CES
COOPERATIVISMO E ECONOMÍA SOCIAL
Núm. 45 (2022-2023), páxs. 111-129
ISSN: 1130-2682

*THE CONSEQUENCES OF WRONGFUL TRADING FOR THE COOPERATIVE'S DIRECTORS, PARTICULARLY THE PROHIBITION FROM PERFORMING MANAGEMENT FUNCTIONS AND THE LOSS OF CREDITS IN THE INSOLVENT COOPERATIVE**

Maria de Fátima Ribeiro[1]

Recepción: 30/03/2023 - Aceptación: 05/09/2023

* This paper is based is based on a lecture given at Rulescoop 2022, XV Congreso de la Red Universitaria Euro-Latinoamericana en Economía Social y Cooperativa, Santiago de Chile, on the 16th November 2022.

[1] Associate Professor of the Faculty of Law of Universidade Católica Portuguesa. Member of the Católica Research Center for the Future of Law, R. de Diogo Botelho 1327, 4169-005 Porto, https://orcid.org/0000-0002-1801-1432, E-mail: mribeiro@ucp.pt.

ABSTRACT

The applicability of the Portuguese legal regime to cooperatives may raise specific questions, particularly with regards to the effects of wrongful trading for their directors. Namely, the disqualification of the cooperative director and the loss of any credits he may have towards the cooperative are to be considered, because of the specificities of their implementation in the context of cooperatives.

In Portugal, cooperatives are subject to insolvency and to the Portuguese insolvency legal regime (*Código da Insolvência e da Recuperação de Empresas*: CIRE). But the applicability of this regime to cooperatives may raise specific questions, particularly with regards to the effects of wrongful trading for their directors.

Under Portuguese cooperative law (*Código Cooperativo*: CCoop.), one of the consequences of wrongful trading is, inevitably, the loss of mandate of convicted board members. But there is no eligibility requirement relating back to this, so nothing seems to prevent an individual previously convicted of wrongful trading from taking on these functions in a cooperative. Under Portuguese insolvency law (Código da Insolvência e da Recuperação de Empresas: CIRE), there may be a prohibition from performing management functions for a period that can range from 2 to 10 years (because of wrongful trading). In this case, the prohibition safeguards the position of the cooperative towards the election of a previously convicted individual during that period. But how can we solve the problem in any other cases? And can this conviction also constitute grounds for exclusion of a member from the cooperative? If so, on what specific grounds and under what terms?

There is yet another problem concerning the consequences of a wrongful trading conviction of a director under Portuguese insolvency law, in the case of a cooperative insolvency. When a director has been convicted of wrongful trading as part of the insolvency of the cooperative they manage, one of the consequences of such conviction is - pursuant to the CIRE - the loss of any credits they might have on the insolvent cooperative. Since they are mostly simultaneously a cooperator, what is the scope of this conviction with regards to any credit rights they might have as a cooperator, upon the dissolution and liquidation of the cooperative?

In this study, following an analysis of the legislative solutions provided in Portugal, we try to provide an answer to these questions. As there are no specific answers in the doctrine and no case-law treatment, we will considerer the basic principles and rules of the insolvency law as well as the fundamental cooperative principles.

KEYWORDS: cooperatives; insolvency; wrongful trading; directors.

SUMMARY: *1. WRONGFUL TRADING AND ITS CONSEQUENCES FOR DIRECTORS. 2. THE INSOLVENCY OF COOPERATIVES. 3. THE DISQUALIFICATION OF A COOPERATIVE DIRECTOR. 4. THE LOSS OF ANY CREDITS TOWARDS THE COOPERATIVE. 5. CONCLUSION. 6. BIBLIOGRAPHY.*

1 Wrongful trading and its consequences for directors

Wrongful and fraudulent trading brings severe consequences to directors in an insolvency procedure. Though in many countries' legislations both wrongful and fraudulent trading are addressed under the same name concerning the civil offence (as in Portugal law: "insolvência culposa"[1]), in the UK Insolvency Act of 1986 they are described as separate offences with different names (under sections 214 and 213 of the Insolvency Act). The main difference between the two in the UK is that wrongful trading is a civil offense and is often done unwittingly. Fraudulent trading is both a civil and a criminal offence, necessarily done with clear intent to deceive and defraud the company's creditors and customers and is not such a common offence[2].

In the legal systems of most of European countries, the consequences for directors of both wrongful and fraudulent trading are, amongst others, that they will be held personally liable for a part of the company's debts (in the case of fraudulent trading they will be held liable for a larger proportion of those debts)[3], that they

---

[1] Cfr. articles 186.º ff. CIRE.

[2] According to section 214 of the 1986 Act, wrongful trading occurs when company directors have continued to trade when "[t]hey knew, or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation" and did not take "every step with a view to minimising the potential loss to the company's creditors". Fraudulent trading occurs, as described by section 213 of the 1986 Act, when "in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose". In Portugal, most of those acts are also criminal offences, but in that case, they are specifically regulated under criminal law – the conviction under the insolvency law is not even able to determine, *per se*, a criminal conviction (cfr. article 185.º CIRE).

[3] The directors affected by the court decision in a wrongful trading conviction will be responsible for the cooperative's debts if the remaining assets of the cooperative are not enough to pay all its creditors (cfr. article 189.º CIRE). The amount of that liability will be determined by court, but the legal limit consists of both all the liabilities of the cooperative and all the assets of the director. As that director is eventually a cooperator this may be seen as a legal exception to the rule of the irresponsibility of the members for the cooperative's debts – a fully justified exception.

will lose any credits they might have on the insolvent company and that they will be disqualified from being a director of a company for a certain period of time[4].

As in this study we will address solely the civil consequences of those offences to directors, from this point onwards we will refer only to wrongful trading, comprising both the civil offences covered by wrongful and fraudulent trading.

It is important to point out that, generally, wrongful trading can carry consequences for shadow and *de facto* directors, in the same way as it does for *de iure* directors. And that *de iure* directors are regarded as such for any functions entrusted to them even if they did not carry them out, as are any illegal actions of a *de facto* director in which they did not participate in them[5]. This means that both *de iure* and shadow directors must not, by act or omission, generate nor aggravate the insolvency of the company they manage.

The duty to have due regard to the interests of creditors even in the likelihood of insolvency and to avoid conducts that threaten the viability of the business has been reaffirmed at article 19 of the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt[6].

So, in the time preceding an enterprise's insolvency directors must put creditors' best interests first and not pursue their own benefit – they cannot deepen the company's insolvency. That is the reason why we can speak, in that stage when directors must avoid deepening insolvency (deepening the devaluation of creditors' claims), of *insolvency governance* instead of *corporate governance*[7].

---

[4] Cfr. article 189.º CIRE.

[5] Cf. Maria de Fátima Ribeiro, "Responsabilidade dos administradores meramente nominais pelos actos praticados por administrador de facto", in *Revista de Direito Comercial*, 2022, in https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/6230f49159c00a6e349a0d9a/1647375506447/2022-12+-+0519-0556+-+LA-PV.pdf, 519-556, pp. 520 ff..

[6] In https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1023. Cfr. J. M. Coutinho de Abreu, "Deveres dos administradores antes da insolvência", in *Reestruturação de empresas e exoneração do passivo restante em Portugal e Espanha. Reestructuración de empresas y exoneración de deuda en Portugal y España* (coord. Alexandre de Soveral Martins/Carlos Gómez Asensio, Instituto Jurídico FDUC, Coimbra, 2023, 151-156, pp. 151 ff.; Eva Recamaán Graña, "La transposición de la Directiva 2019/1023 y su influencia en el estatuto jurídico del administrador en la crisis en España", in *Reestruturação de empresas e exoneração do passivo restante em Portugal e Espanha. Reestructuración de empresas y exoneración de deuda en Portugal y España* (coord. Alexandre de Soveral Martins/Carlos Gómez Asensio, Instituto Jurídico FDUC, Coimbra, 2023, 157-176, pp. 158 ff..

[7] Cf. Michael Schillig, **"**The Transition from Corporate Governance to Bankruptcy Governance - Convergence of German and US Law?", in *European Company and Financial Law Review*, Vol. 7, No. 1, 2010, 116-157.

There is a wide spectrum of behaviours or acts covered by wrongful trading, such as trading while insolvent, taking excessive salaries, not fulfilling duties concerning the accounting or tax obligations of the company, selling company assets for "undervalue" or lower than their market value prior to the liquidation, or wilfully increasing the company's debts. And even undercapitalisation resulting in insolvency can be seen as leading to directors' liability[8].

The occurrence of wrongful trading is determined by an insolvency practitioner or by a judge, depending on each country's legislation. And there is usually an expiry period, so a director cannot be charged for past acts or omissions after that time is passed.

It is worth noting that due to the Coronavirus pandemic, though, emergency legislation had been enacted worldwide to change some of the rules concerning wrongful trading. The goal was to not make directors personally liable if they continued to trade while the situation was so unclear and uncertain as it was[9].

---

[8] Cf. Ger J.H. van der Sangen, "The principles of European Cooperative Law and their impact on Future law-making on cooperatives. The case of the Netherlands", in *IJCL – International Journal of Cooperative Law*, Vol. I (1), 2018, 39-56, p. 53. In Portuguese legislation the liability of the companies' directors can be based on wrongful trading, and it is rather easy to achieve such an outcome. If it is proven that any faulty acts of a director (including a shadow director) have led to the state of insolvency, or have deepened it, and that those acts have taken place in the 3 years prior to the insolvency proceeding, he or she will be held responsible for all the debts the insolvent company isn't be able to pay through the liquidation of its assets (cfr article 186 1 Insolvency Code). Several legal presumptions of fault and wrongful trading are still present in Portuguese legislation. I would point out the presumption of wrongful trading in article 186 2.g.: there is necessarily wrongful trading when a director carries on the activity of the company, knowing or having the duty to know that this will mostly probably lead to insolvency. Furthermore, there is a legal presumption of fault whenever a director does not file for insolvency of the company in due course – he or she has the duty do so in the 30 days after the moment he or she knows, or should have known, that the company was in a state of current insolvency. In this case, the director will most likely be condemned for wrongful trading.

[9] Cfr. the analysis of Stephan Madaus/Francisco Javier Arias, "Emergency COVID-19 Legislation in the Area of Insolvency and Restructuring Law", in *European Company and Financial Law Review*, 2020, 318-352, pp. 324 ff., and Luca Enriques, "Pandemic-Resistant Corporate Law: How to Help Companies Cope with Existential Threats and Extreme Uncertainty During the Covid-19 in Crisis", in *European Company and Financial Law Review*, 2020, 257-273, pp. 258 ff.. In Great Britain suspension of liability for wrongful trading was effected by section 12 of the *Corporate Insolvency and Governance Act 2020*, which created a seemingly irrefutable presumption that the director in question was not responsible for any worsening of the financial position of the company or its creditors that occurred during the relevant period: 1) In determining for the purposes of section 214 or 246ZB of the Insolvency Act 1986 (liability of director for wrongful trading) the contribution (if any) to a company's assets that it is proper for a person to make, the court is to assume that the person is not responsible for any worsening of the financial position of the company or its creditors that occurs during the relevant period. 2) In this section the "relevant period" is the period that (a) begins with 1 March 2020, and (b) ends with 30th June 2021. This means that from 1 July 2021 directors in Great Britain may once again be held liable for wrongful trading. In Portugal the regulation was different. In the Portuguese law, companies' directors are not obliged to file for insolvency since March 2020 even if the current insolvency is not due to the pandemic crisis (cfr. article 7.º n. 6a) of *Lei n.º 1-A/2020,*

But simultaneously there have been many forms of support to companies facing those difficulties, such as loans, furlough**,** and grants. Since even during the period covered by the emergency legislation directors must have acted in the interest of the company and its creditors, this money could not have been used in a business that was already insolvent and/or with no reasonable prospect of avoiding insolvent liquidation. If directors did so they might have been trading wrongfully. And the same can be said of directors who misused the funds received by the company at the time.

2 The insolvency of cooperatives

Article 2 of the Portuguese Cooperative Law defines cooperative as an autonomous association of persons, united voluntarily, of variable composition and capital, which, through cooperation and mutual assistance on the part of its members and in accordance with cooperative principles, aims not at profit but at satisfying the economic, social, or cultural needs and aspirations of said members. As is stated in Article 17 PCC, a cooperative acquires legal personality when its incorporation is registered – and then, because the cooperative becomes a legal person, its assets are autonomous from its members' assets[10] and therefore the members are not liable for the cooperative's debts[11] (Under Portuguese law, cooperative rules must respect cooperative principles, embodied in Art. 3 of the PCC: voluntary and open membership; democratic member control; members' economic

---

de 19 de Março, by amending of *Lei nº 4-A/2020*; this law was consecutively amended by *Lei n.º 16/2020, de 29 de Maio*, by which the suspension of the duty to file for insolvency was stated in article 6.º-A, n. 6a of *Lei n.º 1-A/2020*; then, by amendment of *Lei n.º 4-B/2021, de 1 de Fevereiro*, it was stated on article 6.º-B, n. 6ª of the same law). This law has finally been revoked by Lei n.º 31/2023, de 4 de Julho**,** meaning that in Portugal directors might not be held liable for wrongful trading on that grounds if they continue**d** to trade in a situation of former insolvency until the 5th July 2023. But this suspension does not constitute an irrefutable presumption that the director in question was not responsible for any worsening of the financial position of the company or its creditors that occurred during the relevant period – his behaviour during the pandemic crisis and afterwards could fall under wrongful trading due to other legal duties that were not suspended. Cfr. the critical analysis of Maria de Fátima Ribeiro, "The insolvency of a commercial company due to the Covid-19 pandemic and the duties of company directors in the Portuguese legal system, in Law", in *Business and Innovation Studies (LBIS) Conference Full Paper Proceedings Book*, in https://lbisconference.com/wp-content/uploads/2022/03/LBIS-FULL-PAPER-PROCEEDINGS-BOOK-2022.pdf, London, 2022, 90-95, 90 ff.; *idem*, "Os deveres dos administradores na crise provocada pelos efeitos da pandemia Covid-19 e a suspensão do dever de apresentação à insolvência", in *Revista da Ordem dos Advogados*, Ano 81 - Vol. I/II - Jan./Jun. 2021, 263-288, 265 ff..

[10] Which is not the case before the registration: cfr. Maria de Fátima Ribeiro, "Artigo 18º – Responsabilidade antes do registo", in Código Cooperativo Anotado (coord. Deolinda Meira e Maria Elisabete Ramos), Almedina, Coimbra, 2018, 109-115, pp. 109 ff..

[11] Cfr. Deolinda Meira/Maria de Fátima Ribeiro, "Artigo 80º – Regime económico", in Código Cooperativo Anotado (coord. Deolinda Meira e Maria Elisabete Ramos), Almedina, Coimbra, 2018, 443-450, pp. 443 ff..

participation; autonomy and independence; education, training, and information; cooperation among cooperatives; and concern for the community**.** Though one could question the possibility of subjecting cooperatives to insolvency, nowadays it is established that cooperatives are subject to insolvency, as are any non-profit associations[12].

But the insolvency legal framework must be adapted to the cooperative reality and its specificities[13]. We will particularly address the characteristics of the consequences of a cooperative's insolvency to its directors.

As we have established above regarding companies, the "negative" consequences exist only when the directors have not performed a cautious management, ignoring their duties[14]. And, if we consider the cooperative reality, when approaching insolvency directors' duties must be conducted in a particular way.

---

[12] Cf. Catarina Serra, "A evidência como critério da verdade — estão as cooperativas sujeitas ao regime da insolvência? — Anotação ao Acórdão do Tribunal da Relação do Porto de 16 de Janeiro de 2006», in VV.AA., *Jurisprudência Cooperativa Comentada — Obra Colectiva de Comentários a Acórdãos da Jurisprudência Portuguesa, Brasileira e Espanhola* (coord.: D. APARÍCIO MEIRA), Imprensa Nacional Casa da Moeda), Lisboa, 2012, 405-412, *passim*; *idem*, "Por que estão as associações sujeitas à insolvência (e porque não estariam)? Anotação ao acórdão do Tribunal da Relação de Guimarães de 22 de Janeiro de 2013", in *Cooperativismo e Economía Social (CES)*, n.º 36, anos 2013-2014, 231-239, *passim*. **To** Portuguese court decisions stating that cooperatives are subjected to insolvency cf. the decisions of *Tribunal da Relação do Porto, 16.01.2006,* and *Tribunal da Relação do Porto, 16.03.2006*, in www.dgsi.pt.

[13] This problem exists in other jurisdictions, since there are usually no specific laws addressing the insolvency of cooperatives – it basically refers to general insolvency law that is in most cases conceived to the insolvency of profit companies. For the analysis of the difficulties found in Indonesian jurisdiction, for instance, cf. Rachmat Suharto, "The bankruptcy characteristics of cooperative legal entities", in *Hang Tuah Law Journal*, vol. 3, issue 1, April 2019, 1-12, p. 2. And where there are specific laws, like in Italy, there still is the problem of reconciling the application of the general insolvency law and the specific cooperative insolvency law. Cfr. the analysis of Emanuele Cusa, "Le cooperative insolventi tra liquidazione coatta amministrativa e liquidazione giudiziale", in *Il Diritto Fallimentare e delle Società Commerciali*, n. º 6, 2022, 1158-1185, pp. 1158 ff.. A similar problem exists in Brasil, where the insolvency law does not apply to cooperatives, creating a system with different solutions for identical problems in the insolvency of economic operators: cooperatives are subject to the legal frame of the non-businessperson's insolvency. Cfr. Emanuelle Urbano Maffioletti, *As Sociedades Cooperativas e o Regime Jurídico Concursal. A Recuperação de Empresas e Falências, Insolvência Civil e Liquidação Extrajudicial e a Empresa Cooperativa*, Almedina, Coimbra, 2015, pp. 220 ff..

[14] Otherwise, the insolvency will be considered fortuitous, as happened in a very outstanding case in Spain (known as the *Fagor* case), known for different aspects "such as the liabilities, the number of workers and creditors and the turnover, apart from its social and media resonance", for it was "an enterprise with a considerable weight in the Basque economy", seen as "an emblematic cooperative". Cf. Itziar Villafañez Perez, "A brief chronicle of and some notes on the bankruptcy proceeding of Fagor Electrodomésticos S. Coop.", in *International Journal of Cooperative Law*, vol. I (1), 2018, 185-188, p. 188.

In fact, when a cooperative is financially wealthy directors must act in the best interest of its cooperators (with respect to certain rules that address public interests). Of course, it is expected that they do not cause the insolvency themselves and that they promote the financial welfare of the cooperative, to the benefit of its members.

But as insolvency approaches there is a shift in the interest cooperative directors must take into account: they must consider creditors' interests before any others[15]. Due to the principle of limited liability[16], the members of a cooperative do not bear the risk of a devaluation of its assets at that stage – but unsecured creditors will bear the risk of any potential losses.

Under Portuguese insolvency law, if the court states that there is wrongful trading in a cooperative insolvency the consequences are, same as they were in a company insolvency, that any director affected by that qualification will be held liable for the debts of the cooperative, will lose any credits they might have on the insolvent company[17] and will be disqualified from being a director of a company or a cooperative for a certain period of time[18].

---

[15] It can even be said, like note above, that there is a shift in the directors' duties, there is a shift from corporate governance to insolvency governance. Cf. the analysis of Michael Schillig, "The Transition from Corporate Governance to Bankruptcy Governance - Convergence of German and US Law?", cit., p. 116-157**,** *passim***.**

[16] That applies to all the cooperative's members, in any jurisdiction. See for instance article 15 of the Spanish *Ley de Cooperativas* – it seems important to highlight the court clarification in the Fagor case we mentioned in the previous note: the members of the cooperative were not declared liable for the companies' debts and losses. Cf. the analysis of Cf. Itziar Villafañez Perez, "A brief chronicle of and some notes on the bankruptcy proceeding of Fagor Electrodomésticos S. Coop.", cit., p. 188. This is also one of the *Principles of European Cooperative Law*: Section 3.5 states that [c]ooperatives have legal personality and enjoy patrimonial autonomy", and "[n]o member shall be liable for the debts of the cooperative for more than the amount they have subscribed, unless cooperative statutes provide for the liability of the member by guarantee subject to a cap". But some legal systems admit that cooperators might be liable for the cooperative's debts, beyond the subscribed capital, in some cases. It can happen, for instance, in French, German and Portuguese jurisdiction. Cf. the analysis of Gemma Fajardo/Deolinda Meira, "Chapter 3. Cooperative financial structure", in VV.AA., *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Intersentia, Cambridge, 2017, pp. 88 ff.. The limited liability exists in the context of the legal personality of the cooperative, as seen above.

[17] Another very relevant problem that exists in any case of a cooperative insolvency, apart from the question of wrongful trading, is the qualification of these credits. We will analyse that point *infra*.

[18] This was exactly what happened, namely, in the case of *Tribunal da Relação de Évora, 02.05.2019*, in www.dgsi.pt, where the Portuguese court confirmed the decision of the appealed court that judged there was wrongful trading in the insolvency of a cooperative, and so has condemned the cooperative director accordingly: he lost any credits he had on the cooperative, he was liable to the cooperative creditors for the debts of the cooperative remaining after the liquidation of its assets, and he was disqualified for three years.

3 The disqualification of a cooperative director

Portuguese cooperative law establishes the loss of office of the disqualified person in a wrongful trading process[19]; but it does not establish that the disqualification of a person precludes the possibility of them becoming a member of the administrative board. However, the Portuguese insolvency law (CIRE) states that that disqualification – which can last from two to ten years – prevents the disqualified person from being a member of a board (both administrative and supervisory) in any form of enterprise, including a cooperative[20]. So, an individual who is a director of a cooperative must be replaced if in the meantime he/she is disqualified, and he/she will have to wait for the end of the disqualification period to become a cooperative director again. But what if that person wants to be the director of that same cooperative after the disqualification period?

The answer to that question falls under the insolvency legislation and we must consider its adequacy in the cooperative context. Under insolvency law this person can return to being a director after the disqualification period. In a cooperative, members of the governance bodies are elected from among the cooperators[21], as stated by article 29.º CCoop.. Investor members may join the board but cannot represent more than twenty five percent of the number of its effective members – which means that at least seventy five percent of the total number of members of each of the cooperative bodies must be cooperators. So, if a cooperative is to be managed by a sole director, he may not be an investor member.

Since the directors must be mostly cooperators themselves, we must consider the possibility of member exclusion. Let's suppose that there was a disqualification of the director that is also a cooperator, on the grounds of wrongful trading in the cooperative insolvency process. And that, in the same case, it was possible to achieve its recovery[22]. The director's disqualification was determined to last for two years.

---

[19] Cf. article 30.º s) CCoop.. Differently, the Spanish cooperative law formally states that a person disqualified in an insolvency process cannot be a cooperative director for the disqualification period. And the loss of office of a disqualified director will not occur automatically: it depends on the request of any co-operator. Cf. article 41. 1. b) and 4 of *Ley 27/1999*.

[20] Cf. article 189.º, 2 c), CIRE: "Declarar essas pessoas inibidas para o exercício do comércio durante um período de 2 a 10 anos, bem como para a ocupação de qualquer cargo de titular de órgão de sociedade comercial ou civil, associação ou fundação privada de actividade económica, empresa pública ou cooperativa".

[21] Except for the statutory auditor and the investor members (cf. article 29.º, n. 8, CCoop.).

[22] In fact, the recovery of the enterprise does not affect the possibility of a conviction on the grounds of wrongful trading, at least under the insolvency Portuguese law. That has been specifically decided by the Portuguese court decision of *Tribunal da Relação de Guimarães, 18.12.2017*, in www.dgsi.pt, in a case where the directors advocated that the approval of a recovery plan for the cooperative would necessarily exclude the possibility of their conviction on the grounds of wrongful trading, by alleging that it was only possible in the case of the cooperative's assets liquidation.

Can he/she be again the cooperative's director after that period? We must of course ask if it is the best interest of that cooperative that this individual could become its director again, after that short period of time.

But additionally, and especially, we must focus on their membership: should this individual be able to keep their status of cooperator? Or are we dealing with a case of member exclusion?

Under Portuguese cooperative law, a member can only be excluded on the grounds of a serious and culpable breach of its legal or statutory duties[23]. The law does not formally establish that a disqualification for wrongful trading as a cooperative director is a cause for member exclusion. But if we analyse the members' legal duties, we can see that they must respect the cooperative principles before any other duties[24].

And one of the fundamental cooperative principles is it must be democratically managed by the cooperative members. It means loyalty has, in this context, a special density and relevance. Once a director is disqualified on the grounds of wrongful trading, showing lack of care and loyalty while managing the cooperative, he undoubtedly has also breached his duty of loyalty as a cooperator. This necessarily makes this cooperator responsible before all the cooperative members for his behaviour as cooperative director. The breach of trust that occurs whenever a cooperative director is disqualified for wrongful trading is serious and affects his relationship with the other cooperators and the cooperative itself. That must be seen as grounds for member exclusion[25].

Once a former director is excluded as member from the cooperative, he can no longer become a director (at least, a member director) – and this impediment lasts forever (unless he is admitted again as a cooperator), not only for the time of the disqualification. So, this solution might be the adequate answer to the first question we are addressing under this point.

But the same result could be achieved, however, with an adequate legal interpretation of article 30.º a) CCoop.. It could be argued that if a person is excluded from the board when convicted on the grounds of wrongful trading the *ratio* of that law covers the situation we are analysing – it would prevent them from being a director of any cooperative in the future. However, this reading of the law is, of

---

[23] Cf. article 26.º CCoop..

[24] Cf. article 22.º, n. 1, CCoop..

[25] To the analysis of a case where the facts clearly showed a breach of loyalty of the cooperative directors that correspond to the violation of the principle of democratic management, cf. Maria Elisabete Ramos, "Responsabilidade civil pela administração da cooperativa. Anotação ao Acórdão do Supremo Tribunal de Justiça de 25 de outubro de 2012", in *Cooperativismo e Economía Social*, nº 35 (2012-2013), 349-361, pp. 351 ff.. In this situation the question of the exclusion of these directors from de cooperative – therefore losing the statute of members – was not considered. But undoubtedly there were grounds for it, considering their behaviour while cooperative directors that were, simultaneously, cooperators.

course, controversial. So, it would be preferable that the cooperative laws clearly stated that this is a suitability requirement for becoming a cooperative director.

We can also consider, at this point, the problem of a wrongful trading conviction not concerning the cooperative in question (for instance, the member's personal insolvency or the insolvency of another enterprise whose board he is part of). As he/she has been convicted on the grounds of wrongful trading, the proposed legal interpretation of article 30.º a) of the Portuguese cooperative law would not just make him/her excluded from the concerned board but also unable to assume the position of a cooperative director. In that case that member would no longer be able to become a director of that cooperative, even after the disqualification period.

Let's now consider the personal insolvency of the director in the case of it being fortuitous – what happens if that individual is or wants to become a member of the administrative board of a cooperative? Portuguese jurisdiction does not have an answer to that question, so he/she will be able to act as cooperative director, unless the cooperative statutes establish that personal insolvency constitutes grounds for exclusion from the board of directors and an impediment to becoming its member.

All the questions posed above are not answered in the Principles of European Cooperative Law. In fact, Section 2.5 sets several rules concerning the cooperative governance structures, including board composition and representative principles. For instance, section 2.5 (6) states that most members of administrative and supervisory boards shall be cooperator members. Yet there is no provision regarding the disqualification issue, neither the personal fortuitous insolvency of that person. Of course, any grounds for disqualification (for example, personal insolvency or court order of disqualification as a director) can be found in the statutes of the cooperative. But the question of how to solve the problem when they are not found on the cooperative statutes remains unanswered[26].

4 The loss of any credits towards the cooperative

Another consequence of wrongful trading for directors is, in some jurisdictions (as happens under Portuguese insolvency law), that the affected director loses any credit he/she may have towards the cooperative and must return to the cooperative any goods or rights received on that basis (cfr. article 189.º n. º 2, d) CIRE).

After a final court decision declaring the insolvency of a cooperative, a winding up by judicial process might take place[27], leading to the liquidation of the assets.

---

[26] Cf. Ian Snaith, "Chapter 2. Cooperative governance", in VV.AA., *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Intersentia, Cambridge, 2017, p. 71.

[27] Cf. article 112.º, n. 1, g) CCoop..

The first question to be answered is whether the liquidation in an insolvency context must, under Portuguese law, follow the rules of the insolvency law or the special rules of the cooperative law. This is a very important point, because those rules are quite different.

The destination of the assets in a liquidation following a cooperative winding up is generally subject to cooperative law. One of the causes of winding up is the final court decision stating the insolvency of a cooperative (cfr. article 112.º, n. 1, g) CCoop.).

The issue is that article 113.º, n. 1, CCoop. stipulates that in any case of winding up of a cooperative, whatever the reason, a winding up board must be appointed by the general meeting. This winding up board is responsible for the liquidation of the assets. In the first instance, all the cooperative's creditors must be paid or seized after the payment of the expenses of the liquidation process[28]. Then article 114.º CCoop. states that in a liquidation process the cooperative's creditors must be paid with respect to a specific order[29]: first of all, the payment of wages and benefits due to employees of the cooperative; then, the payment of any remaining debts of the cooperative, including the redemption of investment securities, bonds, and other potential benefits due to cooperative members; and If after these operations there are any remaining assets, they will be used to the redemption of capital contributions[30].

However, that cannot be the case when the winding up is due to the cooperative insolvency, despite the "whatever the reason" text in the cooperative law. Article 113.º, n. 5, CCoop. states that in that case the insolvency law must be applied, with the due amendments. Once article 113.º rules the liquidation of the cooperative following its winding up, we must then infer that the liquidation in an insolvency process follows the insolvency law, except when it collides with the fundamental cooperative principles.

Now, according to the insolvency rules, we have to considerer two specific questions concerning the nature of the credits a cooperator may have: whether the cooperator's labor credits are to be strictly considered labour credits; and whether a cooperator's credits are to be considered held by a specially connected person.

---

[28] Cf. the rules of CIRE, by reference to article 113º, n. 5, CCoop..

[29] Cf. article 114.º, n. 1, CCoop..

[30] But it is impossible to distribute residual assets, in accordance with the provisions of article 114.º, n. 2 and 3, CCoop., because of the "social function that cooperatives are required to fulfill", witch "means that following the liquidation, they should be used for the promotion of the cooperative movement (the so-called principle of disinterested distribution)". Cf. Deolinda Meira, "Chapter 10. Portugal", in VV.AA., *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Intersentia, Cambridge, 2017, pp. 484 ff..

Than a third question that can be asked in this matter is if the aforementioned consequence of wrongful trading affects all the credits a director that is a cooperator may have towards the cooperative or if some of those credits are to be excluded due to its source – namely the labour credits when existing, because in the insolvency law they are generally subject to a special protective regulation, due to their nature.

To answer the first question we must consider, first, if the credits of the cooperatives where cooperators work for the cooperative (for example, in a teaching cooperative) can be seen as strict labour credits. This means we must determine if there is a labour relationship between a cooperator and the cooperative in those cases, because the credits of cooperators that are simultaneously cooperative workers could benefit from the privileges that the Portuguese cooperative law concedes to labour credits – that should be paid before other ordinary creditors (cf. article 114.º, 1, a) CCoop.).

Portuguese courts have been deciding that there is no labour relation here because cooperators establish the rules they are subjected to, so one cannot establish the subordination between the cooperative and the worker[31]. In a recent decision, the court has even stated that cooperators are truly entrepreneurs in relation to the cooperative[32].

So, we have not a labour credit *stricto sensu* when a cooperator works for the cooperative. Consequently, to the courts, cooperators are not to be considered employees, nor paid before any other creditor in the cooperative liquidation. But this isn't broadly understood by the Portuguese doctrine. Jorge Leite argues that not all situations are to be seen in the same way, and we must consider if there is economical subordination and if the relationship with the cooperative decision makers is free of conflict. In any case, some fundamental principles of labour law should apply even if the relationship is not a strict labour one[33]. Catarina Carvalho criticizes the above-mentioned court orientation with similar arguments[34]. And to

---

[31] Cfr. the decision of *Tribunal da Relação do Porto, 27.02.2012*, in www.dgsi.pt.

[32] Cfr. the decision of *Tribunal da Relação de Guimarães, 18.03,2021*, in www.dgsi.pt: the workers which are simultaneously members of the cooperative are considered not to have a labour relationship with the cooperative but instead a cooperation relation, with no subordination. Analysing the evolution in the courts' decisions, cfr. Deolinda Meira, "El fenómeno de las falsas cooperativas en Portugal. Especial referencia a los riesgos de hibridación, resultantes de la indefinición legal con respecto al estatuto jurídico del socio trabajador", in *Innovación social y elementos diferenciales de la economía social y cooperativa* (dir. Marina Aguilar Rubio), Marcial Pons, Madrid, 2022, 139-158, pp. 147 ff..

[33] Cfr. Jorge Leite, "Relação de trabalho cooperativo in *Questões Laborais*, 1994, n.º 2, 89-108, pp. 105 ff.. He is followed by Deolinda Meira, "El fenómeno de las falsas cooperativas en Portugal. Especial referencia a los riesgos de hibridación, resultantes de la indefinición legal con respecto al estatuto jurídico del socio trabajador", cit., pp. 148 ff..

[34] Cf. Catarina Carvalho, "Qualificação da relação jurídica entre cooperador e cooperative: contrato de trabalho ou acordo de trabalho cooperative? Anotação ao Acórdão do Tribunal da Relaçao

Margarida Almeida workers should maintain this privilege despite being cooperative members, because of the *ratio* of this law: the general protection of the labour credits[35].

Yet a different and important question is whether a cooperator can be considered, for a few reasons, a person with a special connection with the cooperative. Under Portuguese insolvency law, the credits of a person specially related with the insolvent are to be paid after all other credits: they are subordinate credits. Concerning a company, shareholders are not usually considered specially related person, so their credits are not affected by this qualification. But should this be the case in the insolvency of a cooperative? This problem was brought to a Portuguese court. The decision of *Tribunal da Relação de Guimarães, 07.02.2019*[36] was as follows: a cooperator cannot be considered a person specially related to the cooperative for the purposes of subjecting his credits to that regime, because the Portuguese law does not allow for that result. In fact, by simply being a cooperator a person does not have a statute that is like the cooperative directors' – even if it is true that a cooperator does have rights and duties concerning the governance of the cooperative that are more comprehensive than a shareholder's rights and duties in a company.

Let us now consider the specific situation of a director that is a cooperative member. If he has credits towards the cooperative and those have its source in the work that he provided to the cooperative those credits can be considered labour credits – and so protected by the privilege that the insolvency law generally grants to labour credits. Moreover, that privilege is not to be questioned because of the special connection of the cooperator with the cooperative – if it were, in liquidation due to insolvency those credits would be considered subordinated (and paid after all other credits) instead of privileged. The cooperative law *ratio* confirms this understanding: in cooperative liquidation employees must be paid before any other creditors, as seen above.

However, if the director is affected by a wrongful trading judicial decision, what happens to these labour credits he may have towards the cooperative? Must they remain specially protected or subject to the loss of credits? We cannot sub-

---

do Porto, de 19 de Setembro de 2011", in *Jurisprudência Cooperativa Comentada. Obra Colectiva de Comentários a Acórdãos da Jurisprudência Portuguesa, Brasileira e Espanhola* (coord. Deolinda Meira), Imprensa Nacional Casa da Moeda, Lisboa, 2012, 587-593, pp. 588 ff..

[35] Cfr. Margarida Almeida, "As relações de trabalho nas cooperativas portuguesas", in VV.AA., *Estatuto jurídico de los trabajadores-socios de cooperativas y otras organizaciones de la economía social y solidaria,* Asociacion Iberoamericana de Derecho Cooperativo, Mutual y de la Economia Social y Solidaria, in https://recipp.ipp.pt/bitstream/10400.22/15245/1/Projecto%20Internacional%20Relatório%20PORTUGAL%20-%20PARTE%20I.pdf, p. 97.

[36] In www.dgsi.pt.

scribe to this, considering the grounds for a wrongful trading decision. So even any labour credits held by a director would be lost in that case.

Of course, he/she will also lose the credits that come from the services he provides as a director – cooperative directors are to take remuneration, unless the statutes define otherwise (cfr. article 38.º l) of the cooperative law). This means the director will not be able to claim those credits either, in the liquidation process.

Another question needs to be addressed at this point. We must also consider any other credits the director may have towards the cooperative as a member – such as the redemption of investment securities, bonds, and other potential benefits due to cooperative members, and redemption of capital contributions.

Outside an insolvency process, the redemption of investment securities, bonds, and other potential benefits due to cooperative members would be paid alongside the credits of all other creditors. But under insolvency law rules, the credits from a cooperator that come from a financing operation of the cooperative must be considered subordinated credits. In fact, article 48.º g) CIRE states that the loans of the shareholders are to be considered subordinated credits. That means the law establishes that all members' financing transactions to an insolvent entity are carried out in a context of privileged information, due to the close relationship of these persons with the insolvent. This circumstance justifies the subordination of the resulting credits, to protect the interests of creditors who are not in this privileged situation[37]. Since the same arguments are valid in the context of the insolvency of a cooperative, the same legal framework must be considered in the case of membership financing operations in a cooperative[38].

So, in insolvency liquidation, cooperators would not be paid for those credits alongside other creditors but only after them – if there were any remaining assets.

---

[37] Cfr. Maria de Fátima Ribeiro, "Riscos dos negócios das sociedades com pessoas especialmente relacionadas com elas, no quadro da insolvência (da resolução em benefício da massa insolvente e da subordinação de créditos)", in *IV Congresso Direito das Sociedades em Revista*, Almedina, Coimbra, 2016, 290-318, pp. 294 ff..

[38] Another very interesting question is whether those members could file for the insolvency of the cooperative because of these credits to the financing of the cooperative's activity. Under Portuguese Company Law, article 245.º 2 prohibits shareholders from filing for the company's insolvency as holders of credits for the financing of the company. They could only file for insolvency when their credits have a different source. The reason for this restriction in that when they act as the company's "owners" and contribute to the financing of the company they "own" members should not be able to file for the insolvency of the company on the grounds of its incapacity to return them these investments. If we think about the cooperative's principles and rules, this solution should also be applicable to at least all the cooperator' credits that were intended for financing the cooperative. And it is doubtful whether it can be appliable to all their other credits on the cooperative. To the analysis of this same problem under the Indonesian law, cfr. Adis Nur Hayati, "Juridical Study on Cooperative Legal Entity Bankruptcy Submissions by its member", in *Jurnal Penelitian Hukum De Jure*, Volume 22 Number 2, June 2022, 257-270, pp. 257 ff..

And when the cooperator is also a cooperative director, we must consider another cause for subordination of his credits: if any kind of credit (including the ones above mentioned) was constituted when the cooperator was already a director it would automatically be qualified as subordinated because the director is necessarily a related person to the cooperative (cfr. articles 48.º a) and 49.º, n. 2, c) CIRE)[39].

The consequence is the same: he would be paid after all other creditors.

Finally, if that director is affected by a wrongful trading decision, he/she will no longer be eligible to receive any amount of any of those credits. The law is clear in establishing that he/she loses any credits towards the cooperative – including the redemption of capital contributions.

5 Conclusion

One of the consequences of wrongful trading is, under article 30.º a) CCoop., the loss of mandate of convicted board members. And under Portuguese insolvency law, there may be a prohibition from performing management functions for a period that can range from 2 to 10 years. After the end of the disqualification period, and since the directors must be mostly cooperators themselves, we must consider the possibility of member exclusion on the grounds of his/her breach of duty of loyalty as a cooperator, to prevent the possibility of his/her return to the cooperative's board of directors – the breach of trust that occurs whenever a cooperative director is disqualified for wrongful trading is serious and affects his relationship with the other cooperators and the cooperative itself. The same result could be achieved, both in this case and when the director is not a cooperator, with an adequate legal interpretation of article 30.º a) CCoop., arguing that the *ratio* of that law covers the situation we are analysing, but this reading of the law is controversial. It would then be preferable that the cooperative laws clearly stated that not having been previously disqualified for wrongful trading is a suitability requirement for becoming a cooperative director.

Another consequence of wrongful trading for directors is, under article 189.º n. º 2, d) of the Portuguese insolvency law, that the affected director loses any credit he/she may have towards the cooperative and must return to the cooperative any goods or rights received on that basis. This should apply to all his/her credits towards the cooperative, not only to the credits that come from the services he/she provides as a director, but also to those credits that could be considered labour credits (when he/she is also a cooperator and the source of those credits is the

[39] The reasons for this classification are the same as those given in respect of members' credits. Cfr. Maria de Fátima Ribeiro, ob. cit., pp. 299 ff..

work that he provided to the cooperative) and those derived from any membership financing operations.

6 Bibliography

Abreu, J. M. Coutinho de – "Deveres dos administradores antes da insolvência", in *Reestruturação de empresas e exoneração do passivo restante em Portugal e Espanha. Reestructuración de empresas y exoneración de deuda en Portugal y España* (coord. Alexandre de Soveral Martins/Carlos Gómez Asensio, Instituto Jurídico FDUC, Coimbra, 2023, 151-156.

Almeida, Margarida – "As relações de trabalho nas cooperativas portuguesas", in VV.AA., *Estatuto jurídico de los trabajadores-socios de cooperativas y otras organizaciones de la economía social y solidaria,* Asociacion Iberoamericana de Derecho Cooperativo, Mutual y de la Economia Social y Solidaria, in https://recipp.ipp.pt/bitstream/10400.22/15245/1/Projecto%20Internacional%20Relatório%20PORTUGAL%20-%20PARTE%20I.pdf.

Carvalho, Catarina – "Qualificação da relação jurídica entre cooperador e cooperative: contrato de trabalho ou acordo de trabalho cooperative? Anotação ao Acórdão do Tribunal da Relaçao do Porto, de 19 de Setembro de 2011", in *Jurisprudência Cooperativa Comentada. Obra Colectiva de Comentários a Acórdãos da Jurisprudência Portuguesa, Brasileira e Espanhola* (coord. Deolinda Meira), Imprensa Nacional Casa da Moeda, Lisboa, 2012, 587-593.

Cusa, Emanuele – "Le cooperative insolventi tra liquidazione coatta amministrativa e liquidazione giudiziale", in *Il Diritto Fallimentare e delle Società Commerciali*, n. º 6, 2022, 1158-1185.

Enriques, Luca – "Pandemic-Resistant Corporate Law: How to Help Companies Cope with Existential Threats and Extreme Uncertainty During the Covid-19 Crisis", in *European Company and Financial Law Review*, 2020, 257-273.

Fajardo, Gemma/Meira, Deolinda – "Chapter 3. Cooperative financial structure", in VV.AA., *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Intersentia, Cambridge, 2017.

Hayati, Adis Nur – "Juridical Study on Cooperative Legal Entity Bankruptcy Submissions by its member", in *Jurnal Penelitian Hukum De Jure*, Volume 22 Number 2, June 2022, 257-270.

Leite, Jorge – "Relação de trabalho cooperativo", in *Questões Laborais*, 1994, n.º 2, 89-108.

Madaus, Stephan/Javier Arias, Francisco. – "Emergency COVID-19 Legislation in the Area of Insolvency and Restructuring", in Law *European Company and Financial Law Review*, 2020, 318-352.

Maffioletti, Emanuelle Urbano – As Sociedades Cooperativas e o Regime Jurídico Concursal. A Recuperação de Empresas e Falências, Insolvência Civil e Liquidação Extrajudicial e a Empresa Cooperativa, Almedina, Coimbra, 2015.

Meira, Deolinda – "Chapter 10. Portugal", in VV.AA., *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Intersentia, Cambridge, 2017.

– "El fenómeno de las falsas cooperativas en Portugal. Especial referencia a los riesgos de hibridación, resultantes de la indefinición legal con respecto al estatuto jurídico del socio

trabajador", in *Innovación social y elementos diferenciales de la economía social y cooperativa* (dir. Marina Aguilar Rubio), Marcial Pons, Madrid, 2022, 139-158.

– Meira, Deolinda/Ribeiro, Maria de Fátima "Artigo 80º – Regime económico", in Código Cooperativo Anotado (coord. Deolinda Meira e Maria Elisabete Ramos), Almedina, Coimbra, 2018, 443-450.

Recamán Graña, Eva – "La transposición de la Directiva 2019/1023 y su influencia en el estatuto jurídico del administrador en la crisis en España", in Reestruturação de empresas e exoneração do passivo restante em Portugal e Espanha. Reestructuración de empresas y exoneración de deuda en Portugal y España (coord. Alexandre de Soveral Martins/Carlos Gómez Asensio, Instituto Jurídico FDUC, Coimbra, 2023, 157-176.

Ribeiro, Maria de Fátima – "Riscos dos negócios das sociedades com pessoas especialmente relacionadas com elas, no quadro da insolvência (da resolução em benefício da massa insolvente e da subordinação de créditos)", in *IV Congresso Direito das Sociedades em Revista*, Almedina, Coimbra, 2016, 290-318.

– "Artigo 18º – Responsabilidade antes do registo", in *Código Cooperativo Anotado* (coord. Deolinda Meira/Maria Elisabete Ramos), Almedina, Coimbra, 2018, 109-115, pp. 109 ff..

– "Os deveres dos administradores na crise provocada pelos efeitos da pandemia Covid-19 e a suspensão do dever de apresentação à insolvência", in *Revista da Ordem dos Advogados*, Ano 81 - Vol. I/II - Jan./Jun. 2021, 263-288.

– "The insolvency of a commercial company due to the Covid-19 pandemic and the duties of company directors in the Portuguese legal system", in *Law, Business and Innovation Studies (LBIS) Conference Full Paper Proceedings Book*, in https://lbisconference.com/wp-content/uploads/2022/03/LBIS-FULL-PAPER-PROCEEDINGS-BOOK-2022.pdf, London, 2022, 90-95.

– "Responsabilidade dos administradores meramente nominais pelos actos praticados por administrador de facto", in *Revista de Direito Comercial*, 2022, in https://static1.squarespace.com/static/58596f8a29687fe710cf45cd/t/6230f49159c00a6e349a0d9a/1647375506447/2022-12+-+0519-0556+-+LA-PV.pdf, 519-556.

Sangen, Ger J.H. van der – "The principles of European Cooperative Law and their impact on Future law-making on cooperatives. The case of the Netherlands"**,** in *IJCL – International Journal of Cooperative Law*, Vol. I (1), 2018, 39-56.

Serra, Catarina – "A evidência como critério da verdade — estão as cooperativas sujeitas ao regime da insolvência? — Anotação ao Acórdão do Tribunal da Relação do Porto de 16 de Janeiro de 2006», in VV.AA., *Jurisprudência Cooperativa Comentada — Obra Colectiva de Comentários a Acórdãos da Jurisprudência Portuguesa, Brasileira e Espanhola* (coord.: D. APARÍCIO MEIRA), Imprensa Nacional Casa da Moeda), Lisboa, 2012, 405-412.

– *Idem*, "Por que estão as associações sujeitas à insolvência (e porque não estariam)? Anotação ao acórdão do Tribunal da Relação de Guimarães de 22 de Janeiro de 2013", in *Cooperativismo e Economía Social (CES)*, n.º 36, anos 2013-2014, 231-239.

Schillig, Michael – **"**The Transition from Corporate Governance to Bankruptcy Governance - Convergence of German and US Law?", in *European Company and Financial Law Review*, Vol. 7, No. 1, 2010, 116-157.

Snaith, Ian – "Chapter 2. Cooperative governance", in VV.AA., *Principles of European Cooperative Law. Principles, Commentaries and National Reports*, Intersentia, Cambridge, 2017.

SUHARTO, RACHMAT – "The bankruptcy characteristics of cooperative legal entities", in *Hang Tuah Law Journal*, vol. 3, issue 1, April 2019, 1-12.

VILLAFAÑEZ PEREZ, ITZIAR – "A brief chronicle of and some notes on the bankruptcy proceeding of Fagor Electrodomésticos S. Coop.", in *International Journal of Cooperative Law*, vol. I (1), 2018, 185-188.