



Los grupos económicos cooperativos y el reto de cuantificar las entidades de la economía social¹

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Recibido: 27 de marzo de 2018 / Aceptado: 4 de febrero de 2019

Resumen. El Código Cooperativo portugués permite a las cooperativas establecer sociedades mercantiles y filiales, así como adquirir participaciones en el capital social de sociedades mercantiles, siempre y cuando ello no perjudique la autonomía de la cooperativa. Si la cooperativa adopta esta estrategia de grupo para satisfacer las necesidades de sus miembros, nos encontramos ante el concepto de "mutualidad indirecta", admitido expresamente en la doctrina y en la legislación de ciertos ordenamientos jurídicos. En estos casos, la Cuenta Satélite de la Economía Social debe considerar a estas sociedades mercantiles controladas o participadas por cooperativas como entidades de la economía social. Por tal motivo, es necesario un análisis casuístico que permita distinguir entre la mutualidad indirecta y la *societalización* del fenómeno cooperativo.

Palabras clave: Grupo cooperativo; Sociedad mercantil; Mutualidad indirecta; Economía Social; Principios orientadores; Cuenta Satélite.

Claves Econlit: K30; K49; P13.

[en] The cooperative economic groups and the problem of the quantification of the social economy entities

Abstract. The Portuguese Cooperative Code allows cooperatives to set up commercial companies, subsidiaries, and acquire shares in the capital of commercial companies, provided this does not affect the autonomy of the cooperative. If through these group strategies, the cooperative aims to meet the needs of its members, we will be facing on the concept of 'indirect mutuality', a concept expressly admitted by the doctrine and the rules of certain jurisdictions. In these cases, the Social Economy Satellite Account should consider these commercial companies owned or participated by cooperatives as entities of the social economy. Therefore, a case-by-case analysis will be carried out to distinguish situations of indirect mutuality from situations of companization of the cooperative phenomenon.

Keywords: Cooperative group; Commercial companies; Indirect mutuality; Social economy; Guiding principles; Satellite Account.

Summary. 1. Introduction. 2. Inter-cooperation and integration of cooperatives: grounds and framework. 3. The technical and legal expedient of the association of cooperatives with other legal

¹ This text corresponds, with slight modifications, to the communication presented at the 9th Iberian International Colloquium on Cooperativism and Social Economy, held in Santiago de Compostela (Galicia) on October 5 and 6, 2017.

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persons. 4. The cooperative Integration and the question of the indirect mutuality. 5. The issue of the quantification as entities of the social economy. 6. Conclusions. 7. Bibliographical references.

How to cite: Meira, D. (2019) The cooperative economic groups and the problem of the quantification of the social economy entities. *REVESCO. Revista de Estudios Cooperativos, Segundo Cuatrimestre*, Nº 131, pp. 103-124. DOI: 10.5209/REVE.63562.

1. Introduction

In Portugal, the cooperatives have been adopting group strategies, through the establishment of commercial companies, holding companies (SGPS), subsidiaries, shares in the capital of national or non-national commercial companies.

Taking into account the data of the Social Economy Satellite Account (SESA 2013)³, for the total number of cooperatives in question (2177 cooperatives), there are 188 cooperatives holding a total of 340 shares in the capital of other entities, of which 42 own 100% of the share capital of said entities.⁴

Approximately 81% of the commercial companies that are 100% owned by cooperatives develop their economic activity in the following areas: development, housing and environment (26.8%), processing activities (22%), culture, sports and recreation (17.1%), trade, consumption and services (14.6%).

The economic relevance of these commercial companies owned by cooperatives is evident. In fact, in 2013, this phenomenon has generated approximately 137.8 million EUR of Gross Value Added (GVA). In addition, the commercial companies 100% owned by the cooperatives were also responsible for the payment of 46.8 million EUR on compensations in 2013.

As it is highlighted in SESA, this reality makes the analysis of the economic dimension of the cooperatives more complex.

In line with the French SESA (2013 Edition), it was decided not to include the values presented by the commercial companies 100% owned by cooperative capital or by other commercial companies, directly or indirectly owned by cooperatives, although it was included in the document a “box” containing additional information about the group strategies and its importance in terms of employment and GVA.

This option has an obvious impact. As set out in the said “box”, if the GVA generated by these commercial companies was taken into account, the cooperatives would turn into the second group of the most relevant entities of the social economy, and the weight of the GVA of the social economy in the total of the national economy would rise from 2.8% to 2.9%.

In this paper, we intend to inquire if this option of excluding these commercial companies owned or held (directly or indirectly) by cooperatives within the social economy sector and not consider their economic value for statistical purposes, is

³ Project developed by the National Institute of Statistics (INE), in partnership with CASES (Cooperativa António Sérgio para a Economia Social), as a result of a cooperation protocol signed between both.

⁴ https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_destaques&DESTAQUESdest_boui=278817467&DESTAQUESmodo=2&xlang=en

juridically the most appropriate approach, considering the guiding principles of this sector enshrined in the Portuguese Framework Law on Social Economy (LBES)⁵.

This quest will involve a preliminary reflection on the reasons justifying these group strategies, regarding the concept of “indirect mutuality” and its eligibility in the Portuguese legal system, as well as on the economic regime of the results arising from the shares of cooperatives in commercial companies.

Methodologically, this study bases itself on a bibliographic and desk research, and on the analysis of the legislation that frames this thematic.

2. Inter-cooperation and integration of cooperatives: grounds and framework

The economic globalization, the emergence of major international economic groups and the saturation of the market, have forced the cooperatives to increase their size, in order to become more competitive. In fact, one can see that many cooperatives are small and medium-sized and, frequently, to survive in the competitive market that surrounds them, they have to get involved in integration and cooperation processes (Vasserot, 2010; Nagore, 2016).

These processes have their bases, from the outset, in Article 61(3) of the Constitution of the Portuguese Republic, under which: “Cooperatives can be grouped into unions, federations, and confederations or other forms of organization provided by law.”

In the same vein, Article 7(1) of the LBES states that: “social economy entities may organise themselves freely and group themselves into associations, unions, federations, or confederations that represent and defend their interests” (Meira, 2013).

Finally, the Portuguese Cooperative Code (PCC), approved by the Law 119/2015, of August 31, allows various forms of articulation among cooperatives: multi-sector cooperatives (Article 4(2)); the incorporation of cooperatives of a higher degree or the second degree (Articles 101 to 108); and the association between cooperatives and other legal persons (Article 8).

All these forms have their bases on Article 3 of the PCC, which states the principle of cooperation among cooperatives, and provides that “cooperatives serve their members most effectively and strengthen the cooperative movement by working together through local, national, regional, and international structures.” This principle establishes a duty of mutual cooperation among cooperatives (inter-cooperation) that has the aim of continuing the interests of cooperators and the community in which the cooperative operates.

The concept of inter-cooperation adopted in this study is nevertheless broader than the cooperative principle underlying the above definition, since we believe that this concept can cover both relations among cooperatives and relations between cooperatives and other legal persons.

The doctrine points two classification criteria, regarding the inter-cooperation forms: a criterion that distinguishes between the formal and the informal inter-

⁵ Law 30/2013 of 8 May 2013.

cooperation; another one that distinguishes between horizontal and vertical inter-cooperation (Namorado, 1995; Leite, 2012).

The informal inter-cooperation results in a set of contractual relationships that reflect an economic or another, more or less regular, form of collaboration and does not lead to a loss of individuality on the part of each cooperative.

In turn, the formal inter-cooperation translates into the integration of cooperatives into higher-tier structures or into associations by cooperatives with other legal persons, resulting the creation of another legal person of a cooperative or other nature.

Inter-cooperation may take one of two forms: horizontal inter-cooperation (between cooperatives from the same or different branches, or between cooperatives and other legal persons); and vertical inter-cooperation (cooperative groups and second-tier cooperatives).

In all these cases of inter-cooperation, and as stated in Article 3 of the PCC, the aim is to increase the effectiveness of how a cooperative serves its members, with its mutualist scope being the ultimate foundation for these processes.

3. The technical and legal expedient of the association of cooperatives with other legal persons

3.1. The terms of association

Focusing now on the terms of association, the Article 8(1) of the PCC provides for “the association of cooperatives and other legal persons, provided that this association respects the cooperative principle of autonomy and independence.”

From this rule, it follows that:

- (i) Cooperatives can associate with two categories of legal persons: legal persons of a cooperative or non-cooperative nature (associations, foundations, civil companies, commercial companies, and others); and
- (ii) This association may or may not result in the creation of another legal person.

Legal persons created by associations of cooperatives are cooperatives that must not be confused with second-tier cooperatives (Namorado, 2000). This understanding is reinforced by Article 8(3), of the PCC, which expressly allows the extension of the voting regime of higher-tier cooperatives to legal persons resulting from an association between cooperatives.

Under Article 8 of the PCC, cooperatives may also join a consortium or an association in the form of a partnership (Decree-Law No. 231/81 of 28 July 1981) or participate in a complementary group of companies (Decree-Law No. 43/73 of 25 August 1973)⁶.

⁶ Regarding the admissibility of the participation by a cooperative in a complementary group of companies, see the Opinion issued by the “Conselho Técnico da Direção-Geral dos Registos e do Notariado” dated 24.04.2001, in *Boletim dos Registos e Notariado*, May 2001 (*Parecer da Direção-Geral dos Registos e do Notariado* de 24 de abril de 2001).

3.2. Requirements

Under Article 8(1) of the PCC, maintaining the autonomy and independence of a cooperative is a necessary condition for its association with other legal persons.

This idea of autonomy and independence refers to the cooperative principle of the autonomy and the independence (Article 3 of the PCC)⁷ and it will aim to ensure that the cooperative's association with other legal persons calls into question neither the independence of the cooperative nor its democratic member control. We are therefore referring to autonomy in the existence and winding up of the cooperative (which could be jeopardised if unlimited liability is assumed) and to autonomy in the management of its business and assets.

On the same line as Correia & Rodrigues (2012: 393), we disagree with Namorado's position when he argues that observance of the principle of autonomy would not be compatible with the integration of a cooperative into a commercial company in which it did not hold a majority position (Namorado, 2000: 190). This doctrinal position would prevent, from the outset, the establishment of commercial companies exclusively by cooperatives, in which the different cooperative partners will not be able to hold the majority of the shares.

Thus, to determine if the autonomy is or is not affected by the cooperative association with other legal persons, it is needed a case-by-case assessment.

In this direction, it is important to stress some examples of factual and legal situations that can imply the loss of autonomy (Correia & Rodrigues, 2012), namely:

- (i) The assumption of unlimited liability by the cooperative, as a partner of a commercial company;
- (ii) The allocation by the cooperative of a significant part of its property to make a contribution to a commercial company that has a subordination contract with another partner;
- (iii) The displacement by the cooperative of instrumental activities, although essential to its functioning for a commercial company, in which originally had the majority of votes, but lost them later, following an increase in the capital; or
- (iv) The case of the execution of a shareholders' agreement by the cooperative that affects its voting rights in a constituted company that is valid under Article 17 of the CSC (Trigo, 1998).⁸

⁷ This principle states that "Cooperatives are autonomous, self-help organisations controlled by their members. If they enter into agreements with other organisations, including governments, or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintain their cooperative autonomy."

⁸ The shareholders agreements are conventions concluded between two or more persons, on the side-lines of the memorandum and the articles of association of the company, which focus on social matters and aim at the production of a legal bond between them.

3.3. Problematization of the question of knowing if the cooperatives can establish companies

The Article 8(1) of the PCC allows the cooperatives to set up companies, including commercial companies, provided this association does not undermine the autonomy of the cooperative, as previously mentioned.

We find no restriction in the corporate legal regime on participation of a cooperative in a commercial company, since neither Article 980 of the Portuguese Civil Code,⁹ nor the Commercial Companies Code (CSC) (except for cases in which the CSC requires that the partner have a certain corporate form, as in the system of affiliated companies, particularly with regard to companies in a group relationship) poses any obstacle to the access of a cooperative to a partner in a commercial company (Correia & Rodrigues, 2012).

In this context, cooperatives may create companies, including commercial companies.

Cooperatives may not, however, constitute any kind of commercial company. Indeed, given the rules in Article 8 of the PCC (namely the prohibition against loss of autonomy) cooperatives cannot assume unlimited liability in commercial companies.

This means that not all types of company, or types of liability permitted by them, will be accessible to cooperatives.

In particular, cooperatives cannot be a partner in a general partnership or be a general partner in a limited partnership, because in these types of companies, the partners, besides of being held accountable to the company for its obligation of contribution, they are also held accountable to company's creditors for the company's obligations (Articles 175 and 465 of the CSC).

In the case of a private limited company, cooperatives cannot assume liability for company debts in their statutes, on the terms mentioned in Article 198 of the CSC.¹⁰

3.4. Problematization of the possibility of a cooperative itself creating a commercial company

As mentioned before, from the data contained in the Social Economy Satellite Account (SESA 2013) results that 42 cooperatives hold, directly or indirectly, the totality (100%) of the share capital of other legal persons.

We will be referring, from the outset, to the single-member private limited company (*sociedades unipessoais por quotas* (Arts 270-A ff. of the CSC), created originally by cooperatives and to the situations of supervening tolerated

⁹ This norm provides that “Memorandum of association is the one in which two or more people commit to contribute with goods or services to pursuit together a certain economic activity that is not of mere fruition, in order to distribute the profits resulting from this activity.”

¹⁰ The Article 198 of the CSC constitutes a deviation from the general rule of the limitation of liability of the partners of the private limited company. Indeed, Article 197(3) of the CSC provides that only the assets of the company shall be accountable to the company's creditors. The Article 198(1) allows that, through a statutory provision, the partners assume direct liability towards the company's creditors (joint or subsidiary in relation to the company and to perform only in the liquidation phase); despite of being a personal liability, it continues to be a limited liability (“up to a certain amount”).

single-shareholdership (Article 142, paragraph 1(a), of the CSC). This last situation occurs when a company is established with several partners, but due to several vicissitudes sees the number of partners reduced to the unit and, consequently, witnesses the concentration of the shares held by remaining partner. In this case, we will have an alleged transience of the supervening single-shareholdership, with risks of a deferred dissolution.¹¹

It is excluded the direct establishment, by cooperatives, of single-member public limited companies, because the corporate legislator does not allow that a cooperative establishes, for itself, a single-member public limited company, affecting this ability to the private limited companies, public limited companies and limited partnerships by shares [Article 488(1), in set with Article 481(1) of the CSC].

In this context, it seems clear that when we talk about the possibility of a cooperative establishing, alone and directly, a commercial company, we are referring only to single-member private limited company [Article 270(A) et seq. of the CSC]. As a matter of fact, Article 270(C), paragraph 2, of the CSC allows the unilateral establishment of a single-member private limited company by any legal persons, as long as it is not another private limited company (Costa, 2003).

Nothing prevents, according to our point of view, the cooperative to establish a single-member private limited company. The incorporated company enjoys autonomy of assets and the sole shareholder (the cooperative) has limited liability. In fact, the company and the cooperative are two separate legal entities, with separate accounts. From a tax perspective, the company and the cooperative have different tax regimes and therefore the tax benefits afforded to the cooperative are not applicable to the company. Finally, the sole shareholder (in this case the cooperative) controls the single-member private limited company, in full compliance with the principle of the democratic member control and the principle of autonomy and independence (Costa, 2003).

3.5. The question of the cooperative groups

The PCC is silent on the issue of cooperative groups. Thus, if one takes into account the provisions of Article 9 of the PCC, which contains a reference to the CSC, which is immediately applicable to anything that is not specifically provided for in the PCC, and since the solution does not infringe cooperative principles (Frada & Gonçalves, 2009), we must reflect on arrangements for cooperative groups that are consistent with those principles to which Portuguese cooperatives may have access.

The corporate law does not allow the cooperatives to establish the so-called legal company groups, which means those whose creation results from the use of one of the legal instruments that the Commercial Companies Code explicitly predicted for this purpose. In the Portuguese legal system, there are three

¹¹ The Article 142(1) of the CSC provides that the dissolution can be administratively required: “a) When, for over a year, the number of partners is inferior to the minimum required by law, except if one of the remaining partners is the State or entity equivalent to him in law for that purpose.”

instruments: the total control (Articles 488 and 489 of the CSC);¹² the joint venture relating to groups (Article 492 of the CSC)¹³ and the subordination agreement (Article 493 of the CSC).¹⁴ The rules governing these legal instruments are exceptional (Antunes, 2002), therefore, its application by analogy is not possible.

This exceptional nature finds its foundation in two deviations from the traditional normative standard: (i) in the group relations, the managing company (partner of the subordinated one in the group relations by total control; and partner in the group relations based on subordination agreement) has the right to give binding instructions to the management of the subordinated company (Article 503 of the CSC); (ii) as counterpoint to the existing permeability between the grouped companies and its assets, it is allowed to the creditors of the subordinated company a supplemental protection, imposing a personal and unlimited liability of the managing company (or head) for all the obligations of the subordinated company. Therefore, in exchange for the power of emanating binding instructions, the managing company answers without limits for the obligations and losses of the subordinated company, in benefit of the creditors of this company (Costa, 2014).

Thus, regarding the cooperatives, when we talk about groups, we will be only talking about *de facto* company groups, that is to say, those where the management power held by the parent company on its subsidiaries had its origin not in a legal instrument of establishment of the group, but in contractual legal instruments or other sources, as majority shareholding, shareholder agreements, inter-company contracts, economic and factual relations of dependence (Antunes, 2002).

4. The cooperative Integration and the question of the indirect mutuality

4.1. Previous presentation of some examples from the cooperative practices

For a better understanding of the concept of indirect mutuality and its possible admissibility in the Portuguese legal system, we resort, previously, to a few examples from the practice on the cooperative economic groups.

Specifically, we will describe three cooperative groups that have in common the circumstance of the cooperative holding 100% of the share capital of an entity whose legal form is the one of a holding company (SGPS), which in turn holds shares of other companies.

The Holding Companies (SGPS), regulated by the Decree-Law 495/88, of December 30,¹⁵ are commercial companies, that can adopt the form of private limited company or public limited company, that concern the lasting holding of

¹² In accordance with the Article 488 of the CSC, the initial or original total control relies on the exclusive ownership of a public limited company by one single partner that will be able to assume the form of a public limited company (single or plural), a private limited company (single or plural) or a limited partnership by shares.

¹³ Group situation of agreement basis, where companies, independent of one another, subordinate themselves to a single and common management.

¹⁴ Group situation of agreement basis, in which a company (called subordinate) subordinates its management to the board of another company, called "head company", dominant or not of the first company.

¹⁵ With the changes that were introduced by the Decree-Law 318/94, of December 23, by the Decree-Law 78/98, of November 27 and by the Law 109-B/2001, of December 27.

shares of other companies, legally independent, not exerting directly an economic activity. They are framed in the general figure of the holding companies, being companies established with the purpose of intervening in the management and control of the participated ones, exerting the social rights inherent to the corresponding shares, in order to receive the profits or dividends, as well as the resultant incomes of eventual alienations of these shares.

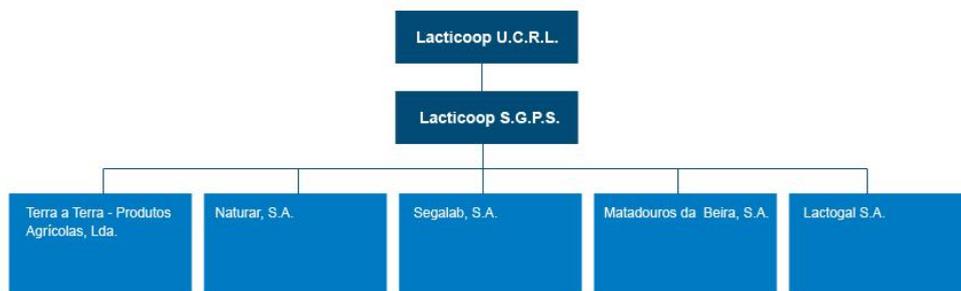
Through the Holding Companies, the cooperatives exert indirectly an economic activity. Thus, Article 1, paragraph 2 of the Decree-Law 495/88 provides that “(...) the share in a company is considered to be an indirect way of the exercise of an economic activity when it does not have occasional character and reaches, at least, 10% of the share capital with voting rights of the subsidiary company, either by itself, or through shares of other companies that the Holding Company is dominant” (Lopes, 1998).

Of the information available in the electronic page of the “Grupo Lacticoop”, results that the Group includes a union of cooperatives, the “Lacticoop, UCRL”, whose corporate object is the wholesale trade of milk, which, through a Holding Company, the “Lacticoop SGPS Unipessoal, Lda.”, participates in the “LACTOGAL - Produtos Alimentares, SA.”. Through this SGPS, the cooperative is, equally, shareholder of the “Matadouros da Beira Litoral, SA”, a company whose corporate object is the promotion of the regional development, implementation, namely by the direct or indirect exercise of the slaughter, transformation, treatment and commercialization of meats and its derivatives, in which it withholds a shareholding of 29.38%. It is, also, through the same SGPS, partner of the “Segalab - Laboratório de sanidade animal e segurança alimentar, SA”, that has as corporate object the rendering of services of analyses and samples of veterinary, agricultural origin, of food and feed, as well as the support to the dairy farms and the rendering of services of assistance to the hygiene and health control of the production, processing and supply chains and companies of the agri-food sector, in which withholds a shareholding of 2%. Through the same SGPS, she is the only partner of “Naturar SA”, company whose corporate object includes the activities of processing, trading and packing agricultural products. Finally, through the same SGPS, it is partner of the “Terra a Terra - Produtos Agrícolas, Lda.”, a company whose corporate object is the wholesale trade of milk and other agricultural products, developing as complementary activities the road transport of goods, national and international on behalf of third parties; maintenance and repair of vehicles and equipment, distribution and transportation of agricultural products, rental of machinery and equipment, the provision of logistical and operational services, farming and agribusiness exploitation, provision of technical support services in these areas. In this company, it withholds a shareholding of 99,93%.¹⁶

This scheme of relations is shown in the image below (also from the electronic page):

¹⁶ Information available in <http://www.lacticoop.pt/2/participacoes.html> (retrieved on 16 July 2017).

Figure. 1. Group Lacticoop.

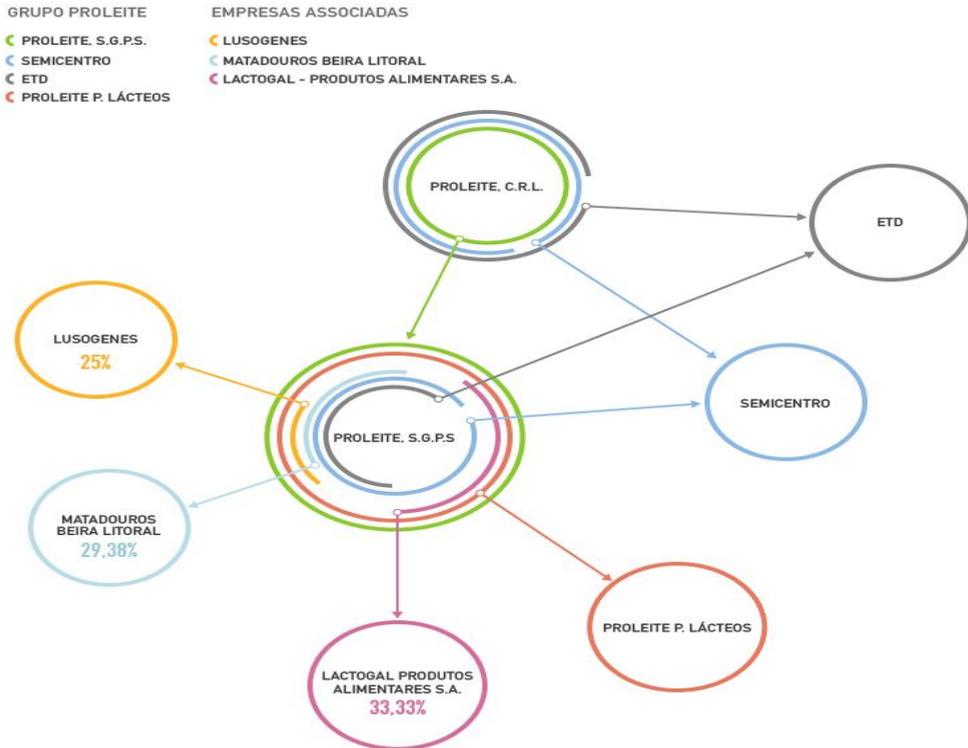


Group Lacticoop - <http://www.lacticoop.pt/2/participacoes.html>

In turn, through the information available on the electronic page of the cooperative Proleite, one can verify the existence of a scheme of relations between the entities that constitute the Proleite Group. The Proleite cooperative, CRL is owner of the Proleite SGPS that, in turn, holds a share of 33.3% of the capital of LACTOGAL – Produtos Alimentares, SA.¹⁷ In the same electronic page, it is possible to see a scheme of relationships between the entities that constitute the Proleite Group (as presented in the diagram below):

¹⁷ Information available in <http://www.proleite.com.pt/index.php/grupo-proleite> (retrieved on 16 July 2017).

Figure. 2. Proleite Group.

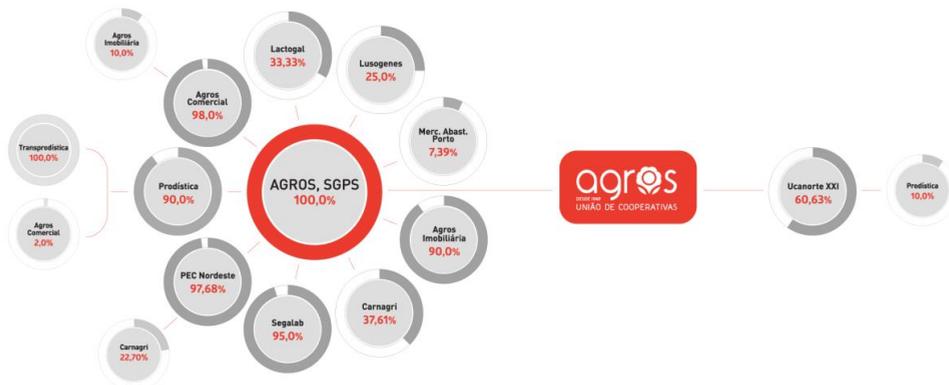


Proleite Group - <http://www.proleite.com.pt/index.php/grupo-proleite>

Similarly, the scheme that illustrates the relationships of the Agros Group, available in its electronic page, suggests that the relationship between Agros UCRL and LACTOGAL - Produtos Alimentares, SA is also mediated by Agros SGPS.¹⁸ On the same electronics page, it is possible to query a scheme of relationships between the entities that constitute the Agros Group (as presented in the diagram below):

¹⁸ Information available in <http://www.agros.pt/a-agros#grupo-agros> (retrieved on 16 July 2017).

Figure. 3. Agros Group.



Agros Group - <http://www.agros.pt/a-agros#grupo-agros>

4.2. The indirect mutuality

We will dwell not on the reasons that were on the basis of the formation of these groups and that led these cooperatives to resort to real operations of corporate engineering. Briefly, the doctrine points out some legal limitations of the cooperative model that prevent the growth and the possibilities of expansion and penetration of the cooperatives into new markets, as well as obtaining external resources: limits on the transfer of the cooperator's position, limits on the investor members, difficulties in concentrating capital and attracting foreign investment, obligation to allocate mandatory and indivisible reserves, limits on operations with third parties, limits on investment in commercial companies, among others (Vasserot, 2010).

What is certain is that from the examples mentioned it follows that cooperatives concerned develop their activity or, at least, a substantial part of it, not directly with its members, in the context of the cooperative, but indirectly through commercial companies controlled or participated by the own cooperative.

There are legal systems that, in this regard, recognize, specifically, the concept of "indirect mutuality". Effectively, one can indicate the Article L.24.1 of the French Code of Commerce for merchants cooperatives,¹⁹ as amended in 2001 (Hiez, 2013), the Finnish Law of 2002, in which the interchange between the cooperator partner and a controlled company (at least in 51%) by the cooperative is considered, expressly, as "mutualist", on the condition that the cooperative withholds the control of the company (Henry, 2013) and the Norwegian Law, as amended in 2007, which establishes, in the Article 1, Paragraph 3, of the Cooperative Act, 29 June 2007, No. 81, a definition of indirect mutuality, featuring that "A cooperative society also exists if the interests of the members [...] are promoted through the members' trade with an enterprise, which the cooperative

¹⁹ Law 2001-420 of the 15th of May 2001.

society owns alone or together with other cooperative societies, including secondary cooperative [...]” (Fjortoft & Gjems-Onstadt, 2013).

This concept also seems to be admitted in the Principles of European Cooperative Law (PECOL), the first project developed by the SGECOL (Study Group on European Cooperative Law), considering that when the concept of cooperative is defined (Section 1.1 (3)) one admits that “cooperative enterprise may include an enterprise carried out by a subsidiary if this is necessary to satisfy the interests of the members and the members of the cooperative maintain the ultimate control of the subsidiary” (Fajardo et al, 2017:19).

One shall not forget that the cooperatives have a mutualistic scope, once they aim, mainly, at the satisfaction of the needs of its members, as consumers, suppliers or workers of the cooperative, being this scope what distinguishes them from other entities. What truly identifies the cooperative is the absence of an autonomous scope that differentiates itself from the interests of the cooperators. Following the mutualistic scope of the cooperative, the cooperators assume the obligation of participating in the activity of the cooperative, cooperating mutually and helping one another in obedience to the cooperative principles [Article 22, Paragraph 2(c) of the PCC]. Such means that the cooperatives operate with its members, in the scope of an activity that is directed at them and in which they participate cooperating, activity that Spanish doctrine and law refers as “*actividad cooperativizada*” (Vasserot, 2006) and that in PECOL it is called “cooperative transactions” (Fajardo et al., 2017).

Therefore, it seems that the concept of “indirect mutuality” is compatible with the mutualistic scope, if admitted with limits and conditions, as in the PECOL. Thus, “Subsidiaries held by cooperatives are only permitted if their purpose supports the main institutional objective of member-promotion. Economic activities of cooperative enterprises cannot be entirely outsourced, so that the cooperative society no longer has a fully operational enterprise” (Münkner, 2017: 270-271).

Otherwise, it carries obvious risks of demutualization of the cooperatives, therefore, in the matter that concerns us, it is required always a case-by-case analysis, in order to determine if such limits and conditions were observed.

Actually, if the activity of the cooperatives has been transferred for the commercial company without any limits, we may be looking at a covert conversion of the cooperative into a commercial company, with the consequent violation of the Article 111 of the PCC, prohibiting the conversion of the cooperative into a commercial company.

In fact, the Article 111 of the PCC provides that “The conversion of a cooperative into any form of commercial company is null and void, as are all acts that seek to thwart or circumvent said legal prohibition.”

This prohibited form of conversion is heterogeneous, since the converted legal entity was not originally a commercial company (Correia, 2009; Lanz, 2010). Furthermore, the prohibited conversion includes both a formal cooperative conversion or a conversion by extinguishment, in which the original legal person is dissolved and replaced by another that succeeds it.

The legislator also forbids covert conversions, which are understood here as being any acts that allow cooperatives to access the regime of commercial companies.

Two main arguments are raised by legal theory against the admissibility of conversions:

- (i) the dogmatic argument: the causal heterogeneity of the two legal persons;
- (ii) the public order argument: difficulties with maintaining the control by the public authorities that is imposed on the activities of cooperatives (this control could no longer be carried out if a conversion were to be accepted) and the possibility that the cooperative format might initially be used to obtain the benefits granted by the legislator to cooperatives, including tax benefits, followed by a conversion into a company.

The first argument is based on the idea that the mutualist scope is essential to cooperatives and consequently that a cooperative cannot adopt a for profit purpose through its conversion into a commercial company without triggering its dissolution. This idea, which is defended in Portugal by Raúl Ventura, is based on a conceptual and interpretative rule according to which conversions of legal entities with different purposes are not permitted. The author invokes the essential difference in purpose between cooperatives and companies: the mutualist scope of cooperatives and the profit aims of commercial companies (Ventura, 1990).

This understanding is founded on the fact that the prevailing legal theory in Portugal argues that cooperatives are clearly distinct from commercial companies since one of the essential characteristics of commercial companies is the distribution of profits (in the sense of capital accruals) among their shareholders (Abreu, 1999).

Otherwise, it will be allowed the establishment of a commercial company by a cooperative or in association with other cooperatives, proving that the commercial company was established for the development of instrumental, preparatory or complementary activities of the economic activity developed between the cooperative and its members, keeping the main activity that was on the basis of its creation. The cooperative segments the activities that integrate its social object, delivering one or more of these activities to a subsidiary controlled or participated by the cooperative.

However, unlike what some doctrine defends (Bonfante, 2010), we consider that it won't be lawful a pure holding cooperative, where the cooperative simply holds companies' capital without directly performing any economic activity with its members (Münkner, 2017: 270-271).

We will always be able to question why, in these cases, the cooperative does not opt by the way that would be more natural considering the "cooperative identity" and that would be the establishment of a multi-sector cooperative [Article 4(2) of the PCC], that is to say, a cooperative that develops activities carried out by different branches of the cooperative sector (Leite, 2012).

In fact, in accordance with Article 4 of the PCC, the branches existing today in Portugal are: consumption; trading; agriculture; credit; housing and construction; working production; crafts; fishing; culture; services; teaching; social solidarity, assuming expressly that a cooperative covers activities from several branches.

The multi-sector or multi-purpose cooperatives may adopt an internal organisation that is divided into sections created and governed in terms of their operations, by the cooperative's statutes [arts. 13 and 19 of Decree-Law No. 335/99 of 20 August 1999 (agricultural cooperatives); art. 4 of Decree-Law No. 523/99 of 10 December 1999 (multi-sector trade cooperatives); art. 3 of Decree-Law No. 522/99 of 10 December 1999 (multi-sector consumer cooperatives); art. 4 of Decree-Law No. 502/99 of 19 December 1999 (multisector housing and building); and art. 3 of Decree-Law No. 7/98 of 15 January 1998 (social solidarity cooperatives)].

The risks of demutualization, if they exist, will be able to base a claim for civil liability against the members of the management and supervisory bodies (Articles 71 and 76 of the PCC) and, ultimately, give cause to an administrative procedure of dissolution of the cooperatives, promoted by the “Cooperativa António Sérgio para a Economia Social” (CASES), as external supervisory of the cooperatives in Portugal, based on the non-coincidence of the cooperative activity with the express object in the statutes [Article 118(2) of the PCC].

Leaving aside the underlying reasons to the option, that do not fit in the scope of this study,²⁰ the fact is that the Portuguese legislation on cooperatives does not recognize explicitly the concept of “indirect mutuality”, but it also does not forbid it.

In this context, admitting the possibility that the cooperative can develop its mutualistic scope indirectly, through a company controlled by itself or where it withholds shareholdings together with other cooperatives, arises the problem of the classification of the results originated from that economic activity. Can we classify them as cooperative surpluses?

The cooperative surplus is the term used in the doctrine and the legislation to assign the positive economic results that stem from the pursuit of the mutualistic scope by the cooperative, corresponding to the difference between revenue and the costs of the cooperativized activity with the members. It is an amount temporarily paid in excess by the cooperators to the cooperative or underpaid by the cooperative to the cooperators, in exchange for their participation in the activity of the cooperative (Bandeira, Meira & Alves, 2017).

Considering this definition, it seems, at first sight, that qualifying such results as surpluses would imply, from the outset, the denial of the legal entity of the participated commercial company. The cooperative and the commercial company are two separate legal entities with autonomous assets.

A possible solution would be to defend that the results originated from these operations developed by the companies controlled or participated by cooperatives should be under the regimen foreseen in the PCC for the operations with non-members or third parties (“terceiros”).

Indeed, the Article 2(2) of the PCC consecrates the possibility of cooperatives, in pursuit of their object, to conduct business with non-members, subject to any

²⁰ One of the arguments invoked by the cooperatives for the establishment of these economic groups concerns the great capitalist economic groups. See, in this regard, the judgment of the Court of Appeal of Lisbon, in September 29 2005, Case 2062/2005-8. The complete text can be consulted in: <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/3f6edd41f484c9c1802570c3003a06a5?OpenDocument&Highlight=0,associa%C3%A7%C3%A3o,de,cooperativas>.

restrictions set forth in the law applicable to each cooperative branch. Even though the law does not define what is meant by a third party (“terceiro”) it seems to be settled doctrine that in the wake of the teachings of Namorado (2005: 184): “from the cooperative point of view, non-members are those who have a business relationship that is directly related to the pursuit of the cooperative’s primary object as if they were members, although, in fact, they are not.”

This means that the business conducted with non-members the legislator is referring to is of the same kind of business as the one conducted by the cooperative with its members. In light of this concept of non-members or third parties (“terceiros”), the characterization of shareholdings in companies as a transaction with non-members does not seem to be adequate (Meira, 2009).

To preserve the mutualist scope — preventing the conversion of a cooperative into a *de facto* for-profit company — Portuguese cooperative law obliges the allocation of financial results arising from transactions with non-members that may not be distributed among cooperators (Articles 100.1 and 114 of the PCC) to indivisible reserves (Meira, 2016).

The basis for this legal regime is that in cooperatives, the economic results of transactions with non-members must be legally regarded as profit and not as a true cooperative surplus, since these transactions are not carried out as a part of a mutualistic activity.

However, we have some reservations about the full suitability of this solution. The doubt persists regarding the results proceeding from operations that the cooperative develops indirectly of commercial companies by them withheld or participated jointly with other cooperatives and that refer to activities situated in the cooperative social object, that, despite of being instrumental or complementary activities, are essential for the pursuit of the mutualistic scope. Today, it seems that the emergence of these groups and its relevance in economic terms will impose the necessity to revisit the regime of determination and distribution of these results in the cooperative and, eventually, to argue the possibility of, with restrictions, distributing a part of these results by the cooperators, applying similarly the regimen foreseen for the patronage refund (“retorno”).

This is the solution defended in the PECOL Principles, about the results coming from the subsidiaries, stating that “It should be noted (...) that the cooperative enterprise may include an enterprise of a subsidiary if this is necessary to satisfy the interest of the members and if the members of the cooperative maintain ultimate control over the subsidiary. In this case, this rule shall apply to the results of the activity carried out by the subsidiary which is necessary to satisfy the interest of the cooperative members” (Fajardo & Meira, 2017: 90).

Regarding the activities situated outside the cooperative social object (extra-cooperative activities), we will be clearly before profits (for example, results from the ownership of company shares or other assets).

In any case, what is certain is that the existence of cooperative groups generates a diversity of economic results (Fajardo, 1997). Therefore cooperatives must have separate accounts that allow surpluses from activities with members to be distinguished from profits obtained from transactions with non-members or other extra-cooperative activities. These separate accounts also permit a cooperative to

account for its divisible and indivisible assets without the risk of confusion (Fajardo, 2015).

Neither the PCC, nor the accounting legislation applicable to the cooperatives in Portugal (*Accounting Normalization System - SNC*)²¹ have commented on this question, so it is still possible, in the current state of the legislation, the non-adoption of a separate accounts, with the consequent difficulties in terms of control and supervision regarding the origin, distribution and allocation of the economic results of the cooperatives (Meira, 2016).

5. The issue of the quantification as entities of the social economy

At this point, it is time to question if these commercial companies withheld or participated by cooperatives could be considered (and, therefore, quantified) as entities of the social economy sector, what constitutes the main objective of this study.

The Framework Law on Social Economy (LBES) establishes, in the Article 4, the cast of the organizations of the social economy, stating that “they integrate the social economy, namely, the following entities, since established in national territory: a) cooperatives; b) mutual associations; c) Charities (*Misericórdias*); d) foundations; e) private institutions of social solidarity not included in the aforementioned ones; f) associations with altruistic purposes that act in the cultural, recreational, sports and local development scope; g) entities of the community and worker collective sub-sectors, integrated in the terms of the Constitution of the Portuguese Republic in the cooperative and social sector; h) other entities endowed with legal entity, that respect the guiding principles of the social economy, foreseen in the Article 5 of the LBES, and that appear in the database of the social economy” (Meira, 2013).

It can be questioned if these commercial companies withheld or participated by cooperatives cannot be considered entities of the social economy in accordance with the Article 4(h) of LBES.

In the search for an answer we cannot forget that the legislator makes this possibility conditional upon fulfilment of a basic requirement: the respect for the guiding principles of the social economy. These appear listed in the Article 5 of LBES, namely: “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

²¹ Decree-Law No. 158/2009 of 13 July (that approved the *SNC*), as amended by the Decree-Law No. 86/2015 of 11 March.

surpluses distribution within any social economy entity established in the Constitution.”

Considering that the commercial companies pursue, primarily, a profit purpose, it seems, at first sight, that it does not respect the guiding principle of the primacy of the person and the social objectives, from the outset on the capital. It is obvious that one can argue that these profits cannot be distributed by the cooperators, being necessarily allocated to the indivisible reserves, as detached above, for what it will be fulfilled the guiding principle foreseen in the subparagraph g).

It should be noted, further, the question of the respect for the principle of free and voluntary membership that in the case of the cooperatives will correspond to the cooperative principle of voluntary and open membership,²² which confers to the cooperative a structural variability, either in the plan of the cooperators and in the plan of the share capital [Article 2(1) and Article 81(1), both of the PCC]. The share capital of a conventional commercial company is fixed and steady, only being able to be modified with respect to the rigorous process foreseen in the statutes (Meira, 2009; Domingues, 2009).

In addition, it will not be applied to the commercial companies withheld or participated by cooperatives, which, as we saw, take the form of private limited or public limited company, the principle of the democratic control by members.

In the private limited or in the public limited commercial company it will be the share capital — and not the personal conditions of the partners — that will determine and organize their entire complex of rights and duties. Among the rights, it stands out the fundamental right to the profit, for which the rule, in the commercial companies, is that the partner will participate in the profits according to its participation in the share capital. As a matter of fact, the rule, in commercial companies, is that the participation in the profits will be the counterpart of the invested capital and, therefore, the distribution criterion depends on the participation of each one in the share capital (Santos, 2002).

The participation in the share capital will be, equally, relevant regarding other rights of partners, namely: the right to assign a minority representative in administration bodies and the right of supervision of the public limited companies (Serens, 1997)²³; the right to certain information on the life of the company (Labareda, 2002);²⁴ the right to require the convening of the General Meeting, in

²² The Principle of voluntary and open membership is formulated, in the Article 3 of the PCC, as follows: “Cooperatives are voluntary organisations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination.”

²³ The Article 392(6), of CSC, said that “The articles of association may also establish that a minority of shareholders having voted against a motion which was passed in the appointment of directors shall have the right to appoint at least one director, provided that this minority represents at least 10% of the share capital.” In turn, the Article 418(1), of the CSC, provides that “at the request of shareholders, owners of shares representing one tenth, at least, of the share capital, presented in the 30 days after the general meeting that has chosen the members of the Board of Directors and the Supervisory Board, the court can nominate another effective member and a substitute for the Supervisory Board [...]” Such norm will aim to assure to the minorities representation in the management of the company and in the nomination of the supervision body.

²⁴ In the public limited company, only those who hold 1% of the share capital *will be able to exert* the minimum right to information, enshrined in Article 288 of the CSC. The Article 291 consecrated the so-called collective right to information, stating, in paragraph 1, that “the shareholders whose shares reach 10% of the share capital can request, in writing, to the Board of Directors or to the Executive Board of Directors to given to them, also in writing, information relating to corporate matters.”

the private limited and public limited companies;²⁵ and the right to suggest the claim for liability against the managers or the directors for damages that these have caused to the company (Ramos, 2002).²⁶

Finally, the right to vote is, generally, proportional to the value of the participation of the partner in the share capital (Domingues, 2015).

It transpired from all this that the actual motivation of the partners' participation in a company and, consequently, its involvement in it, is mainly the profitability of a capital that they invested in it, therefore the percentage held in that share capital is reflected in the practical content of the rights of the shareholders, which will result in different positions of the several partners.

Otherwise, in the cooperatives, due to the principle of the democratic member control (Article 3 of the PCC),²⁷ prevails an equality of treatment of the cooperators, regardless of its financial participation, and consequently the rule is the one of the equality on the exercise of the rights, with particular emphasis on the right to vote ("one member, one vote") (Meira, 2014).

As a result, in abstract, focusing only in the legal form and in the regime that underlies to them, the safest solution will be to consider that the commercial companies withheld or participated by cooperatives cannot be considered (and, therefore, quantified) as entities of the social economy.

However, the solution that seems more adequate and fair to us will be the one of the case-by-case analysis. Providing evidence that cooperatives established the subsidiary company for the satisfaction of the needs of its members, keeping the main activity that was at the base of its creation or, at least, a substantial part of it, holding the control of that subsidiary and allocating the results from the activity developed by the subsidiary to indivisible reserves, will be fulfilling the guiding principles of social economy. Thus, in these cases, these commercial companies withheld or participated by cooperatives should be considered entities of the social economy in accordance with the Article 4(h) of LBES.

We believe that, in any case, the results in terms of employment and GVA generated by these entities should always be considered for statistical purposes, for what we disagree with the option taken in this respect by the SESA of 2013.

²⁵ The Article 248(1), of the CSC, establishes that "general meetings of private limited companies shall be subject to the provisions regarding the general meetings of public limited companies, in everything that is not specifically regulated for those". In turn, the Article 375(2), of CSC, already mentioned, makes the possibility of convening the General meeting depend on the ownership of shares corresponding, at least, to 5% of the share capital, by one or more shareholders.

²⁶ The Article 77 of the CSC establishes that only those who hold 5% of the share capital will be able to bring a liability suit against the managers or directors to claim reparation for damages that these have caused to the company.

²⁷ The Article 3 of the PCC establishes that "Cooperatives are democratic organisations controlled by their members, who actively participate in setting their policies and making decisions. Men and women serving as elected representatives are accountable to the membership. In primary cooperatives members have equal voting rights (one member, one vote) and cooperatives at other levels are also organised in a democratic manner."

6. Conclusions

Even though we are aware that we are clearly on a shaky ground, the option, taken in the Social Economy Satellite Account in 2013, of not quantifying any commercial company owned or participated by cooperatives in the list of the social economy entities, it does not seem to be the most appropriate.

Under the regime provided for in the PCC, the cooperatives may constitute commercial companies, subsidiaries, acquire shares in the share capital of commercial companies, provided that this does not affect the autonomy of the cooperative.

In any of these cases, the cooperative is prohibited from group relations which translate into any form of “subordination” of the cooperative to the interests of other entities. In fact, the cooperative principles of autonomy and independence and democratic control by the members prevent the cooperative from being a controlled entity in a group of companies dominated by another legal entity.

If the cooperative established the subsidiary to satisfy the needs of its members, we would be dealing with the concept of “indirect mutuality”, a concept expressly admitted in the legal doctrine and in the legislation of certain legal systems. The cooperative pursues its mutualistic scope not directly with its members, but, indirectly, through commercial companies controlled or participated by the cooperative itself.

In these cases, if the cooperative maintains the main activity (or at least a substantial part thereof) that was in the basis of its creation, if it has control of this subsidiary and allocate the results of the activity carried out by the subsidiary to indivisible reserves, the guiding principles of the social economy are fulfilled.

Thus, in terms of legal framework, these commercial companies owned or participated by cooperatives should be considered entities of the social economy sector under the Article 4(h) of LBES.

Therefore, a case-by-case analysis will be carried out to distinguish situations of indirect mutuality from situations of companization of the cooperative phenomenon.

If it is understandable that considering the complexity of the subject, the SESA of 2013 has chosen, in terms of quantification of the entities, the solution that would generate the least perplexity, one no longer understands the hesitation regarding statistical consideration of the results in terms of employment and GVA generated by these entities.

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