

WORKING PAPER

The Portuguese Law on Social Economy

Deolinda APARÍCIO MEIRA

CIRIEC N° 2014/12



**CIRIEC activities, publications and researches are realised
with the support of the Belgian Federal Government - Scientific Policy
and with the support of the Belgian French Speaking Community - Scientific Research.**

**Les activités, publications et recherches du CIRIEC sont réalisées
avec le soutien du Gouvernement fédéral belge - Politique scientifique
et avec celui de la Communauté française de Belgique - Recherche scientifique.**

**This working paper is indexed and available
in SSRN and RePEC**

**Ce working paper est indexé et disponible
dans SSRN et RePEC**

ISSN 2070-8289

© CIRIEC

No part of this publication may be reproduced.

Toute reproduction même partielle de cette publication est strictement interdite.

*The Portuguese Law on Social Economy**

Deolinda Aparício Meira**

Working paper CIRIEC N° 2014/12

* Paper presented at the 4th *CIRIEC International Research Conference on Social Economy* "Social economy on the move... at the crossroads of structural change and regulation", University of Antwerp (Belgium), October 24-26, 2013.

** Associate Professor in the Law Department of the Polytechnic Institute of Oporto/ISCAP/CECEJ, CIRIEC-Portugal, Portugal (Email: meira@iscap.ipp.pt).

Abstract

This study is a reflection on the Portuguese Framework Law on Social Economy, highlighting, from a critical point-of-view, its contribution to the explicit institutional and legal recognition of the social economy sector. It does so by defining the concept of social economy and listing the entities engaged in this sector, by defining its guiding principles and the mechanisms for its promotion and encouragement, and also by describing the creation of a tax and competition regime which will take into account its specificities. The setting up of this foundation of the social economy was based on the constitutional principle of protection of the social and co-operative sector, which substantiates the adoption of differentiating solutions in view of the positive discrimination of this sector.

Keywords: social economy, framework law, guiding principles, social economy entities, legal regulation.

JEL-codes: K29, K40.

1. Introduction

This study aims at reflecting about the juridical relevance of Law No. 30/2013, of May 8, the so called “*Lei de Bases da Economia Social*” (*LBES*), a framework law on the social economy, unanimously approved by the Portuguese Parliament on 15 of March, 2013.

Portugal became, with this decision, the second country in Europe (right after Spain¹) to pass a framework law on the social economy.²

We find it relevant to stress the Portuguese *LBES* is a generic law that lays down a framework for a legal regime that the government will develop through more detailed regulations. In other words, to lay down a framework means to establish the fundamental political options and to leave to the government the specific task of creating the legal regimes. Furthermore, it should be noted that the framework law shall take precedence over the implementing decree-laws that are subordinate to it.

In line with the above, a framework law is then a general law of limited scope in which the institutional and legal recognition of the social economy sector is laid down fundamentally through: the delimitation of the subjective nature of its actors and principles that guide them; the identification of the modes through which the social economy is organised and represented; the definition of the guidelines of the policies of promotion of the social economy; the identification of channels through which the institutions of the social economy and the public authorities communicate.

2. The Legal Visibility of the Social Economy Sector Deriving from the Constitution of the Portuguese Republic

From the above mentioned objectives, we would like to emphasise the explicit legal recognition of the social economy, which, as postulated in legal writings, is a factor of great significance in the legitimisation of this sector (Sánchez Pachón, 2009).

Nevertheless, because the constitutional text already recognises the social economy, this issue loses relevance. In Portugal, the Social Economy has its legal basis in the constitutional text. As a matter of fact, this sector is the object of autonomous provision in the Constitution of the Portuguese Republic (“*Constituição da República Portuguesa*” - *CRP*), even if the same designation is not used. The designation used is “social and co-operative sector”.

The social and co-operative sector is thus protected by a number of principles scattered throughout the constitutional text, but nevertheless implicitly articulated by a set of logical principles or structuring vectors (Namorado,

¹ “*Ley No. 5/2011, de Economia Social*”, in force since the end of April 2011.

² Meantime, in Quebec (Canada) was approved on October 10, 2013, the “*Projet de loi 27 - Loi sur l'économie sociale*” and has since been published in France and is in discussion the “*Projet de Loi relative à l'économie sociale et solidaire*”, NOR [V10.°27.05.2013].

2005), such as the principle of co-existence of the three sectors (public, private and social and co-operative), the principle of co-operative free initiative, the principle of protection of the social and co-operative sector; the principle of the State's commitment to stimulate and support the creation of co-operatives; the principle of conformity with co-operative principles of the *International Co-operative Alliance* (ICA).

From these principles, we highlight, for their relevance in the social economy sector, the *Principle of co-existence of the three sectors* and the *Principle of protection of the social and co-operative sector*.

The *Principle of co-existence of the three sectors*, enshrined in Art. 82, is considered one of the key principles of the “economic constitution” laid down in the *CRP*. The above principle ensures the co-existence of three economic sectors – the public sector, the private sector and the social and co-operative sector –, treated as equals and granted the same constitutional dignity, as necessary frameworks of a constitutionally enshrined economic model that can be characterised as a social market economy (Miranda & Medeiros, 2006). Under Art. 82, No. 4, of the *CRP*, the social and co-operative sector is divided into four sub-sectors, comprising two main divisions: the co-operative (comprising the co-operative sub-sector) and the social one (comprehending the worker collective, community and charity sub-sectors).

The *Principle of protection of the social and co-operative sector* [par. f) of Art. 80 of the *CRP*], in which the positive discrimination for the sector in relation to the other two is laid down, as well as the measures to promote its development, also merits special attention.

In line with this principle, Art. 85, No. 1, of the *CRP* stipulates the State’s commitment and support to the creation and the activity of co-operatives, when it reads that “the State shall stimulate and support the creation and activities of co-operatives” and when, in Art. 85, No. 2, it makes sure that “the law shall define the fiscal and financial benefits to be enjoyed by co-operatives, as well as preferential terms and conditions for obtaining credit and technical assistance”. The above mentioned “*stimulus*” will result, mainly, from legislative measures that raise interest in the co-operative business, while the “*support*” will be the result of administrative measures aiming at facilitating the specificities of that business (Fonseca, 2008).

The positive discrimination of co-operatives, in relation to the private sector and extended, in our view, to the remaining entities of the social sector we referred to above is, thus, established in Art. 85, No. 2. The text provides for the definition of the ways to promote the creation and activities of co-operatives, and it leaves to law the definition of fiscal and financial benefits, as well as the laying down of preferential terms and conditions for obtaining credit and technical assistance (Meira, 2011a).

That is why the *LBES* cannot ignore the fact that the *CRP* already provides for this sector in the constitutional text, and refers to it in various rules. The first

reference appears in Art. 1, named “*Object*”, when it is postulated: “The present law establishes, based on what is laid down in the Constitution regarding the social and co-operative sector, the foundations of the legal regime of the social economy [...]”

3. The Definition of the Concept of Social Economy

The issue of the institutional invisibility of the social and co-operative sector is not, as we have seen, a relevant question in the case of Portugal, due to the constitutional provisions for the sector. Still, one of the issues often referred to as an obstacle to the development of the sector is the definition of the concept of social economy, that is, to determine what the social economy is, who its main actors are, and what general principles govern them.

The concept is, as we know, open and under construction, and, in legal writings, the difficulties in finding a precise and well-founded definition are more than obvious (Namorado, 2006; Fajardo Garcia, 2009). Nevertheless, it is our opinion that the decision to define the concept of social economy in the *LBES* using a combined technique was a good one. In fact the definition of social economy in Art. 2 is complemented by an open list of the entities of the social economy (Art. 4), and by the listing of its guiding principles (Art. 5).

3.1. The definition of Social Economy

In this way, under the Art. 2, No. 1, of the *LBES*, “Social Economy are all social and economic activities, freely carried out by the entities mentioned in Art. 4 [...]”, and those entities “aim at pursuing the general interests of society, directly and through pursuing the interests of their members, users and beneficiaries, whenever socially relevant.”

Two defining criteria emerge from this definition: the activity carried out and the object pursued. In this law, what stands out is the association of the concept of social economy with a social-economic activity aiming at the pursuit of a general interest.

The term economic activity is understood as an activity of production of goods and provision of services in the interest of the members or the community, based on a formula that maximises profits and minimises costs (Namorado, 2005). To carry out economic activity is a necessary condition for an entity to integrate the sector of social economy. To this activity, a social activity may add on, that is to say an activity that has social solidarity or any other social object as its purpose. However, if an entity pursues a social object but does not engage in economic activity, it may not integrate the social economy sector. If that were not the case, every foundation, that necessarily

pursues a “socially relevant objective”³, would be part of the social economy sector.

In what concerns the criterion of the object pursued – the general interest – we advocate that it refers to more than the fact that such entities pursue a social purpose, in partnership with the Social State and in cooperation with it, to ensure a vital minimum guarantee of social, cultural, and economic rights to citizens (“a social-public partnership”⁴ between the State and the entities of the social economy). As a matter of fact, it also points to the peculiar organisation and operation of the sector, quite distinct from that of the public and private sectors (Fuster Asencio, 2009) and reflected in its guiding principles, as we shall later see.

The pursuit of such general interest, is admitted in the law, is carried out directly or indirectly through the pursuit of the interests of members, users, and beneficiaries.

An example of entities directly pursuing the general interest are entities classified as “*Instituições Particulares de Solidariedade Social*” (IPSS – Private Institutions of Social Solidarity), legal persons, not pursuing profit, having social solidarity as their main object, endowed with a distinct mission of support to social and economic vulnerability (Art. 1 of Decree-law No. 119/83, February 23), and built on a paradigm of social intervention (Almeida, 2011).

As to other entities, some pursue such general interest indirectly. That is the case of co-operatives, whose social object integrates the two dimensions – the economic and the social one. Co-operatives are, actually, corporations directly pursuing an economic activity (Art. 7 of the *Portuguese Co-operative Code - CCoop*⁵), carried out in the interest of their members, although keeping in mind the pursuit of social objectives. The co-operative institution, as a matter of fact, has always combined an important social dimension with an economic dimension, the latter aiming at the pursuit of the economic interests of the co-

³ Under Art. 3 of the Portuguese framework law of foundations (“*Lei-Quadro das Fundações*”, Law 24/2012, of July 9), a foundation is “a legal person endowed with significant assets and which irrevocably pursues a socially relevant objective”. “Socially relevant objectives” are there understood as “those which result in the benefit of one or more categories of persons distinct from the founder, his/her relatives or similar, any person or persons of his/hers business and personal relations, namely assistance to handicapped persons, refugees and immigrants, victims of violence, the promotion of citizenship, culture, and scientific research, the arts, sports, the protection of family, children and young people, among others”.

⁴ This expression is found in the “*Carta de Cascais para a Economia Social*” (Letter from Cascais to the Social Economy), approved by the *Conselho Nacional para a Economia Social* (National Council for the Social Economy - CNES) and presented in the international Conference, on the subject of “The social economy in the challenges of the XXI century”, on 29 June 2013.

⁵ In this text, hereinafter, the Cooperative Code (Law No. 51/96, of September 1996, in force since 1 January 1997) will be referred to as *CCoop*.

operators. Such combination derives mainly from the concept of co-operative contained in Art. 2 of the *CCoop*, according to which the co-operative aims not at profit but at satisfying economic, social or cultural needs and aspirations of its members, and from the management concept of the co-operative business, based on the obedience to co-operative principles, and on cooperation and mutual assistance of its members. The social mission of the co-operative is a primary result of such obedience to the co-operative principles established in 1995, in Manchester. These principles define the *Co-operative Identity* whose legal effects include the mandatory co-existence in the co-operative of the economic and social dimensions. Co-operatives pursue a distinct social mission, by combining the interests of their members with the general interest and the consequent pursuit of sustainable development objectives. The objects and purposes of the co-operative will not be limited to its members, but will conversely take into consideration the interests of the community where it operates.

In this respect, the *Principle of concern for community*, established in Art. 3 of the *CCoop*, lays down that “co-operatives work for the sustainable development of their communities through policies approved by their members”, thus providing that co-operatives are organisations that exist for the benefit of co-operators, but which, at the same time, take responsibility towards their communities, e.g., they ensure the sustainable development of those communities in their diverse dimensions: economic, social and cultural (Meira, 2009).

3.2. Open list of the entities of the Social Economy

The definition of social economy is complemented by an open list of the entities that integrate the social economy, laid out in Art. 4, according to which “the entities that integrate the Social Economy, as long as they are registered in the country, include: a) co-operatives; b) mutual societies; c) *Misericórdias* (religious social solidarity associations); d) foundations; e) private institutions of social solidarity not included in the aforementioned ones; non-profit associations operating in the areas of culture, leisure, sports, and local development; g) entities of the community and worker collective sub-sectors; h) other entities with legal personality and complying with the guiding principles of the social economy, as established in Art. 5 of the *LBES* – these entities must be included in the social economy database”.

In this way, and like in the Spanish legislation, the *LBES* does not consider the entities legal form as the sole criterion of subjective definition. Under Portuguese law, the legal forms that traditionally integrate the social economy (co-operatives, mutual societies, associations and foundations) and a legal status (the statute of private associations of social solidarity – *IPSS*) are considered to integrate entities in the social economy sector. This was, in our view, a wise decision of the Portuguese legislator. *IPSS* may, as a matter of fact, take the

form of social solidarity associations, voluntary associations of social action, mutual aid societies, social solidarity foundations, and *Irmandades da Misericórdia* (religious social solidarity associations), and such status may be granted to co-operatives (Statute No. 101/97, September 13), to *Casas do Povo*, the Portuguese local cultural and social associations (Decree-law No. 171/98, June 25 and Ministerial Order No. 17747/99, September 10), and to any other entities that do not fall into the traditional social economy legal forms.

Paragraph d) of the law highlights the special status of the *Misericórdias*, that fall within the scope of religious law, are guided by the principles of the Christian faith and morality, and whose aim is to fulfil social needs and practice the Catholic religion. These entities have, in the civil legal order the status of private institutions of social solidarity (Art. 68 of Decree-law No. 119/83, February 25). In the legal order, this group of Social Economy entities includes the three types of religious social solidarity associations – *Santas Casas da Misericórdia*, *Irmandades das Santas Casas das Misericórdias* and *Misericórdias* – that exist in Portugal⁶.

The LBES, supported in the constitutional text, integrates in the social economy sector the entities included in the community and worker collective sub-sectors, exactly because the *CRP* integrated them in the social and co-operative sector. The community sub-sector includes “Community means of production possessed and managed by local communities” [Art. 82, No. 4, b), of the *CRP*]. The worker collective sub-sector includes “Means of production operated by worker collectives” [Art. 82, No. 4, c) of the *CRP*].

In what concerns the legal forms – co-operatives, mutual societies, associations and foundations – co-operatives are number one in the list of the final text of the *LBES*, and do not appear in fifth place, as they were in the draft version of the law (Draft Bill No. 68/XII, of February 2011). This is, from our standpoint, a wise evolution, considering that co-operatives have always been the strongest branch of the social economy, and are grounded in logic and criteria that are similar worldwide (Dabormida, 1989). In the words of Monzón Campos, social economy is historically linked to co-operatives, the latter being the backbone of the former, and co-operative principles were the reference for the guiding principles established for the social economy, as we shall see (Monzón Campos, 2010, p. 23-25). Moreover, when comparing with the social sector, the co-operative is granted fuller protection by the *CRP*.

Lastly, it is worth mentioning that the wording of paragraph h) of this law poses a problem, when it makes it possible for “other entities with legal personality, which respect the guiding principles of the social economy” to integrate the sector of social economy. We want to start by emphasising that we believe it was wise to consider that it is no longer possible to define social

⁶ The exception is the “*Santa Casa da Misericórdia de Lisboa*”, a legal person of public utility, which is integrated in the Public Administration sector (Decree-law No. 322/91, of August 26), and therefore not included in the sector of Social Economy.

economy solely by the entities that traditionally integrated it – co-operatives, mutual societies, associations and foundations – thus allowing for the integration of other organisations, as long as they comply with the guiding principles of the social economy. Still, the issue of determining what entity will verify and validate the compliance of such entities with the above mentioned principles remains. It is our understanding that, in the Portuguese legal system, two entities would be suitable for the task: the “*Cooperativa António Sérgio para a Economia Social*” (*CASES*), a co-operative oriented to the social economy sector, created by Decree-Law No. 282/2009, of October 7; or the “*Conselho Nacional para a Economia Social*” (*CNES*), the national council for the social economy, created by Resolution of the Council of Ministers No. 55/2010, of August 4. The *CASES* is a public interest co-operative aiming at promoting the creation of social economy organisations, promoting and disseminating the principles and values of those organisations, promoting the institutional recognition and competence of the social economy organisations [Art. 4, No. 2, par. a) to d), of Decree-Law No. 282/2009]. In its turn, the *CNES* is a government consultation body to the areas of public policies and strategies of promotion and development of the social economy. Among other competences, it must “propose legislative initiatives to the government and discuss matters affecting the social economy or any of its parts” [Art. 2, par. c), of the Resolution of the Council of Ministers No. 55/2010].

3.3. Guiding principles of the Social Economy

The guiding principles that complement the definition of the concept of social economy are listed in Art. 5 *LBES*, when it establishes that: “The entities of the social economy are autonomous and operate within the scope of their activities in accordance with the following guiding principles: a) the primacy of the individual and of the social objects; b) free and voluntary membership; c) democratic control of the bodies by members; d) convergence of the interests of members, users or beneficiaries with the general interest; e) respect for the values of solidarity, equality, non-discrimination, social cohesion, justice, equity, transparency, shared social and individual responsibility and subsidiarity; f) management that is autonomous and independent from public authorities and any other entities not integrated in the social economy; g) the allocation of surpluses to the pursuit of the social objects of the social economy in accordance with the general interest, without prejudice to any specificity of surpluses distribution within any social economy entity established in the Constitution.”

Although we do not wish to analyse each of these principles in detail, the wording of this ruling raises several issues we would like to discuss.

It is, in our view, quite evident how strongly the above guiding principles are influenced by the co-operative principles and values that, together with the concept of co-operative, make up the so-called “Co-operative Identity”, defined by the International Co-operative Alliance (ICA), in Manchester, in 1995. The

co-operative values, operating as the ethical structure of the co-operative principles, are: (i) self-help, self-responsibility, democracy, equality, equity and solidarity; such are the values that shape the business of co-operatives; (ii) the values of honesty, openness, social responsibility and caring for others shape the individual behaviour of coop-members. Co-operative principles, in turn, are seven: voluntary and open membership, democratic member control, member economic participation, autonomy and independence, education, training and information, cooperation among co-operatives, and concern for community (Namorado, 2001).

It is also relevant to stress the importance the *LBES* places on the autonomy of these entities and on their autonomous management, even though the law does not specify the terms of such autonomy nor does it provide any criteria to verify how they are put in practice.

When the law lays down that the entities of the social economy are autonomous, what is intended is, from our point-of-view, to stress the fact that those entities have a legal personality that is distinct from those of their members, e.g. to say that they are autonomous to engage in legal relations. This legal personality necessarily implies assets autonomy, which means that the entities' assets are distinct and independent from the assets of the entity's members.

When the law refers to management that is autonomous and independent from public authorities and any other entities not integrated in the social economy such concept is based in the co-operative principle of autonomy and independence. In this way, such independent and autonomous management acquires a double meaning. On the one hand, it is a guarantee that, in its relations with the State, the social economy is not exploited. It is up to the State to set up the regulatory framework of these entities. Specific provisions for tax exemptions and financial benefits, as well as privileged conditions of access to credit and to technical assistance must be laid down by law. That is why, further ahead in Art. 9 of the *LBES*, it is established that, in its relations with the social economy entities, the State must: “stimulate and support the creation and activities” of the social economy entities [par. a) of Art. 9 of the *LBES*]; “guarantee the principle of cooperation by taking into consideration, namely in the planning and development of the public social systems, the economic, human and material capacity utilization of the entities of the social economy, as well as the levels of technical competence and insertion in the country's social and economic fabric” [par. b) of Art. 9 of the *LBES*]; e “guarantee the necessary stability in the relations with the social economy entities” [par. d) of Art. 9 of the *LBES*]. It is, therefore, up to the State to promote the social economy sector, but not to supervise it. On the other hand, the above mentioned autonomy aims at ensuring that the inflow of capital from external sources questions neither the independence nor the democratic control of these entities by their members. The relevance of this rule is clearly understood when we consider the fact that a

significant number of social economy entities need external public or private funds to carry out their activities.

It is not irrelevant to stress one more time that the “principle of democratic control by the members” does not apply to foundations, seen that foundations represent assets allocated to a specific social purpose, and do not represent a body of individuals with a common interest. This is why, in our view, an exception should have been provided for in law⁷.

We should also mention the use of the term “surpluses”, in par. g) of the same rule, which is not, in our opinion, the most adequate use of the term. As we see it, the legislator could have used the term “results”⁸, instead because the term “surpluses” identifies a specific type of revenue typical of co-operatives, therefore not broad enough in meaning to comprehend the remaining entities.

In fact, surplus earnings results from business carried out between the co-operative and its members, is generated by members, and, in that sense, constitutes “the result of a tacit waiver of the members to co-operative immediate advantages” (Namorado, 2005). Surplus earnings is thus defined as an amount that members provisionally pay to the co-operative in excess, or that the co-operative owes to the members, as a return for member participation in the activity of the co-operative (Meira, 2010). This is why a co-operative refund may take place in co-operatives, as is established in the No. 1 of Art. 73 of the *CCoop*. Exceptions to this situation apply to social solidarity co-operatives in which all surpluses will revert, mandatorily, to reserves (Art. 7 of Decree-law No. 7/98, of January 15), and to housing co-operatives (Art. 15 of Decree-law No. 509/99, of November 19).

Finally, there is the question of determining if, by integrating the group established in par. a) to g) of Art. 4 of the *LBES*, an entity complies with the guiding principles enunciated in Art. 5 (Paz Canalejo, 2012). In line with the position of the Spanish Framework Law, it is our understanding that the entities mentioned in par. a) to g) of Art. 4 of the *LBES* should be considered entities of the social economy *ope legis* (Montesinos Oltra, 2012), since the legislation does not explicitly impose the observance of the guiding principles, thus implying that such observance is the result of the nature and legal regimes of those entities. This view of ours is confirmed by the adoption, in Art. 5, of a tone that is declaratory and not an imposition: “The entities of the social economy [...] operate within the scope of their activities in accordance with the following guiding principles [...]” A reference to the observance of the guiding principles

⁷ That was the solution adopted in the “SOCIAL ECONOMY EUROPE’s Charter of principles”, by the Permanent European Conference of Cooperatives, Mutual Societies, Associations and Foundations (CEP-CMAF), where the principle of “democratic control by members, with the exception of foundations which do not have members”, among others, was established.

⁸ In the Spanish Framework Law on the Social Economy, the expression used in par. b) of Art. 4 is “appropriation of net results”.

appears only in par. h) of Art. 4, when the possibility of integrating the social economy is opened to other entities with legal personality and included in the social economy database.

4. Forms of Organisation, Representation and Interaction of the Social Economy with its Members, with the Community and with the State

To actually know the social economy, reliable and adequate statistics are needed. In this sense, Art. 6 of the *LBES* establishes that “it is the competence of the Government to set up, publish, and keep an updated record in a specific on-line site of the permanent database of the social economy” (No. 1) and that “it shall also ensure the creation and maintenance of a satellite account for the social economy, developed within the national statistical system (No. 2).

Setting up forms of organisation and representation of the entities of the social economy, to help them act as partners with other sectors of the economy and with public authorities, was another concern of the *LBES*.

What is more, the forms in which these entities articulate will favour the competitiveness and economic potential of the same entities. In this sense, No. 1 of Art. 7 of the *LBES* recognises the right of social economy entities to “freely organise themselves and create associations, unions, federations or confederations to represent them and to defend their interests”. No. 2 of Art. 7 of the *LBES*, in turn, establishes that “social economy entities are represented in the Economic and Social Council and in other bodies with competences in the definition of public policies and strategies of development for the social economy”, thus emphasising a concern reflected in the legislation to favour the access of these entities to influential roles in the processes of political decision, as social and economic actors especially relevant in our society.

In the pursuit of their social object – necessarily oriented towards members, users or beneficiaries – these entities shall ensure the adequate levels of quality and security, and shall act with transparency (Art. 8 of the *LBES*). Ensuring transparency is also the State's competence, in such a way that, “articulated with the organisations that represent the social economy entities, it develops mechanisms of supervision to guarantee a transparent relation between the entities and their members, in an effort to optimize resources, namely through the utilization of supervisory structures already in use” [par. c) of Art. 9 of the *LBES*].

5. The Issue of the “Promotion of the Social Economy”

One of the main objectives of the *LBES* is the promotion and development of the social economy and its organisations.

In this way, No. 1 of Art. 10 of the *LBES*, lays down the public authorities’ obligation to “promote the social economy”, based on the fact that “the

promotion, valuation, and development of the social economy, as much as of the organisations that represent it, is of general interest.” The “general interest” becomes, in this way, the justification for the adoption of measures to promote the social economy.

Public authorities shall, in addition, “promote the principles and values of the social economy” [par. a) of No. 2 of Art. 10 of the *LBES*], “promote the creation of mechanisms to strengthen the economic and financial self-sustainability of the entities of the Social Economy, in compliance with the stipulated in Art. 85 of the Constitution of the Portuguese Republic” [par. b) of No. 2 of Art. 10 of the *LBES*].

As referred above, this constitutional rule establishes the principle of protection of the social and co-operative sector, which, in turn, shall be the foundation for the adoption of distinct solutions in the areas of taxation, access to credit, technical assistance, or others, to the entities of the social economy. From such positive discrimination, that is constitutionally established, we may draw the conclusion that, if, in Portugal, the relations of the State with the entities of the social economy were exactly the same as those of the State with private corporations, the *CRP* would not be respected. That is why the Government may decide freely on tax or any other benefits to grant the entities of the social economy with, but is not constitutionally authorised not to grant them any support. The same is true for support on the technical and credit levels.

The promotion of the social economy by the public authorities shall also include: “support to the creation of new social economy entities and to the diversity of social economy initiatives, by triggering innovative responses to the challenges faced by local, regional, national or any other communities, and by removing the obstacles to the formation and development of economic activities of the social economy entities” [par. c) of No. 2 of Art. 10 of the *LBES*]; “promotion of research and innovation in the social economy, of training of the social economy entities, as well as to facilitate the access of these entities to technological innovation and organisational management practices and processes” [par. d) of No. 2 of Art. 10 of the *LBES*]; and “to deepen the dialogue between the public authorities and the representatives of the social economy, at national and European level and, thus, promote mutual knowledge and dissemination of good practices [par. e) of No. 2 of Art. 10 of the *LBES*].

Promotion of the social economy means, in addition, to provide these entities with “favourable treatment in terms of taxation, that the law defines taking into consideration the entities’ nature and foundation” [Art. 11 of the *LBES*]. Two aspects stand out from this rule, that we now analyse: firstly, the commitment expressed in the law to provide the social economy entities with a differentiated tax system that favours them (positive discrimination) when compared with the private entities operating in the market; secondly, and because of the diversified nature of the entities of the social economy, the above mentioned tax system differentiates the social economy entities themselves; it does so, as we see it, on

the basis of how much they pursue general interest objects – that is how we interpret the complex expression in the law that states “that the law defines taking into consideration the entities' nature and foundation”.

On this matter, we want also to emphasise the relevance of a Court of Justice of the European Union Ruling, of 8 September 2011⁹, on questions referred to the Court of Justice by the Italian tax authorities, relating mainly to whether the national tax regime providing for the exemption of producers' and workers' co-operative societies is classifiable as State aid within the regulations of the European Union. Under the terms of the above mentioned Ruling, State aid to co-operatives – the already mentioned tax exemptions – are coherent with the European regulation that sees co-operative societies and commercial societies as distinct entities both in their purposes and in their legal regimes (Costas Comesaña, 2012; Fajardo Garcia, 2013).

As matter of fact, under no circumstances may differential treatment imply a competitive advantage of the social economy entities in relation to the other market operators (Sánchez Pachón, 2009; Bahía Almansa, 2011). This differential treatment is, on the contrary, a form of compensation for the social purposes these entities must pursue, as is established in par. d) of Art. 5 of the *LBES* as one of the guiding principles of the sector: “convergence of the interests of members, users or beneficiaries with the general interest”. The pursuit of general interests by social economy entities clearly involves an implicit economic cost in their organisation and operation that puts them at a competitive disadvantage in relation to the other market operators.

Taking, once more, co-operatives as an example, we may say that the obligation to cooperate with members (Art. 2 of *CCoop*) prevents them from choosing those customers that would make them more competitive. The cost of the peculiar co-operative economic regime adds on to this, particularly the limitations brought about by the variable nature of their share capital (Arts. 2, No. 1, and 18, No. 1, of the *CCoop*) and the consequent obstacles to the accumulation of capital in the co-operative (Meira, 2011b), together with the difficulties in attracting resources both from non-members and co-operators (Meira, 2012). These have no immediate incentive to invest in their own business: the return paid on shares is scarce and is always dependent on

⁹ See Ruling of the Court of Justice of the European Union (First Chamber) of 8 September 2011, *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. coop. arl (C-78/08), Adige Carni Soc. coop. arl, in liquidation v Agenzia delle Entrate and Ministero dell'Economia e delle Finanze (C-79/08) and Ministero delle Finanze v Michele Franchetto (C-80/08)*. References for a preliminary ruling: *Corte suprema di cassazione* - Italy. Reference for a preliminary ruling - Admissibility - State aid - Tax advantages granted to cooperative societies - Categorisation as State aid within the meaning of Article 87 EC - Compatibility with the common market - Conditions. Joined cases C-78/08 to C-80/08.

Available at:

<http://curia.europa.eu/juris/celex.jsf?celex=62008CC0078&lang1=pt&type=NOT&ancre>.

statutory provision and the existence of revenues (No. 3 of Art. 73 of the *CCoop*); shares have little or no liquidity and it is not easy to trade them (Art. 23 of the *CCoop*); significant amounts of surpluses are allocated to mandatory reserves (Arts. 69 and 70 of the *CCoop*) that cannot be divided among co-operators (Art. 72 of the *CCoop*), a situation that results from the co-operative's social purpose and means that assets will revert to the promotion of co-operativism upon liquidation of the co-operative (Art. 79 of the *CCoop*).

6. A Difficult Question: Are Social Economy Entities Subject to Competition Rules?

Without explicit mention to “competition”, Art. 12 of the *LBES* provides that social economy entities are subject to “community and national rules that apply to the general interests social services, within the scope of their activities, without prejudice to the constitutional principle of protection of the social and co-operative sector”.

It must be said, nevertheless, that finding out whether social economy entities are subject to competition rules is a complex question.

Taking into account the provisions laid down in Art. 2 of the “*Lei de Defesa da Concorrência*”, the Portuguese law on the defence of competition [Law No. 18/2012, of May 8 (hereinafter *LDC*)], all economic activity carried out by the public, private, or co-operative sectors, either permanently or occasionally, is subject to the competition legal regime. It must be noted that what is referred to in law is the co-operative and not the social economy sector which, as we have already demonstrated, has a broader definition.

Moreover, No. 2 of Art. 2 of *LDC* establishes that the law “applies to the promotion and defence of competition, namely to restrictive practices and concentration operations of undertakings which pursue on the national territory or may have any effects on the territory, now or in the future”, and defines undertaking, according to provisions of No. 1 of Art. 3, as “any entity that pursues an economic activity consisting on the offer of goods or services in a certain market, regardless of its legal status or mode of operation”. When analysing this rule, Coutinho de Abreu states that “there are entities (public but also other types of entity) which do not pursue an economic activity, namely those which pursue an exclusively ‘social’ activity, based on the principle of solidarity, aiming not at profit, and assisting the beneficiaries free of charge or receiving consideration that is not proportional to the costs (namely in the areas of social security, and public health and education) — these entities being inclusive, whereas the market ‘excludes’ [...]” (Abreu, 2013, 31). One must, of course, keep in mind that the simple fact that an entity pursues social purposes is not in itself enough not to classify the activity it carries out as economic activity. It must, on the other hand, be stressed that, according to provisions laid down in No. 1 of Art. 2 of the *LBES*, and as we have stressed before, if an entity pursues

a social object but does not engage in economic activity, it may not integrate the social economy sector.

As we have stated above, the *LBES* does not make an explicit reference to competition rules but to community and national rules that apply to the general interest social services.

It is not within the scope of the present work to analyse the concept of general interest social services, in itself a very complex concept. We would briefly like to refer that this is a broad concept, encompassing services of an economic nature and services that are not economic in nature, guaranteed by the State in its role as a public authority. The reason for them to be designated as general interest social services is that their object is the pursuit of a general interest. It is the State's competence to decide on the nature and scope of general interest services, and, thus, decide whether to provide the services or it can decide to entrust them to other entities, which can be public or private, and can act either for-profit or not for-profit. Both No. 2 of Art. 4 of the *LDC* and No. 2 of Art. 106 of the Treaty on the Functioning of the European Union (TFEU) state that undertakings entrusted with the operation of services of general economic interest shall be subject to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. Moreover, it should be emphasised that such tasks, as well as those of social economy entities, are general interest tasks (Porto & Silva, 2013).

But are we referring to all the entities of the social economy? The answer to this question is also a complex one. In what co-operatives are concerned, there are no doubts that they are subject to the above mentioned regime, the more so in that Art. 2 of the *LDC* is clear stating that the co-operative sector is subject to its regime. Still, we raise the question of knowing if an association classified as an IPSS, providing services in the areas of health and social security, which means that its tasks are exclusively social and guided by the principle of solidarity, is also subject to the rules on competition. In some legal writings the answer is negative, the justification being the fact that these are the domains of solidarity where mere effectiveness does not rule (Porto & Silva, 2013).

Even if it is not possible to ignore the issues and controversy we referred to, we would say that what is expressed in Art. 12 of the *LBES* is that: (i) integration in the social economy sector does not mean that an entity is not subject to national and community rules on competition; (ii) the spirit of the law is to allow that these social economy entities, as well as general interest social services are not subject to national and community rules on competition, whenever that prevents them from pursuing their objective: the pursuit of the general interest.

7. Conclusions

The *LBES* is a contribution to the explicit legal recognition of the social economy, which is a factor of great significance in the legitimisation of this sector. However, in the Portuguese legal system, the issue of the invisibility of the social and co-operative sector is not a relevant question, due to the constitutional provisions for the sector. The social and co-operative sector is thus the object of autonomous provision by the *CRP*.

The *LBES* is also a contribution to the definition of the concept of social economy, by centring that definition on the activity of the social economy entities (a social and economic activity) and on the object pursued (the general interest), and by presenting an open list of the entities of the sector, as well as defining the guiding principles of those entities.

Also worth emphasising is the concern with the identification of the modes through which the social economy is organised and represented and the identification of channels through which the institutions of the social economy and the public authorities communicate, channels which should be stable and based on the principle of co-operation.

The promotion of the social economy by the public authorities is one of the most important objectives of the *LBES*, when it recognises that such promotion is already established in the constitutional rule that provides for the principle of protection of the social and co-operative sector, which, in turn, shall be the foundation for the adoption of distinct solutions in the areas of taxation, competition, or others, thus providing for a positive discrimination. Such positive discrimination is the result, not only of the social objects pursued by these entities, but also of their modes of organisation and operation.

To conclude, we would say that, even though there was evolution from the Draft Bill to the final approved text, a point which, in our opinion, is particularly open to criticism is that in the definition of the guiding principles the structural heterogeneity that characterises the sector has been ignored. We believe that it would have been wise to provide for an exception for the foundations, in what concerns the principle of democratic control by members. We also do not approve of the inadequate use of the term “surpluses”, in par. g) of Art. 5, when in the *LBES* the principle of the allocation of surpluses of these entities in accordance with the general interest is provided for. Finally, we question the difficulties arising from the interpretation of the rules on taxation and on competition, caused by the wording of the same rules.

References

- Abreu, J. M. Coutinho de (2013), “Artigo 3.º”, in: *Lei da Concorrência – Comentário Conimbricense*, Miguel Gorjão-Henriques (coord.), Coimbra, Almedina, 33-38.
- Almeida, V. (2011), *As Instituições Particulares de Solidariedade Social*, Almedina/CES, Coimbra.
- Bahía Almansa, M. B. (2011), “El régimen fiscal especial de las cooperativas y su compatibilidad con la normativa sobre ayudas del Estado”, *CIRIEC-España, Revista Jurídica de Economía Social y Cooperativa*, No. 22, 151-180.
- Costas Comesaña, J. (2012), “O regime fiscal das cooperativas como auxílio público que falseia a concorrência no Mercado Interno. Comentário ao Acórdão do Tribunal de Justiça de 8 de setembro de 2011”, in: *Jurisprudência Cooperativa Comentada. Obra coletiva de comentários a Acórdãos da Jurisprudência Portuguesa, Brasileira e Espanhola*, Deolinda Aparício Meira (coord.), IN-CM, 107-122.
- Dabormida, R. (1989), “Le legislazioni cooperative nei paesi della Comunità Europea”, *Rivista del Diritto Commerciale*, 7/8, 451-497.
- Fajardo Garcia, G. (2009), “La economía social en las leyes”, *CIRIEC-España, Revista de Economía Pública, Social y Cooperativa*, No. 66, 5-35.
- (2013), “La especificidade de las sociedades cooperativas frente a las sociedades mercantiles y la legitimidad de su particular régimen jurídico y fiscal según el Tribunal de Justicia de la Unión Europea”, *Revista de Derecho Mercantil*, 288, 189-222.
- Fonseca, R. G. da (2008), *Comentário à Constituição Portuguesa, II Volume, Organização económica (Artigos 80.º a 107.º)*, Paulo Otero (coord.), Almedina, Coimbra.
- Fuster Asencio, M.^a C. (2009), “Razones que justifican una fiscalidade específica de las mutualidades de previsión social”, *CIRIEC-España, Revista Jurídica de Economía Social y Cooperativa*, No. 20, 2-34.
- Aparício Meira, D. (2009), *O regime económico das cooperativas no Direito Português: o capital social*, Vida Económica, Porto.
- (2010), “O direito ao retorno cooperativo”, *Cooperativismo e Economia Social*, No. 32, Universidade de Vigo, 7-34.
- (2011a), “O quadro jurídico-constitucional do cooperativismo em Portugal”, *Cooperativismo e Economia Social*, No. 33, Universidade de Vigo, 31-46.
- (2011c), “As insuficiências do regime legal do capital social e das reservas na cooperative”, in: *I Congresso de Direito das Sociedades em Revista*, Almedina, 129-155.
- (2012), “O regime de transmissão dos títulos de capital na cooperativa”, in: *Jurisprudência Cooperativa Comentada. Obra coletiva de comentários a Acórdãos da Jurisprudência Portuguesa, Brasileira e Espanhola*, Deolinda Aparício Meira (coord.), IN-CM, 549-555.
- Miranda, J. & Medeiros, R. (2006), *Constituição Portuguesa Anotada*, Tomo II, Coimbra Editora.

Montesinos Oltra, S. (2012), “Ley de Economía Social, interés general y regímenes tributários especiales”, *CIRIEC-España, Revista Jurídica de Economía Social y Cooperativa*, No. 23, 2012, 9-35.

Monzón Campos, J. L. (2010), “La economía social ante los nuevos desafíos”, in: *Estudios de Economía Social*, Universidad de Valladolid, 21-41.

Namorado, R. (2011), “A Identidade Cooperativa na Ordem Jurídica Portuguesa”, *Oficina do Centro de Estudos Sociais*, No. 157, Faculdade de Economia da Universidade de Coimbra.

— (2005), *Cooperatividade e Direito Cooperativos. Estudos e Pareceres*, Almedina, Coimbra.

— (2006), “Os quadros jurídicos da economia social – uma introdução ao caso português”, *Oficina do Centro de Estudos Sociais*, No. 251, Faculdade de Economia da Universidade de Coimbra.

Paz Canalejo, N. (2012): *Comentario sistemático a la Ley 5/2011, de Economía Social*, Tirant lo Blanch.

Porto, M. & Silva, J. N. Calvão da (2013), “Artigo 4.º”, in: *Lei da Concorrência – Comentário Conimbricense*, Miguel Gorjão-Henriques), Coimbra, Almedina, 39-45.

Sánchez Pachón, L. Á. (2009), “La delimitación de las entidades y organizaciones de economía social en la próxima ley reguladora del sector”, *CIRIEC-España, Revista de Economía Pública, Social y Cooperativa*, No. 66, 61-84.

This yearly series of working papers (WP) aims to publish essentially works in English or in French resulting from the scientific network of CIRIEC and more specifically its working groups. The WP are submitted to a review process and are published under the responsibility of the President of the International Scientific Council, the president of the scientific Commissions or the working groups coordinators and of the editor of the CIRIEC international scientific journal, the *Annals of Public and Cooperative Economics*.

These contributions may be published afterwards in a scientific journal or book.

The contents of the working papers do not involve CIRIEC's responsibility but solely the author(s)' one.

The submissions are to be sent to CIRIEC, Université de Liège au Sart Tilman, Bât B33 (bte 6), BE-4000 Liège, Belgique.

Cette collection annuelle de Working Papers (WP) est destinée à accueillir essentiellement des travaux en français ou en anglais issus du réseau scientifique du CIRIEC et en particulier de ses groupes de travail. Les WP font l'objet d'une procédure d'évaluation et sont publiés sous la responsabilité du président du Conseil scientifique international, des présidents des Commissions scientifiques ou des coordinateurs des groupes de travail et de la rédactrice de la revue scientifique internationale du CIRIEC, les *Annales de l'économie publique, sociale et coopérative*.

Ces contributions peuvent faire l'objet d'une publication scientifique ultérieure.

Le contenu des WP n'engage en rien la responsabilité du CIRIEC mais uniquement celle du ou des auteurs.

Les soumissions sont à envoyer à l'adresse du CIRIEC, Université de Liège au Sart Tilman, Bât B33 (bte 6), BE-4000 Liège, Belgique.

Publications

- 2014/01 Berliner Wasserbetriebe (BWB) – Water and sewage company in Berlin
Christina SCHAEFER & Stephanie WARM
- 2014/02 Berliner Wasserbetriebe (BWB)
Christina SCHAEFER & Stephanie WARM
- 2014/03 Publicization versus Privatization: Recent worldwide evidence
Stefano CLÒ, Chiara F. DEL BO, Matteo FERRARIS, Carlo FIORIO,
Massimo FLORIO & Daniela VANDONE
- 2014/04 Statistical methods for evaluating satisfaction with public services
Giancarlo MANZI & Pier Alda FERRARI
- 2014/05 The French Post
Philippe BANCE & Nathalie REY
- 2014/06 Relation entre l'opérateur de transport public à Bruxelles (STIB)
et l'autorité organisatrice : entre asymétrie et coopération
Christophe GOETHALS
- 2014/07 Reviving social economy in Romania – between emerging social enterprises
in all sectors, surviving communist coops, and subsidiaries of globalization
actors
Cristina BARNA & Ancuța VAMEȘU
- 2014/08 Social exclusion and work integration: Social cooperatives
for people with mental health problems in Greece
Sofia ADAM
- 2014/09 Can the Uncertainty Caused by the Questioning of Tax Measures in Relation
to Cooperatives by the ECJ Be Solved?
Sofía ARANA LANDÍN
- 2014/10 Social Economy, Its Perception and Possibilities of Its Development
in Conditions of the Slovak Republic
Lenka PČOLINSKÁ
- 2014/11 Aid and Support for the Social Economy in Poland – The Case of
Social Cooperatives
Karolina MAJDZIŃSKA
- 2014/12 The Portuguese Law on Social Economy
Deolinda APARÍCIO MEIRA

CIRIEC (International Centre of Research and Information on the Public, Social and Cooperative Economy) is a non governmental international scientific organization.

Its **objectives** are to undertake and promote the collection of information, scientific research, and the publication of works on economic sectors and activities oriented towards the service of the general and collective interest: action by the State and the local and regional public authorities in economic fields (economic policy, regulation); public utilities; public and mixed enterprises at the national, regional and municipal levels; the so-called "social economy" (not-for-profit economy, cooperatives, mutuals, and non-profit organizations); etc.

In these fields CIRIEC seeks to offer information and opportunities for mutual enrichment to practitioners and academics and for promoting international action. It develops activities of interest for both managers and researchers.

Le CIRIEC (Centre International de Recherches et d'Information sur l'Economie Publique, Sociale et Coopérative) est une organisation scientifique internationale non gouvernementale.

Ses **objectifs** sont d'assurer et de promouvoir la collecte d'informations, la recherche scientifique et la publication de travaux concernant les secteurs économiques et les activités orientés vers le service de l'intérêt général et collectif : l'action de l'Etat et des pouvoirs publics régionaux et locaux dans les domaines économiques (politique économique, régulation) ; les services publics ; les entreprises publiques et mixtes aux niveaux national, régional et local ; l'économie sociale : coopératives, mutuelles et associations sans but lucratif ; etc.

Le CIRIEC a pour but de mettre à la disposition des praticiens et des scientifiques des informations concernant ces différents domaines, de leur fournir des occasions d'enrichissement mutuel et de promouvoir une action et une réflexion internationales. Il développe des activités qui intéressent tant les gestionnaires que les chercheurs scientifiques.



International Centre of Research and Information on the Public, Social and Cooperative Economy - aisbl
Centre international de Recherches et d'Information sur l'Economie Publique, Sociale et Coopérative - aisbl

Université de Liège au Sart-Tilman
Bât. B33 - bte 6
BE-4000 Liège (Belgium)

Tel. : +32 (0)4 366 27 46
Fax : +32 (0)4 366 29 58
E-mail : ciriec@ulg.ac.be
<http://www.ciriec.ulg.ac.be>