general interest, voluntary and free membership, democratic governance and autonomous and independent management.

Cooperatives have a mutual scope, which distinguishes them from other entities. The feature uniquely identifying cooperatives is not the non-profit-making aim (as other entities share this same feature) but the absence of an autonomous scope, which sets them apart from the interests of their members or cooperators. In the context of the mutualistic scope, the cooperators assume the obligations of participating in the activities of the cooperative, cooperating mutually and helping each other in accordance with the cooperative's principles.

By virtue of this cooperative mutual vocation, the governing bodies will necessarily and primarily be oriented to promoting the members' interests and attending to their economic, social and cultural needs.[37]

Hence, the governing bodies of a cooperative are structured to pursue economic activities mainly in the interest of their members. Note the use of "mainly" and not exclusively because the social object of the cooperative is not limited to meeting the

values of honesty, openness, social responsibility and caring for others. See Moreno (2014), pp. 371–393.

[33] ICA has established that "A cooperative is an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise".

[34] See Fici (2013), pp. 37–64.

[35] See Meira and Ramos (2015), pp. 401–428; Namorado (2018), pp. 28–36.

[36] The main source of Portuguese Cooperative law is the Cooperative Code, approved by Law No. 119/2015, published on 31 August 2015 and entered into force on 30 September 2015.

[37] See Fici (2017), p. 20.

needs of its members, taking also into account the interests of the community where the cooperative operates.[38]

In this regard, the governance of the cooperative should focus entirely on the ICA principle of concern for the community, which states: "Cooperatives work for the sustainable development of their communities through policies approved by their members."

Therefore, although focusing primarily on the needs of their members, cooperatives work to achieve sustainable development for their communities, under certain criteria approved by their members. In this context, the governance of cooperatives is not restricted to their internal relations. The cooperative governance paradigm should be aligned with the fundamental principles of corporate social responsibility (CSR), structuring concepts of sustainability based on the adoption of best practices regarding organization, equal opportunities, social inclusion and sustainable development.[39]

CSR is not voluntary in cooperatives. In other words, given the legal framework of cooperatives, in particular the fact that their governing bodies must consider the principle of concern for the community, it is argued that there is a legal obligation for the governing bodies of the cooperative to incorporate the core values of CSR into their activity, which should be subject to control, both internally (through a general meeting and by the supervisory board) and externally.

The ICA principle of concern for the community is strongly connected with another cooperative principle, the principle of voluntary and open membership, which is the traditional *open door principle*, described as follows: "Cooperatives are voluntary organizations, open to all persons who are able to use their services and willing to accept the responsibility of membership, without gender, social, racial, political or religious discrimination." This principle can be considered from two views: (i) adherence should be voluntary since it depends exclusively on the will of the member, and (ii) the cooperative must be open to all people, provided the member candidates meet two requirements—ability to benefit individually from the cooperative's activities and acceptance of membership responsibilities.

The way in which these two principles connect is evident: the traditional open-door policy, adopted by the cooperative when accepting new members, is justified by the willingness to serve the community in which it is rooted. Taking on members from the area where the cooperative carries out its activity has been a constant practice in this type of organization, whose ultimate goal is to meet the needs of the community. This practice reveals the cooperative as a generator of stable jobs—not least because, being strongly rooted in the communities, cooperatives carry out activities that do not allow relocation—and as a fuel for entrepreneurial spirit.

In this sense, membership in a cooperative must be open to any person able and willing to accept the responsibilities of membership. Another principle of enormous relevance that supports that cooperative governance should promote sustainable

[38] See Meira and Ramos (2014), pp. 493–498.

[39] See Meira (2012), pp. 127–144.

development is the ICA principle of education, training and information, which states that "cooperatives will provide education and training for their members, elected representatives, managers and employees, so that they can contribute effectively to the development of their cooperatives. They will inform the general public, particularly the young and opinion leaders, about the nature and benefits of cooperation."

This principle emphasizes the cooperatives' duty to guarantee the education and training of their members, representatives of the elected bodies, directors or employees, in cooperative thought and practice. Moreover, this principle includes the duty to inform the public, in order to raise awareness of the nature and benefits of cooperation, which could encourage new membership, especially informed membership.

This principle materializes directly in the Portuguese Cooperative Code through the establishment of a compulsory reserve fund, the "reserve for cooperative education, training and information".

The establishment of reserves for education and training means that the cooperative is not only a business organization but also an organization with social and educational concerns. This reserve fund will seek to bear the costs of activities beyond the satisfaction of the purely individual interests of the cooperative members. These activities are not strictly economic but may result in direct or indirect, immediate or deferred economic effects, both for the cooperative and for the community where the cooperative operates.

This reserve is one of the most distinctive features of the cooperative enterprise, compared with other types of enterprises. It generates capital allocated to social activities for the benefit of its members, cooperative workers and the social environment.[40]

It is well known that, as a result of the ICA principle of democratic member control, cooperative governance is characterized as democratic governance.[41]

Thus, cooperatives are managed and controlled by or on behalf of their members, who have ultimate democratic control over their governance system. Voting at members' meetings is in principle on the basis of one member one vote, regardless of the capital held.[42] However, when necessary for the better functioning of a cooperative, statutes may confer multiple votes regardless of the capital held, reflecting, for example, participation in cooperative transactions, the number of people in the specific subdivisions or the balanced representation of different member groups.[43]

The democratic character of cooperative governance also rests on the fact that the members of the governing bodies must be cooperators. According to the cooperative doctrine, this mechanism was designed by the legislator to ensure that members of

[40] See Meira (2017b), pp. 57–72.

[41] See Rodríguez and Revuelta (2015), pp. 175–203.

[42] See Meira (2013a), pp. 9–35 and see also Meira and Ramos (2014), pp. 55–56.

[43] See Snaith (2017), p. 58.

the cooperative's governing bodies would focus their activities on the goal of promoting the interests of members. In fact, by allowing the interests of the cooperators to be directly represented in the management and supervisory bodies, this mechanism has the advantage that the members of these cooperative bodies, by virtue of their experience as a result of their dual role as both beneficiaries and managers, are permanently aware of the interests of the cooperators and do not deviate from the main purpose of the cooperative.[44]

Democratic governance will necessarily be transparent, recognizing members' broad right to information. Thus, it is provided that board members and managers shall ensure that the cooperative operates with a high level of transparency and shall provide members with enough clear information to enable them to control the cooperative. In particular, they shall ensure that members receive full annual accounts and, if appropriate, consolidated accounts that are drawn up, audited and published with an annual report as well as cooperative and financial audit reports, as required by law.[45]

B-Corps must trade competitively for profit, and profit can be distributed. Unlike B-Corps, cooperatives perform an economic activity whose aim is not to make profit but rather to seek mutual cooperation. In fact, a cooperative is a legal person that carries out any economic activity, mainly in the interests of its members and without having profit as its ultimate goal. When cooperatives carry out non-member cooperative transactions, they must keep a separate account of such transactions, and the profits from these non-member cooperative transactions must be allocated to indivisible reserves.

When a member leaves the cooperative, and also in the case of the liquidation of the cooperative, members are only entitled to recover the nominal value of their shares and their portion of the divisible reserves, as provided in the cooperative statutes. If the divisible reserves were generated through transactions with members, the allocation should be made in proportion to the transactions with each member.

Residual net assets shall be allocated in accordance with the principle of disinterested distribution, e.g. distributed to the community or other associated cooperatives (ICA principle of Member Economic Participation).

In conclusion, in our view, cooperatives have powerful dimensions that go beyond the B-Corp identity. By virtue of its legal regime, a cooperative is an enterprise owned and run by its members and built on principles that encourage cooperation, empowerment and solidarity, rather than just profit. The purpose of a cooperative is not limited to meeting the needs of its members but includes equally attending to the interests of the community where the cooperative develops its activity. In the context of cooperatives, CSR is not voluntary. By contrast, B-Corps may benefit many stakeholders, but generally in a passive way. Being a B-Corp company entails a commitment by such company (voluntarily assumed) to

[44] See Münkner (2016), p. 54.

[45] See Meira (2016), pp. 281–327; Snaith (2017), pp. 71–72.

the values set by B-Lab. This commitment does not derive from the legal nature of the entity. [CHECK GRAMMARLY]

9 B-Corps as Social Enterprise

In the current Portuguese legal environment, can certified B-Corps be considered a specific type of social enterprise?

Given the doctrine and legislation in force in various legal systems, the social enterprise can be understood as a private entity independent of the State or other public entity, which pursues an activity of general interest; is managed in a business-like way; does not aim at making a profit, or profits, if any, are mainly reinvested in the scope pursued; and is based on democratic and participatory principles.[46]

Thus, social enterprises can be either non-profit or for-profit organizations. This position is confirmed by trends in European Union law.

According to the definition from the European Commission:[47]

> (. . .) a social enterprise (. . .) is a company whose main purpose is to have a social impact, rather than to generate profits for its owners or partners. It operates in the market by providing goods and services in a business and innovative manner and uses its surpluses primarily for social purposes. It is managed responsibly and transparently, in particular by associating its employees, its customers and other stakeholders (p. 2).

The European Commission uses the term "social enterprise" to refer to companies:

- Whose social or societal objective of common interest justifies commercial activity, which often translates into a high level of social innovation
- Whose profits are mainly reinvested in fulfilling their social objective
- Whose method of organization or ownership system reflects their mission, based on democratic or participatory principles or aiming at social justice

The European Commission underlines the fact that there is no single legal form for social enterprises. Theoretically speaking (and without considering any particular legal system), it is possible to identify (a) for-profit companies that incorporate a social mission strand in their organization, in particular through social responsibility policies (for example, a distribution company that maintains a scholarship programme for its workers); (b) non-profit organizations that manage enterprises

[46] See Meira and Ramos (2019), pp. 1–33.

[47] This is the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Social Business Initiative Creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation [SEC (2011) 1278 final].

(cooperatives, mutuals, foundations that own companies); and (c) hybrid legal figures.[48]

In Portugal, the social enterprise concept is not yet fully stabilized. The first legally valid social enterprise scheme in Portugal corresponds to the social integration enterprise scheme, which is part of a European tradition of social enterprises designed to ensure the integration of long-term unemployed persons and other types of unemployed people with specific characteristics.

Pursuant to the Resolution of the Council of Ministers No. 49/2008, of 6 March, social integration enterprises, regulated by Ordinance No. 348-A/1998, of 18 June (meanwhile repealed by paragraph m) of Article 25 of Decree-Law No. 13/2015), are considered social enterprises. Article 3(1) of the said Ordinance defines social integration enterprises as non-profit legal persons whose purpose is the social-occupational reintegration of disadvantaged or long-term unemployed people into the labour market. In particular, they may take the following forms: cooperatives, associations, foundations and private institutions of social solidarity. They must also operate according to "business management models" (Article 5(1) of the Ordinance). It turns out that the legislator restricts social integration enterprises to non-profit entities.

Furthermore, Bill No. 68/XII of 16 September 2011[49] refers expressly to social enterprises. Thus, in Article 13(2)(c) of the draft law, it is stipulated that the legislative reform of the social economy sector will also involve "the creation of the legal regime of social enterprises, as entities that carry out a trade activity primarily for social purposes, and whose surplus is essentially used for fulfilling such purposes or reinvested in the Community". However, after an overall discussion in the Parliament, this provision was deleted from the final draft of the bill.

We can find a definition of social enterprise in paragraph 7 of Article 250-D of the Portuguese Public Procurement Code.[50] This article, which deals with "contracts reserved for certain services", namely health, social, educational and cultural services, which are included in Annex X of the Code, establishes in paragraph 6 that the regime therein is also applicable to social enterprises, constituted in accordance with the law, provided that the requirements set out in paragraph 2 are cumulatively met, namely:

(a) have as their object the pursuit of a public service mission linked to the provision of the services referred to in the preceding paragraph; (b) reinvest their profits in pursuit of the organization's objective; (c) rely on the participation of workers in the capital stock of the organization performing the contract or base its management structure on participatory principles requiring the active involvement of workers, users or stakeholders; (d) have not signed, in the past three years, with the

[48] See Ramos (2018), p. 123.

[49] Portuguese Official Gazette. II Serie A No. 31/XII/1 2011.09.19 (pp. 24–29).

[50] Decree-Law 18/2008 which establishes the rules applicable to public procurement and the substantive regime governing public contracts that take the form of administrative contracts.

same contracting authority any contract covered by this Section (added by Article 5 of Decree-Law No. 111-B/2017[51]).

These requirements shall be deemed to be fulfilled when organizations are set up or owned, in accordance with the law, by entities that individually or jointly fulfil those requirements (No. 5).

Finally, paragraph 7 states: "[. . .] For the purposes of this article, social enterprises are those that are dedicated to the production of goods and services with a strong component of social entrepreneurship or social innovation and promote labor market integration through the development of research, innovation and social development programs, in the service areas laid down in paragraph 1." So far, this is the only legal definition of social enterprise in Portugal, even if it is a sectoral definition. Note that it does not prevent the pursuit of profit, revealing thus an understanding of social enterprise that will cover both non-profit and for-profit entities, such as commercial companies.[52]

Furthermore, the concept adopted by Regulation 1296/2013[53] admits that both for-profit and non-profit entities can be considered social enterprises. For the purpose of this Regulation, "social enterprise" means an undertaking, regardless of its legal form, that:

(a) in accordance with its Articles of Association, Statutes or with any other legal document by which it is established, has as its primary objective the achievement of measurable, positive social impacts rather than generating profit for its owners, members and shareholders, and which:
    (i) provides services or goods which generate a social return and/or
    (ii) employs a method of production of goods or services that embodies its social objective;
(b) uses its profits first and foremost to achieve its primary objective and has predefined procedures and rules covering any distribution of profits to shareholders and owners that ensure that such distribution does not undermine the primary objective; and
(c) is managed in an entrepreneurial, accountable and transparent way, in particular by involving workers, customers and stakeholders affected by its business activities."

[51] Portuguese Official Gazette. No. 168/2017, 2nd Supplement, Series I of 2017-08-31, effective from 2018-01-01.

[52] In the doctrine, Abreu (2014–2015), pp. 369–376, considers that, in the present Portuguese legal system, companies cannot be considered social enterprises. For a different opinion, see Farinho (2015), pp. 247–270.

[53] Regulation (EU) no. 1296/2013 of the European Parliament and of the Council of 11 December 2013 on a European Union Program for Employment and Social Innovation ("EaSI") and amending Decision No. 283/2010/EU establishing a European Progress Microfinance Facility for employment and social inclusion. On the characteristics of social enterprises, for the purposes of this regulation, see Gonçalves (2019), pp. 197–228.

In this context, we consider that on a case-by-case basis, we can identify some points of contact between certified B-Corps and this concept of social enterprise, which are still not fully elaborated.

10 Registration and Control

There is no legal regime of registration or control specifically dedicated to social enterprises in Portugal.

There is no public register dedicated to B-Corps in Portugal, nor are there public mechanisms to control B-Corps. Any company in Portugal can apply for the B certification provided by B-Lab, a global non-profit organization that aims to create a movement of people who use companies for socially valuable purposes.[54] B certification measures the following areas of impact of companies: "Community", "Environment", "Customers", "Governance" and "Workers".

In Portugal, several companies have already obtained this certification.[55] Being a B-Corp does not give the company a new legal regime (whether it is a Portuguese or an international company). Rather, it is a commitment by each company (voluntarily assumed) to the values set by B-Lab.

Why would a company want to become a certified B-Corp? According to B Lab Europe, there are seven reasons to get this certification: 1) for market differentiation, 2) to measure and improve performance, 3) to attract and retain talent, 4) to foster and improve economic results, 5) to attract and inspire investors, 6) to integrate a global movement of leaders who want to change the world for the better and 7) to drive change.[56]

The certification process involves several steps. First, the value that the company creates for society is measured. Stakeholders can use the free B Impact Assessment electronic platform to measure the company's performance. In this process, the impact of the company (in various relevant areas) is assessed after answering the questions included in the B Impact Assessment. The nature of the questions is determined by the size of the company, sector and market, and there is a total of approximately 200 questions. If the company scores 80 out of 200, it can then proceed to validate the result with B-Lab, which is the B-Corp certification body. The results of the B Impact Assessment are then reviewed by the B Lab's independent Standards Advisory Council.

Finally, the B Corp Declaration of Interdependence must be signed, and certified companies must pay a fee each year. Fees vary according to region and sales volume.

[54] https://bcorporation.net/about-b-lab (accessed on December 17, 2019).

[55] For the list of certified companies in Portugal, see https://bcorporation.eu/about-b-lab/country-partner/portugal (accessed on December 17, 2019).

[56] https://bcorporation.eu/about-b-lab/country-partner/portugal (accessed on December 17, 2019).

In order to maintain B-Corp certification, companies are required to fo through a periodic "recertification".[57] "Companies recertify as B Corps by completing an updated, verified B Impact Assessment, demonstrating that they continue to meet the high performance standards for Certification."[58] "As of July 1st, 2018, B Lab is changing the B Corp Certification term from two years to three years. This means that companies will be required to recertify every three years to maintain Certification."[59]

11 Specific Tax Treatment

In Portugal, there is no specific legal provision of a fiscal nature dedicated to social enterprises or B-Corps. The general tax rules will apply, depending on the nature of the legal person established (association, cooperative or company).

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[57] https://bcorporation.net/news/b-corp-certification-term-changed-three-years (accessed on December 17, 2019).

[58] https://bcorporation.net/news/b-corp-certification-term-changed-three-years (accessed on December 17, 2019).

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