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SUSTAINABLE DEVELOPMENT, LABOUR RIGHTS AND COOPERATIVES: FROM THE UN RESOLUTION AND THE CSDDD TO THE PORTUGUESE COOPERATIVE LAW

DESENVOLVIMENTO SUSTENTÁVEL, DIREITOS LABORAIS E COOPERATIVAS: DA RESOLUÇÃO DA ONU E DO CSDDD AO DIREITO COOPERATIVO PORTUGUÊS

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ABSTRACT

This paper analyses the relationship between the foreseeable changes that the approval of the CSDDD will bring to workers' rights in commercial companies in the European Union and the necessary evolution of these rights in the context of cooperative law. In particular, attention is drawn to the need to introduce some changes to the Portuguese legal regime for the workers of the cooperative who, because they are not simultaneously its members, are not covered by the legal rules which are designed exclusively to protect the position of the latter.

KEYWORDS: Cooperatives' sustainable development, Cooperatives' labour rights, decent work.

SUMMARY: 1. THE UN RESOLUTION 77/281 OF 18 APRIL 2023, ENTITLED "PROMOTING THE SOCIAL AND SOLIDARITY ECONOMY FOR SUSTAINABLE DEVELOPMENT", AND DECENT WORK. 2. THE CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE (CSDDD) - DIRECTIVE (EU) 2024/1760 AND DECENT WORK. 3. THE PORTUGUESE COOPERATIVE LAW AND DECENT WORK. 3.1 The Portuguese Companies Code and the workers' rights. 3.2 The Portuguese Cooperative Law and the workers' rights. 4. CONCLUSION. 5. BIBLIOGHAPHY.

1 The UN resolution 77/281 of 18 April 2023, entitled "Promoting the Social and Solidarity Economy for Sustainable Development", and decent work

On the 18 April 2023, the United Nations General Assembly adopted the resolution "Promoting the Social and Solidarity Economy for Sustainable Development" (A/RES/77/281)[1]. This resolution is a milestone in the field of cooperatives, in particular for having provided an official definition for the Social and Solidarity Economy and for acknowledging that it can contribute to the achievement of the Sustainable Development Goals. We will focus on goal 8, that is to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all, and particularly on goal 8.8: protect labour rights and promote safe and secure working environments for workers.

This resolution is adopted recognizing the resolution of the International Labour Organization concerning decent work and the social and solidarity economy, adopted in June 2022, in which it recognizes, in particular, that the social and solidarity economy encompasses enterprises, organizations and other entities that are engaged in economic, social and environmental activities to serve the collective and/or general interest, which are based on the principles of voluntary cooperation and mutual aid, democratic and/or participatory governance, autonomy and independence. It underlines that the social and solidarity economy can contribute to the achievement and localization of the Sustainable Development Goals, particularly in terms of employment and decent work, such as the promotion of social dialogue, labour rights and social protection. The resolution further emphasizes that the social and solidarity economy contributes to more inclusive and sustainable economic growth by finding a new balance between economic efficiency and social and environmental resilience that fosters economic dynamism, encourages a just and sustainable digital transition, social and environmental protection and

[1] These resolutions are typically recommendations and are not legally binding. They express the collective will of member states but do not impose legal obligations, depending on member states' willingness to comply.

sociopolitical empowerment of individuals over decision-making processes and resources.

The UN resolution is aimed to target social and solidarity economy, which includes cooperatives, associations, mutual societies, foundations, social enterprises, self-help groups and other entities operating in accordance with the values and principles of the social and solidarity economy. Companies are not mentioned in this document - but they are essentially the subject of the Corporate Sustainability Due Diligence Directive, which will also, as we will see below, have its impact on promoting decent working conditions.

2 The Corporate Sustainability Due Diligence Directive (CSDDD) - Directive (EU) 2024/1760 and decent work

Meanwhile, the EU has just approved a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence[2], aiming to ensure that companies take proactive measures to respect human rights and mitigate environmental impacts within their operations and supply chains.

Regarding labour rights, it covers the rights and prohibitions that are specifically listed in the Annex to the proposal: violation of the right to enjoy just and favourable conditions of work including a fair wage, a decent living, safe and healthy working conditions and reasonable limitation of working hours in accordance with Article 7 of the International Covenant on Economic, Social and Cultural Rights; and violation of the prohibition to restrict workers' access to adequate housing, if the workforce is housed in accommodation provided by the company, and to restrict workers' access to adequate food, clothing, and water and sanitation in the work place in accordance with Article 11 of the International Covenant on Economic, Social and Cultural Rights. But other rules protecting human rights will also benefit labour interests, such as the prohibition of interference with freedom of thought, conscience and religion, and the right to freedom of association, assembly, the rights to organize and collective bargaining.

Moreover, the recent approval of the corporate sustainability reporting Directive (Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022, on corporate sustainability reporting), that entered into force on 5 January 2023, reviewed provisions concerning non-financial reporting under the so-called "European Green Deal".

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[2] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, wich entered into force on 25 july 2024. EU directives are legal acts that set out goals for member states to achieve allowing them flexibility in how to implement these goals. They are binding on member states in terms of the results they must achieve, but they are not directly applicable, meaning they require national legislation for enforcement.

Among other purposes, with this Directive the EU aims at transformation of industrial sectors and their value chains, embracing opportunities for efficient production and creation of jobs and wealth-generation opportunities[3].

The specific information that is to be reported is not described in the CSRD – it is described in the Union sustainability reporting standards, ESRS, provided by Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standard. One of the topical ESRS, ESRS S2 "Workers in the value chain", covers the following matters: working conditions, secure employment, working time, adequate wages, social dialogue, freedom of association, including the existence of work councils, collective bargaining, work-life balance and health and safety[4].

Returning to the Corporate Sustainability Due Diligence Directive, also known as CS3D or CSDDD: it was approved on 24 April 2024 by the European Parliament and the Member States will have to transpose the Directive into national law and communicate the relevant texts to the Commission by 26 July 2026 (by 26 July 2027, the rules will start to apply to the first group of companies, following a staggered approach, as stated in Article 37, with full application on 26 July 2029).

The purpose of this Directive is to foster sustainable and responsible corporate behaviour, not only in companies' operations, but also across their global value chains. The new rules are aimed at ensuring that companies in scope identify and address adverse human rights and environmental impacts of their actions, both inside and outside Europe – and it includes promoting rights that ensure fair working conditions[5].

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[3] For the specific analisys of the CSDDD impact in this area, cfr. Vogt, Jeffrey/Subasinghe, Ruwan, "Protecting Workers' Rights in Global Supply Chains: Will the EU's Corporate Sustainability Due Diligence Directive Make a Meaningful Difference?", August 11, 2024, to be published in the forthcoming issue of the Cornell International Law Journal., Available at SSRN: https://ssrn.com/abstract=4927072 or http://dx.doi.org/10.2139/ssrn.4927072, pp. 5 ff..

[4] Cf. Ribeiro, Maria de Fátima/Alves, Filipe Cerqueira "Corporate sustainability reporting", *A Treatise on Environmental Law, Volume III, Environmental Law and other legal fields* (coord. Carla Amado Gomes/Heloísa Oliveira/Madalena Perestrelo de Oliveira), Lisbon Public Law Editions, Lisboa, 2024, 308-338, pp. 310 ff..

[5] This Directive is clearly the result of a complex effort of political compromise, which is why it seen in many ways as timid. Cf. Bueno, Nicolas/Bernaz, Nadia/Holly, Gabrielle/Martin-Ortega, Olga, "The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise", *Business and Human Rights Journal* (2024), 1–7, doi:10.1017/bhj.2024.10, Available at SSRN: https://ssrn.com/abstract=4847506 or http://dx.doi.org/10.2139/ssrn.4847506, pp. 3 ff.; McCullagh, Verity, "The EU Corporate Sustainability Due Diligence Directive: Real Change or More of the Same?" *European Business Law Review*, Volume 35, Issue 5 (2024), 603 – 626, pp. 605 ff.. And the transition from the Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and

It should be noted that Recital 3 reads: 'This Directive will also contribute to the European Pillar of Social Rights, which promotes rights ensuring fair working conditions. It forms part of the Union policies and strategies relating to the promotion of decent work worldwide, including in global value chains, as referred to in the communication of the Commission of 23 February 2022 on decent work worldwide". Therefore, the promotion of decent work is clearly one of the main goals of this Directive.

As for the type of 'workers' to whom decent work is to be guaranteed, it should be emphasised that the aim is for companies to be "responsible for using their influence to contribute to an adequate standard of living in chains of activities". This leads to the notion of workers being included for the purpose of "including a living wage for employees and a living income for self-employed workers and smallholders, which they earn in return for their work and production", as can be read in Recital 34. The range of people covered by this protection is therefore extremely broad, including people who are self-employed but are part of the value chain of another (large) company. This aspect is emphasised in Recital 39, which states that, for the purposes of this Directive, "employees should be understood as including temporary agency workers, and other workers in non-standard forms of employment provided that they fulfil the criteria for determining the status of worker established by the CJEU"[6].

In the Directive, we don't find a definition of worker. But in Article 3(2)(n), we find that a stakeholder is considered to be, in addition to other subjects, "the company's employees, the employees of its subsidiaries, trade unions and workers' representatives", as well as "its subsidiaries and its business partners, including the employees of the company's business partners and their trade unions and workers' representatives".

Next, we see that workers, as stakeholders, must be consulted: Recital 65 states that, "[i]n order to conduct meaningful human rights and environmental due diligence, companies should take appropriate measures to carry out effective en-

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Directive 2013/34/EU, as regards corporate sustainability reporting, to the CSDDD illustrates the EU's commitment to embedding sustainability into the core of corporate governance and operations. The objective of the former was merely to enhance the EU's corporate reporting landscape, focusing on sustainability disclosures. It required companies to disclose information related to environmental, social, and governance (ESG) factors, so that stakeholders have access to relevant sustainability information. Cfr. Ribeiro, Maria de Fátima/ Alves, Filipe Cerqueira, "Corporat sustainability reporting", op. cit., pp. 315 ff.. As sustainability issues gained prominence, the EU recognized the need for more stringent regulations that go beyond mere reporting. The CSDDD aims to establish a framework for corporate responsibility in supply chains, addressing human rights and environmental impacts more directly.

[6] For an analysis of these criteria, cf. Carvalho, Catarina, "O conceito de "trabalhador subordinado" na jurisprudência do Tribunal de Justiça (UE) – Primeiras reflexões", *Colecção Estudos Instituto do Conhecimento AB*, n. 7, *Desafios Laborais* (coord. Catarina de Oliveira Carvalho/Carmo Sousa Machado/Ricardo Costa), Almedina, Coimbra, 2018, 13-40, pp. 14 ff..

gagement with stakeholders, for the process of carrying out the due diligence actions", and that "effective engagement should cover providing consulted stakeholders with relevant and comprehensive information, as well as ongoing consultation that allows for genuine interaction and dialogue at the appropriate level, such as project or site level, and with appropriate periodicity". This consultation must take appropriate care to ensure its effectiveness: "[m]eaningful engagement with consulted stakeholders should take due account of barriers to engagement, ensure that stakeholders are free from retaliation and retribution, including by maintaining confidentiality and anonymity, and particular attention should be paid to the needs of vulnerable stakeholders, and to overlapping vulnerabilities and intersecting factors".

Article 7 of the Directive concretises this aspect. Paragraph 1 states that Member States "shall ensure that companies integrate due diligence into all their relevant policies and risk management systems and have in place a due diligence policy that ensures risk-based due diligence", and that the "due diligence policy referred to in paragraph 1 shall be developed in prior consultation with the company's employees and their representatives, and contain all of the following: (a) a description of the company's approach, including in the long term, to due diligence; (b) a code of conduct describing rules and principles to be followed throughout the company and its subsidiaries, and the company's direct or indirect business partners in accordance with Article 10(2), point (b), Article 10(4), Article 11(3), point (c), or Article 11(5); and (c) a description of the processes put in place to integrate due diligence into the company's relevant policies and to implement due diligence, including the measures taken to verify compliance with the code of conduct referred to in point (b) and to extend that code's application to business partners".

Employees are therefore given a major role in defining the company's due diligence policy, although naturally the result of consulting these stakeholders is not binding.

Finally, workers are also recognised as having the right to complain, namely through their representatives. On this point, Recital 59 states that companies "should provide the possibility for individuals and organisations to submit complaints directly to them in the event of legitimate concerns regarding actual or potential human rights and adverse environmental impacts". Article 14(1) states that "Member States shall ensure that undertakings allow persons and organisations listed in paragraph 2 to submit complaints to them where those persons or organisations have legitimate concerns about actual or potential adverse impacts with regard to the operations of the undertakings themselves, the operations of their subsidiaries or the operations of their business partners in the chains of activity of the undertakings". Then, in paragraph 2, it is stated that "Member States shall ensure that complaints may be lodged by: (a) natural or legal persons who

are affected or who have reasonable grounds to believe that they may be affected by a negative impact, as well as the legitimate representatives of such persons on their behalf, such as civil society organisations and human rights defenders; (b) trade unions and other workers' representatives representing natural persons working in the chain of activities concerned", as normal. What's more, paragraph 3 lays down the obligation for companies to "inform workers' representatives and relevant trade unions" about the procedure "for dealing with complaints referred to in paragraph 1, including a procedure where a company considers a complaint to be unfounded", and that "Member States shall ensure that companies establish a fair, publicly available, accessible, predictable and transparent procedure". In this way, workers and their representatives are given an extremely important role in reporting and learning about complaints regarding legitimate concerns about real or potential human rights and adverse environmental impacts.

The subjective scope of this Directive is companies that reach or exceed a certain size. Firstly, the concept of an undertaking for this purpose is, in accordance with Article 3(1)(a), "a legal person created in one of the legal forms listed in Annexes I and II to Directive 2013/34/EU", or "a legal person created in accordance with the law of a third country in a form comparable to those listed in Annexes I and II to Directive 2013/34/EU". Well, in the Annexes to this Directive only the four legal types of commercial companies are listed, expressly leaving aside the possibility of referring a cooperative to the concept of a company for this purpose.

It is then true that not all companies will be covered by the CSDDD rules. Under the terms of Article 2, only those EU companies that "had more than 1 000 employees on average and had a net worldwide turnover of more than EUR 450 000 000 in the last financial year for which annual financial statements have been or should have been adopted" or are "the ultimate parent company of a group that reached those thresholds in the last financial year for which consolidated annual financial statements have been or should have been adopted", which is estimated to correspond to +/- 6,000 companies[7]. And also non-EU companies that "generated a net turnover of more than EUR 450 000 000 in the Union in the financial year preceding the last financial year' or are 'the ultimate parent company of a group that on a consolidated basis reached that threshold in the financial year preceding the last financial year", which is estimated to correspond to +/- 900 companies[8]. Although micro companies and SMEs are not covered by the proposed rules, the Directive provides supporting and protective

[7] Cf. https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en.

[8] Cf. https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en.

measures also for SMEs, because they could be indirectly affected as business partners in value chains.

In conclusion, the subjective scope of application of the CSDDD rules is apparently quite restricted, being aimed directly only at large commercial companies. But since it will affect the entire value chain of these large companies, it naturally ends up extending its impact to countless micro, small and medium-sized undertakings.

So, cooperatives are not covered by the CSDDD, except to the strict extent that they can qualify as a business party, as defined by Article 3, paragraph 1, point (f): an entity with which the company has a commercial agreement related to the operations, products or services of the company or to which the company provides services pursuant to point (g)[9] ('direct business partner'); or an entity which is not a direct business partner but which performs business operations related to the operations, products or services of the company ('indirect business partner').

The analysis of this evolution makes us understand that whether cooperatives want to have a different impact from other enterprises in this area the different cooperative national laws must evolve to ensure this distinction.

We will then have to determine to what extent the adoption of these legislative changes, as a result of the transposition of the CSDDD, will be able to enshrine a regime for employees of commercial companies that is closer to the principles of decent work than that which results from the rules of cooperative law. To this end, we will take a brief look at the rules in the Portuguese Cooperative Law that are specifically aimed at protecting workers in cooperatives – regardless of whether these workers are also members of these undertakings, since it is not appropriate to consider, for this purpose, those rights that are theirs simply because they are members and derive exclusively from this status.

An overview of the Portuguese Cooperative Law shows that rights have already been enshrined that are not provided for other undertakings, but also that there is still significant room for development in this area.

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[9] Point (g) defines chain of activities as the activities of a company's upstream business partners related to the production of goods or the provision of services by that company, including the design, extraction, sourcing, manufacture, transport, storage and supply of raw materials, products or parts of products and the development of the product or the service; and the activities of a company's downstream business partners related to the distribution, transport and storage of a product of that company, where the business partners carry out those activities for the company or on behalf of the company, and excluding the distribution, transport and storage of a product that is subject to export controls under Regulation (EU) 2021/821 or to the export controls relating to weapons, munitions or war materials, once the export of the product is authorized.

3 The Portuguese Cooperative Law and decent work

It now remains to be seen whether in Portuguese law the special rules of cooperative law make it possible to affirm that opting for this legal form of enterprise is more likely to guarantee respect for the principles of decent work than adopting the corporate form.

Let´s start by the perfunctory analysis of the the specific legal regime for companies with an impact in workers' rights[10].

3.1 The Portuguese Companies Code and the workers' rights

We can consider that, under Portuguese law, the text of Article 64 of the Companies Code has always obliged directors to take into account the interests of stakeholders, namely those of employees, when managing the company[11]. The interpretation of this section of the law has not been without its difficulties[12], but it is certain that it is a rule intended to guide the actions of directors in the management of the company.

In the meantime, at European and global level, there has been a consistent move towards recognizing an increasingly important role for employees in the governance of commercial companies and, above all, in considering what the purpose of these entities should be. The notion of purpose was particularly elaborated by Colin Mayer: "[t]he purpose of the corporation is to do things that address the problems confronting us as customers and communities, suppliers and shareholders, employees and retirees. In the process it produces profits, but profits are not the purpose of the corporation per se" [13]. This view is based on the fact that

[10] It should be noted that article 9 of the Portuguese Cooperative Law admits recourse to the Portugueses Commercial Company Law to fill the lacunae in the cooperative legal system, in terms analysed by Abreu, Jorge Manuel Coutinho de, "Artigo 9.º — Direito subsidiário", *Código Cooperativo Anotado* (coord. Deolinda Meira/Maria Elisabete Ramos), Almedina, Coimbra, 2018, pp. 69 ff..

[11] However, with the 2006 reform, it was determined that this weighting should take place in the context of the fulfilment of the duty of loyalty.

[12] On the one hand, it is claimed that the precept embraces an institutionalist view of social interest (cf, namely, Cunha, Paulo Olavo, *Direito das Sociedades Comerciais*, 7 ed., Almedina, Coimbra, 2019, pp. 125 ff., 567 ff.), on the other that it embraces a contractualist view (cf. namely, Martins, Alexandre Soveral *Administração de Sociedades Anónimas e Responsabilidade dos Administradores*, Almedina, Coimbra, 2020, pp. 232 ff.), and on the other there are authors who recognise an intermediate view, a compromise between the two (this is the case, namely, of Abreu, Jorge Manuel Coutinho de, "Deveres de cuidado e de lealdade dos administradores e interesse social", *Reformas do Código das Sociedades*, Almedina, Coimbra, 2007, p. 46)

[13] Cf. Mayer, Colin, *Prosperity: Better Business Makes the Greater Good*, Oxford University Press, Oxford, 2018, p. 40.

exposure to the risk of operating a corporate enterprise goes far beyond the scope of its shareholders[14].

As far as employees are concerned, considering them as stakeholders means that they should have the right to access information on the sustainability of the company[15]; but also that information should be disseminated on equal treatment and opportunities for all and working conditions, work-life balance and health and safety[16]. Then, ideally, it should lead to them being consulted on certain decisions, through the representation structures that exist in each case - although the usefulness of this consultation is directly dependent on the level of information provided to workers and the tradition of involving these stakeholders. On this point, although the obligation to consult employees on certain decisions has been enshrined on a case-by-case basis[17], the global and transversal relevance of these rules cannot be affirmed. Finally, employees can also be included in the governing bodies of the commercial company, whether they are the management body (which takes decisions) or the supervisory body (whose authorization is often required for management decisions to be valid, and whose purpose is precisely to supervise the actions of the management body). In Portugal, there is no legislative tradition of adopting governance models that give employees this role[18], not least because of the discussion about the (im)possibility of making the status of employee and director compatible[19].

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[14] It should be noted that the use of this concept of purpose ultimately corresponds to taking a position, with the current developments that are required, on the old question of determining what should be understood by social interest - a choice between contractualist and institutionalist views, with a clear bias towards the latter.

[15] Cf. Recitals 9, 14 e 52 CSRD.

[16] See, for example, for the management report, the provisions of Article 66(3) of the Portuguese Commercial Companies Code and Article 29 b/2 b) ii of the CSRD.

[17] See, for example, the various rules providing for the provision of information to workers' committees and their consultation, namely Articles 423 ff. of the Portuguese Labour Code.

[18] Employees can only be represented on the management body under the law and the articles of association if, as a result of receiving shares in the company as a benefit, they hold a sufficient percentage of the capital to be able to appoint a member of that body, under the terms of article 392 of the Portuguese Commercial Companies Code.

[19] The following argue that it is not possible: Abreu, Jorge Manuel Coutinho de, "Administradores e trabalhadores de sociedades (cúmulos e não)", *Temas Societários*, Almedina, Coimbra, 2006, pp. 15 ff.; id., "Sobre o trabalhador/administrador (A propósito de acórdão do STJ de 23/10/2013)", *Para Jorge Leite – Escritos Jurídicos*, Coimbra Editora, Coimbra, 2014, 1-6, p. 5; Costa, Ricardo, *Os administradores de facto das sociedades comerciais*, Almedina, Coimbra, 2004, pp. 805 ff.. With different understanding, cf. Domingues, Paulo de Tarso, "Administradores Trabalhadores – Breves Notas", *Católica Law Review*, vol. II, n. 2 (2018), 11-24, pp. 14 ff..

3.2 The Portuguese Cooperative Law and the workers' rights

If we take a look at the rule that establishes the duties of the members of the management body in the Portuguese Cooperative Law, we find that, strangely enough, there is no reference in article 46, when it sets out the duties of loyalty and care that they have, to respect for the interests of stakeholders – much less a reference to the need to weigh up the interests of workers in the management of the cooperative. On the other hand, it can be said that the interests of workers are given special consideration in this law, to the extent that board members are necessarily cooperators (even if they are just investor members[20])[21], so that in labour cooperatives board members will mainly be cooperative's employees.

So within the scope of cooperative law, a distinction must be made between the situation of workers in labour cooperatives and the situation of workers in other types of cooperatives.

In the former, there is a long discussion about the very nature of the relationship established between the member workers and the cooperatives[22]; and, despite

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[20] Cf. Articles 16(1)(g), 20 and 29(8) of the Portuguese Cooperative Law.

[21] Cf. Article 29(1) of the Portuguese Cooperative Law. Cf. also Meira, Deolinda, "Cooperative governance and sustainability: an analysis according to new trends in European Cooperative Law", *Perspectives on Cooperative Law. Festschrift In Honour of Professor Hagen Henrÿ* (coord. Willy Tadjudje/Ifigeneia Douvitsa), Springer, Singapore, 2022, 223-230, pp. 229 ss.. Unsurprisingly, it has been discussed as part of the Statute for a European Cooperative Society (SCE) the acceptance or non-acceptance of the right to participate in cooperative corporate bodies, with the right to exercise the corresponding voting rights therein, in favour of representatives of the SCE's employees – which is not permitted under the legislation of most of the Member States of the Union, but which forms a substantial part of cooperative practices in Denmark. Cf. Sanz, Javier Minondo, *El nuevo Estatuto de la Sociedad Cooperativa Europea*, *CIRIEC-España, Revista de Economía Pública, Social y Cooperativa*, n. 41 (2002), 9-23, p. 14.

[22] 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. Cf. the decision of *Tribunal da Relação do Porto, 27.02.2012*, in www.dgsi.pt. In a recent decision, the court has even stated that cooperators are truly entrepreneurs in relation to the cooperative. Cf. 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, cf. Meira, Deolinda, "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", *Innovación social y elementos diferenciales de la economía social y cooperativa* (dir. Marina Aguilar Rubio), Marcial Pons, Madrid, 2022, 139-158, pp. 147 ff.. 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, as we will see.

the clear specificity of this relationship[23], it has sometimes been argued that the general regime of the labour law may be applicable to these workers[24], in the absence of a specific regime[25].

Quite simply, since these workers are also members of the cooperative itself, this model clearly ensures greater participation by workers in the governance of the cooperative[26]. However, it is important to clarify that the set of rights through which this participation is guaranteed to workers are conferred on them according to their status as members – and not as workers[27]. In these same cooperatives,

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[23] Which can be seen as a business of a specific nature and distinct from a subordinate employment contract, which is called a 'cooperative employment agreement', in the terms proposed by Meira, Deolinda /Fernandes, Tiago Pimenta, "Enquadramento doutrinal e jurisprudencial do cooperador trabalhador em Portugal", *CES Cooperativismo y Economía Social*, n. 44 (2021-2022), 231-249, pp. 241 ff. – above all because of the difficulty in identifying, in this relationship, the legal subordination that characterizes the employment contract.

[24] Namely, 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. Cf. Leite, Jorge, "Relação de trabalho cooperativo, *Questões Laborais*, n. 2 (1994), 89-108, pp. 105 ff.. He is followed by Meira, Deolinda, "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.. Catarina Carvalho criticizes the above-mentioned court orientation with similar arguments. Cf. 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", *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.. And to 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. Cf. Almeida, Margarida, "As relações de trabalho nas cooperativas portuguesas", 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.

[25] Cf. Meira, Deolinda/Martins, André Almeida/Fernandes, Tiago Pimenta, "Regime jurídico das cooperativas de trabalho em Portugal: estado da arte e linhas de reforma", *CIRIEC-España. Revista Jurídica*, n. 30 (2017), 1-30, pp. 5 ss..

[26] And, of course, it leads to the conclusion that "cooperatives, according to the perception of employees, are the ones that promote more facilitators and that their organisational culture and climate are favourable to fostering a healthy work-life balance" – but, as the authors of this study point out, "[t]he observed outcomes can be primarily attributed to the democratic and participatory management inherent in cooperative structures", meaning the mentioned conclusion can only be reached if the employees that are considered are member workers. Cf. Meira, Deolinda /Castro, Conceição/Antunes, Sofia, "The right to work-life balance in Portuguese cooperatives. A legal and empirical analysis", *CIRIEC-España, Revista de Economía Pública, Social y Cooperativa*, n. 111 (2024), 329-360, DOI: https://doi.org/10.7203/CIRIEC-E.111.28037, pp. 329 and 342.

[27] In the Portuguese legal framework, the category of "labour cooperatives" does not have a specific legal recognition. Currently, within the existing cooperative legislation, the cooperative sectors where

workers who are not members do not enjoy the same rights, nor do these rights exist in other types of cooperatives[28].

It is therefore clear that incooperatives the legal regime applicable to workers who are simultaneously members of the cooperative reflects the characteristics of the labour relationship that are intended to exist in social economy institutions: workers have access to information, are consulted in decision-making and participate in the company's results through the most efficient satisfaction of their needs. This is, after all, the very realisation of some of the cooperative principles.

But another question needs to be answered: does the regime applicable to other workers in labour cooperatives who are not members and to workers in other types of cooperatives also correspond to the principles of decent work in a special way, and does it differ from the regime applicable to any other type of undertaking that cannot be considered a social economy, namely commercial companies?

In order to answer this question, it is important to highlight the aspects of the regime applicable to workers in cooperatives who are not simultaneously members, which are special in relation to the general labour contract regime. In the Cooperative Law, there are three precepts that specifically refer to workers, establishing special rules regardless of whether they are also members:

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cooperative relations primarily involve the provision of labour by members include worker production cooperatives (Decreto-Lei n.º 309/81, de 16 de novembro), service cooperatives in the form of service producers (Decreto-Lei n.º 323/81, de 4 de dezembro), handicraft cooperatives (Decreto-Lei n.º 303/85, de 12 de novembro), fishing cooperatives (Decreto-Lei n.º 312/81, de 18 de novembro), educational cooperatives (Decreto-Lei n.º 441-A/82, de 6 de novembro), and cultural cooperatives ((Decreto-Lei n.º 313/81, de 19 de novembro). For the specific status of cooperator-worker, cf. Meira, Deolinda/ Martins, André Almeida/Fernandes, Tiago Pimenta, "Regime jurídico das cooperativas de trabalho em Portugal: estado da arte e linhas de reforma", op. cit., pp. 4 ff..

[28] The following words of Deolinda Meira are enlightening: "The necessary participation of workers, imposed by Law no. 8/2008, of 18 February, which transposes Council Directive no. 2003/72/EC of 22 July, supplementing the Statute for a European Cooperative Society with regard to the involvement of workers, also poses some difficulties, bearing in mind that a cooperative is a collectively-owned and self-managed entity, which is organised and run in a democratic and participatory manner by virtue of the cooperative principle of democratic member control. Under Portuguese law, the members of co-operative bodies are necessarily co-operators (Article 29.1 of the Cooperative Code). Consequently, regardless of the management and supervisory model adopted by the co-operative, the bodies are staffed by co-operators, and it is the right/duty of each co-operator to exercise the corporate positions for which they have been elected (Article 22(2)(b) of the Cooperative Code). This requirement that the members of the bodies be cooperators will allow the interests of the cooperators to be directly represented in its bodies, with the advantage that the cooperative's directors, guided by their own experience, will always have the interests of the co-operators in mind, without deviating from the main purpose of the co-operative, which is to satisfy the needs of its members. However, in many co-operative branches, the workers or part of them are not members of the cooperative, so there can be tensions between the democratic and self-managing nature of the cooperative and the legal requirement for workers to be involved in the SCE". Cf. Deolinda Meira, oral teaching.

- Article 3, which sets out the co-operative principles, establishes, within the scope of the 5th Principle — Education, training and information, that "[a]ll cooperatives promote the education and training of their members, elected representatives, managers *and workers*[29], so that they can contribute effectively to the development of their cooperatives";

- Article 97(1) stipulates that "a reserve must be set aside for the cooperative education and cultural and technical training of co-operators, *cooperative workers*[30] and the community"; and

- Article 114(1) requires that, when a cooperative is wound up and once the expenses arising from the winding-up process itself have been met, the balance obtained from the winding-up process must be applied immediately and in the first instance to the payment of salaries and benefits owed to the cooperative's workers.

Firstly, it should be pointed out that the only cooperative principle whose legal implementation can cover workers who are not simultaneously members of a cooperative is precisely the 5th Principle mentioned above.

The same principle also states that cooperatives "shall inform the general public, particularly young people and opinion leaders, about the nature and advantages of cooperation", but this duty to inform is not specifically aimed at the cooperative's employees (as an instrument for any consultation with them). On the internal level, it is seen as being aimed at the cooperators (to whom it is attributed by law), in order to promote their special participation in the governance of the cooperative; and on the external level, as a means of raising awareness in the community in which the cooperative operates "about the nature and advantages of cooperation", with a view to encouraging new members[31]. So, as far as workers who are not members of the cooperative are concerned, there is no specification of this duty of information, in order to differentiate their situation from that of workers in corporate companies.

That said, the specialty lies in the duty to promote the education and training of workers in cooperatives, a duty that is not provided for in the general regime of commercial companies – and which is then materialised in the provisions of article 97, requiring the cooperative to set up a reserve for this purpose. Promoting the education and training of workers is a means of providing access to resources and skills, which is essential in promoting decent work[32].

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[29] Our italics.

[30] Our italics.

[31] Cf. Meira, Deolinda, "Artigo 97.º – Reserva para a educação e formação cooperativa", *Código Cooperativo Anotado* (coord. Deolinda Meira/Maria Elisabete Ramos), Almedina, Coimbra, 2018 p. 528.

[32] Cr. Rodríguez González Amalia, "Educación, Formación e Información de los socios en las cooperativas (un principio cooperativo al servicio del fomento del empleo de calidad)", *CIRIEC- España,*

Ultimately, this is a form of employee participation in the results of the cooperative's activity, since this reserve must be made up, in particular, of the part of the net annual surpluses from operations with cooperators that is established by the articles of association or the general meeting, which may never be less than one per cent of these surpluses, and of the net annual results from operations with third parties that are not allocated to other reserves, all under the terms of subparagraphs (b) and (d) of paragraph 2 of the aforementioned article 97. It should be emphasised that this reserve, unlike what normally happens with legal reserves, is not subject to a maximum amount[33], which reinforces the importance given by law to education and training. This aspect of the system also reinforces the understanding that this is a legal reserve in the proper sense, i.e. a reserve that can only be used for the purpose for which it was created[34] and cannot be used to fulfil other obligations of the cooperative, as is expressly stated in Article 97(7).

As for the provisions of Article 114(1), this also establishes a rule for the protection of the cooperative's workers, a rule that must be classified as special, since there is no identical regime established in general labour legislation: the obligation that, when a cooperative is liquidated, the balance obtained in this process must be used as a priority for the payment of salaries and benefits owed to the cooperative's workers, before any other obligations are met, except, of course, those arising from the liquidation process itself.

In fact, this rule should be qualified as special even in relation to the general insolvency regime, since even in the context of insolvency, the protection of employees of a undertaking that has been declared insolvent and is being liquidated is 'restricted' to the recognition, for labour claims, of a credit privilege over special real estate that applies to the property of the employer where the employee carries out his activity, which prevails over any other claim (these claims are then

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Revista Jurídica de Economia Social y Cooperativa, n. 33 (2018), 105-144, pp. 6 ff. and 30 ff.; López Rodríguez, Josune, "La promoción del trabajo decente a través del principio cooperativo de educación, formación e información", in *Boletín de la Asociación Internacional de Derecho Cooperativo*, n. 58 (2021), 115-135, doi: http://dx.doi.org/10.18543/baidc-58-2021pp115-135, pp. 127 ff..

[33] Cf. Meira, Deolinda, "Artigo 97.º – Reserva para a educação e formação cooperativa", cit., p. 529; Meira, Deolinda, "Projeções, conexões e instrumentos do princípio cooperativo da educação, formação e informação no ordenamento português", *Boletín de la Asociación Internacional de Derecho Cooperativo*, n. 57 (2020), 71-94, doi: http://dx.doi.org/10.18543/baidc-57-2020pp71-94, pp. 83 ff..

[34] Cf. Meira, Deolinda, "Artigo 97.º – Reserva para a educação e formação cooperativa", cit., pp. 530 ff.; Meira, Deolinda, "Projeções, conexões e instrumentos do princípio cooperativo da educação, formação e informação no ordenamento português", cit., pp. 87 ff..

considered guaranteed claims) [35] and a general credit privilege over chattel (these claims are then considered privileged claims) [36]/[37].

It should be noted that the protection afforded by the cooperative law rule is broader[38], on two different levels. Firstly, in terms of the range of claims covered – 'salaries and benefits due to the cooperative's employees', without specifying their origin (unlike the legal provision of the Labour Code: 'employee claims arising from an employment contract, or from its breach or termination'), which makes it possible to take into account claims arising, for example, from other deals concluded between the employee and the cooperative. On the other hand, the priority given to the payment of these claims is absolute (only giving way to the payment of the debts of the liquidation process itself), unlike what happens in the context of the privileges conferred by labour law.

It can therefore be seen that the specialities of the regime can be summed up in two broad lines: the workers of cooperatives must be provided with education and training, and for this purpose it is compulsory to set up a legal reserve; in the liquidation of the cooperative, these workers will see their claims satisfied with priority over other creditors.

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[35] As a result, once the debts of the insolvent estate have been paid, the workers are paid first in relation to all other creditors, including public creditors and creditors who hold security rights arising from mortgages on the properties in question. The question of the scope of the property to which this privilege can be understood has divided Portuguese doctrine and jurisprudence.

[36] This privilege even takes precedence over the general credit privileges of the Treasury and Social Security.

[37] Cf. Article 333(1)(2), of the Labour Code.

[38] 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*, in www.dgsi.pt, 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 similar to 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 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. Actually, the cooperative law *ratio* confirms this understanding: in cooperative liquidation employees must be paid before any other creditors, as seen above.

However, despite of the general positive contribution of cooperatives to the development of decent work[39], none of the Portuguese Cooperative Law's rules expressly state that the cooperative's workers that are not simultaneously its members should be informed about management decisions or that their interests should be specifically weighed up in these decisions. Nor do these rules expressly require the direct or indirect participation of cooperative workers in decision-making processes – in other words, they don't establish any rules for the representation of workers on management or supervisory bodies, nor the need for them to be consulted in this context.

4 Conclusion

This being said, it is foreseeable that the transposition of the CSDDD may also have strong mirror impact on the situation of workers in cooperatives; and, on the other hand, it is already allowing us to reflect on the need for the rights of workers in these enterprises to be densified within the framework of cooperative legislation, so that the adoption of this business form is synonymous with the choice of a differentiated governance model, as far as the situation of workers that are not members is concerned. It is true that the cooperative, by virtue of its civic vocation, democratic character and participatory and supportive virtues, is a vehicle that can drive the demand for a different world, but it is still also true that reinvention may be required to respond to a need to maintain the attractiveness of cooperatives and to strengthen their sustainability[40].

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[39] Cf. the analysis of Filippi, Maryline /Bidet, Eric/Richez-Battesti, Nadine, "Building a Better World: The Contribution of Cooperatives and SSE Organizations to Decent Work and Sustainable Development", *Sustainability* (2023), 15, 5490. https://doi.org/10.3390/su15065490, 1-17, pp. 8 ff.; Meira, Deolinda, "Cooperativas, trabalho digno, inclusivo e sustentável. A necessária convergência do ponto de vista jurídico", *Las Cooperativas Como Instrumento de Política de Empleo Ante los Nuevos Retos del Mundo del Trabajo* (coord. Francisco Javier Arrieta Idiakez, Dykinson), Madrid, 2023, 385-404, pp. 391 ff..

[40] Cf. Deolinda Meira, oral teaching, 2025.

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