CUATRECASAS, GONÇALVES PEREIRA

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I THE NEW COOPERATIVE CODE

On September, 30 2015, Law n. 119/2015, August 31, approving the new Cooperative Code ("Code"), entered into force. This diploma expressly revoked Law n. 51/96, September 7, which, in turn, had approved the previous Cooperative Code. Our analysis will focus on the new main features of the cooperative sector.

Most importantly, the new diploma brings the cooperative concept closer to the commercial company concept, in an attempt to overcome some obstacles that cooperatives had presented to investment in the sector.

In this context, the organisational structure of cooperatives was reformulated in the Code. Pursuant to Article 28.1 of the Code, the management and supervision of cooperatives can be structured in accordance with one of the following three possibilities: (i) Board of directors and supervisory board; (ii) Board of directors with audit committee and statutory auditor; (iii) Executive board of directors, general and supervisory board and statutory auditor. In certain cases provided for by law and according to the number two of the same Article, there may be just one director and one sole supervisor, instead of a board of directors/executive board of directors and a supervisory board, respectively.

In a new rule specifically applicable to cooperatives, that has no parallel in the commercial companies legal regulation, the chairman of the board of directors may only be elected for three consecutive terms, as provided for in Article 29.4 of the Code.

Another new feature concerns the introduction of the concept of *investor members*, set out in Article 20 of the Code, alongside regular members, already existing in the previous legislation. However, these non-regular members can only hold capital in a cooperative in accordance with certain conditions imposed by the law.

First of all, their admission must be provided for in the bylaws. In addition, the total sum of the initial capital contributions of investor members must not be greater than 30% of the executed initial capital contributions in the cooperative, as set out in Article 20.1 of the Code.

Furthermore, their capital contributions must be approved by the cooperative's general meeting and must be preceded by a proposal from the board of directors, as stipulated in number three of the same article. This proposal must also contain the elements provided for in number four of Article 20 of the Code.

Their equity shall be acquired, pursuant to Article 20.2(a) and (b) of the Code, through the purchase of equity securities and the purchase of investment securities, respectively.

With regard to the decision-making procedures at the general meeting, Article 41 of the Code allows for multiple voting.

Multiple voting must also be provided for in the bylaws of the cooperative, being limited to general meetings of first-degree, in accordance with the first number of Article 41 of the Code. Number two of Article 41 further develops this provision, delimiting the scope of the multiple votes of members depending on their activities in the cooperative.

A cooperative that adopts multiple voting must have at least twenty members and may not operate in the worker production, crafts, fisheries, consumer or social solidarity sectors, in accordance with Article 41.1(a) and (b) of the Code, respectively.

The law also makes a distinction depending on the number of regular members, with regard to the maximum limit of votes, establishing a limit of three for cooperatives with up to fifty members and five if this number is exceeded, as set out in Article 41.3(a) and (b) of the Code, respectively.

The single vote is maintained, however, for certain matters, by cross-referenced stipulation of number four: amendment of the bylaws and approval and amendment of internal regulations; approval of mergers and spin-offs; approval of voluntary dissolutions; approval of the affiliation of the cooperative with unions, federations and confederations and decisions on the bringing of judicial actions by the cooperative against directors and members of the supervisory body, including withdrawal and agreement in these actions.

Also notable is a final point regarding multiple voting: the fact that they are not restricted to regular members but are also accessible to investor members. This is clearly borne out by Article 41.5, which stipulates that "If there are investor members, under the terms provided for in Article 20, multiple votes can be attributed, according to terms and criteria to be established in the bylaws". It appears that this last expression, despite apparently permitting an absence of limits with regard to this category of members, must be read in the light of Article 41.3, which extends restrictions to investor members, and it must be set in the framework of numbers six and seven, which in turn stipulate that no investor can have voting rights of more than 10% of the total votes of regular members and, altogether, these may not exceed 30% of the total votes of regular members in voting rights.

With regard to changes of a less structural nature, it must be noted that Article 80.2 of the Code provides for the possibility of extending, by stipulation in the bylaws, the liability of regular members beyond the amount of the share-capital subscribed by each member. On the other hand, the minimum amount of share-capital to be subscribed to set up a cooperative has been reduced, from the previous €2,500.00, stipulated in Article 18.2 of Law no. 51/96, September 7, to just €1,500.00, as now set out in Article 81.2 of the Code.

Finally, as a measure to safeguard the regulation of the bylaws of cooperatives already set up under the previous system, Article 119.1 ensures that clauses that do not comply with

the new Code are automatically replaced by their new applicable provisions, naturally without prejudice regarding the changes being resolved by the members.

II NATIONAL LEGISLATION

Decree-Law n. 234/2015 – Official Gazette n. 200/2015, Series I of 13-10-2015

Eighth amendment to Decree-Law n. 96/89, March 28, which creates the International Shipping Register of Madeira, simplifying some procedures concerning the creation, modification and discharge of mortgages and the registration of ships.

CMVM Regulation n. 3/2015 – Official Gazette n. 215/2015, Series II of 03-11-2015

Further develops the system provided for in the Legal Framework for Venture Capital, Social Entrepreneurship and Specialised Investment, approved by Law n. 18/2015, March 4, and revokes CMVM Regulation n. 1/2008.

III EU LEGISLATION

Commission Implementing Regulation (EU) 2015/2016 of 11-11-2015

To ensure that the shares index measures the market price of a diversified portfolio of shares which is representative of the nature of shares typically held by insurance and reinsurance companies, implementing technical standards are laid down with regard to the shares index for the symmetric adjustment of the standard equity capital calculated in accordance with Directive 2009/138/EC of the European Parliament and of the Council.

IV CASE LAW

Judgment of the Court of Appeal of Porto of October 8, 2015
Culpable insolvency – Duration of disqualification of the insolvent party

In this judgment, it was understood that the insolvency should be classified as culpable when the defendant, at the time the company was already in a situation of insolvency, did not start an insolvency procedure and transferred the entirety of the company's assets to a company recently set up by his wife and son, without this second company having paid any financial consideration for the acquisition of the assets.

In this case, the company set up assumed, by a contract, the obligation to pay debts of the insolvent party's company, which, according to the judgment, is not sufficient to support the claim that financial consideration had been paid.

Article 186 of the Insolvency and Corporate Recovery Code regulates culpable insolvency. Given the facts established and described above, it was deemed that it is subsumed in Article 186.2(d), for which reason the judgment is of interest insofar as it clarifies the delimitation of this provision.

Judgment of the Court of Appeal of Porto of October 28, 2015
Swap agreement – Nullity

The main problem of this judgment concerns the lawfulness of a swap agreement. The parties agreed to the reciprocal and future payment of two amounts, on dates set in advance, calculated by reference (in this specific case) to an interest rate.

As set out in the text of the decision, swap agreements are normally instruments of hedging or protection of interest rate risk. In this case, the sole purpose of the agreement was speculation with the interest rate, containing a registered notional amount that had no correspondence in terms of the underlying relationship between the parties, being purely abstract. The question here concerned is the possible nullity of an agreement of this type.

The judgment decided that this type of agreement is lawful, adopting the position of the Decision of the Supreme Court of Justice of February 11, 2015, and rejecting the three causes of nullity alleged by the Appellant, notably: (i) that it represents mere betting or illegal gambling, (ii) that it was illegally structured and also that (iii) it was aimed at mere speculation, which is an offence against public order.

In justification, the judgment notes that "(…) *in practice, a derivative may be used without any connection to an underlying nominate contract, since the swap agreement is sufficient in itself*", basing this opinion on the argument put forward by the abovementioned Decision of the Supreme Court of Justice. It concludes saying that swap agreements in which the notional value does not have any connection with the liabilities or loans of the contracting party are not prohibited.

This position therefore gains further support in case law, contrary to the position defended in the Decision of the Supreme Court of Justice of January 29, 2015, which deemed a similar agreement to be null and void as contrary to public order, which was not accepted in this case.

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