

Theme 3: Laws on social economy, legal statutes and types of undertaking

The Portuguese Law on Social Economy (Law 68/XII, dated 15 March 2013)

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Key words: social economy, framework law, guiding principles, social economy entities, legal regulation

This paper will put forward a theoretical analysis of the aims and repercussions of the Portuguese Framework Law on the Social Economy (FLSE), unanimously approved on 13 March 2013.

Art. 1 defines the FLSE as an overall basic law, aiming at the explicit institutional and legal recognition of the social economy sector, based on the following fundamental aspects: identifying the subjective ambit of its entities, as well as the guiding principles of their competences; defining the organization and representation structures comprised in the social economy; characterising the general principles of the social economy's incentive policies; and identifying the ways in which social economy entities may relate to public authorities.

Among the above-mentioned objectives, the explicit legal recognition of the social economy is especially noteworthy, as the authors point it out as a crucial factor for the sector's legitimisation. In the Portuguese legal system, however, this legal recognition is already made explicit in the Constitution, thus making the statement less imperative. Thus, Art. 1 of this Framework Law "lays down the general principles regarding the legal framework of the social economy, in compliance with the Portuguese Constitution in what concerns the cooperative and social sectors".

In fact, the Portuguese Constitution gives the social economy sector considerable legal autonomy, as may be observed in more than ten articles which, though spread throughout the text, are related along a backbone of structuring principles, especially those

concerning the coexistence of the three sectors (public, private and cooperative/social) and the protection of the cooperative and social sector.

Defining the limits of the social economy is central to the FLSE. Here the legislator chose a mixed technique, i.e., a definition of social economy (as found in Art. 2) combined with an open list of social economy entities (Art. 4) and the account of its guiding Principles (Art. 5).

We share the legislator's view that nowadays we can no longer define the social economy based only on its traditional families (cooperatives, mutual societies, associations and foundations), as this sector may comprise other entities, provided that their scope is within the social economy guiding Principles.

Especially noteworthy, among those guiding Principles, are such principles as "the democratic control of the organization's bodies by their members", the "autonomous management independent from public powers, as well as from any other organizations other than those in the social economy sector", and "the allocation of surpluses for the attainment of the social organization's goals in accordance with the general interest, notwithstanding the specific distribution of surpluses as pertaining to the nature and field of each social economy entity". We intend to go through these principles and discuss their scopes, bearing in mind the diverse, specific organizations making up the social economy sector.

In order to know and characterize the social economy, it is necessary to have reliable statistical data specific to the sector, an aspect included in Art. 6 of the FLSE.

Another concern of the FLSE (see Art. 7) is the creation of organization and representation ways for the social economy entities, which may work as communication channels with other economic sectors or with the public authorities. In addition, the nature of their structures may increase both their competitiveness and their economic potential. Thus, Art. 7 no.1 acknowledges social economy entities the right to "get freely organized and belong to any associations, unions, federations or confederations which represent them and uphold their interests".

Transparency in social economy entities governance has also deserved the legislator attention. Therefore, when pursuing their social objectives (for the sake of their members, users and beneficiaries), these organizations must guarantee the necessary levels of quality and safety, and be conducted with transparency (Art. 8). This is also the State's responsibility, which "shall develop, in conjunction with the representative entities of the social economy organizations, the appropriate supervision mechanisms allowing for a

transparent relationship between those organizations and their members” (Art. 9).

Another fundamental goal of the FLSE is the advancement, encouragement and development of the social economy and its organizations. As a result, Art. 10 no.1 points out the need for public authorities to “stimulate the social economy”, based on the fact that “the encouragement, valorisation and development of the social economy and of the organizations within the sector is of general public interest.”

It is worth pointing out that, between the draft and the final version of the FLSE, there has been considerable improvement and clarification of the legislators’ intention regarding the “encouragement to the social economy”. Indeed, in accordance with Art. 10 no.2 par. a), public powers “shall encourage the creation of mechanisms in order to strengthen the economic and financial self-sustainability of the social economy organizations, in compliance with Art. 85 of the Portuguese Constitution”. The reference to this constitutional provision was not included in the draft but was introduced in the final version. Its impact on the social economy sector is of the utmost importance, as that provision defines the cooperative and social sector protection principle, opening the way for the adoption of particular solutions regarding, among others, taxation, access to credit and technical support for the social economy entities.

As far as taxation is concerned, Art. 11 specifies that the encouragement to the social economy shall mean “a more favourable taxation system legally defined, according to the field and nature of these social entities”. The change of the term “specific”, included in the draft, to “favourable”, in the final version, is also justified by the same constitutional principle.

The promotion of the social economy is also related to the issue of competition, which has not been neglected by the legislators. Given that all the economic activities of the social economy entities must be carried out within the market economy and free competition these organizations “shall comply with Community law and national rules [...], without prejudice of the constitutional principle of protection of the cooperative and social sector” (Art. 12).

The FLSE once more takes into account the protection principle of the cooperative and social sector as defined by the Portuguese Constitution, which may justify the adoption, as we have already pointed out, of particular solutions regarding taxation and access to credit, among others, without disregarding competition rules and regulations. This special treatment of the social economy organizations does not lead to any competitive advantage over other businesses in the market. On the contrary, it makes up for the social role that

they are meant to perform, for, in accordance with Art. 5 par. d), one of the sector's guiding Principles is the conciliation between the interests of its members, users and beneficiaries, and those of the general interest”.

Finally, the impact of the FLSE on the sector's legislative development will be approached. According to Art. 13, the entry into force of this law clears the way for a legislative reform regarding the social economy entities, which shall abide by the FLSE and its guiding Principles.