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The application of Council Regulation (EC) No 1435/2003 of 22 July 2003 on
the Statute for a European Cooperative Society (SCE)

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for a European Cooperative Society (SCE)**

(Text with EEA relevance)

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1. INTRODUCTION

The European Cooperative Society Regulation (SCE from its Latin name ‘Societas Cooperativa Europaea’) was adopted on 22 July 2003¹, two years after the adoption of the European Company Statute (SE from its Latin name Societas Europaea)². The SCE Regulation is complemented by Council Directive 2003/72/EC on the involvement of employees in the SCE (‘SCE Directive’)³. The deadline for adapting national legislation to the Regulation and Directive on the SCE was set for 18 August 2006.

2. THE AIM OF THE STATUTE

The Statute’s main objective is to facilitate the cross-border and trans-national activities of cooperatives⁴. Like the SE Statute, the European Cooperative Society (SCE) Statute is an optional legal instrument. For their cross-border activities/operations, firms can opt to take the legal form of an SCE or that of a national cooperative.

An SCE can be created in any of the following ways:

- by converting a national cooperative which has establishments in another Member State;
- by merging two or more cooperatives from different Member States;
- by five or more natural persons and companies of any legal business form operating in different countries;
- by two companies or five natural persons resident in at least two Member States.

In all these cases there is necessarily a transnational element, since the founders must come from at least two countries.

The purpose of the SCE statute is to remove legal obstacles to the creation and management of cooperative groups from different Member States. Their cross-border business activities are hampered by the disparities between the laws on cooperatives that apply in different countries. The SCE Regulation seeks to limit these problems by allowing cooperatives to restructure themselves through cross-border mergers. It allows an SCE to transfer its registered office to a Member State other than the one where it was first established. The Regulation empowers an SCE to choose the system of corporate governance that suits it best.

1 [OJ of 18 August 2003 \(L207\): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:207:0001:0024:EN:PDF>](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:207:0001:0024:EN:PDF)

2 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, p. 1–21, http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Regulation&an_doc=2001&nu_doc=2157

3 Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, [OJ L 207, 18.8.2003](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=32003L0072&model=guichett&lg=en) p. 25 http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=32003L0072&model=guichett&lg=en

4 The text was proposed by the Commission on 1992 together with two other drafts, one for a European Association and the second for a European Mutual Society, that were withdrawn by the Commission on 2006, due to lack of progress in the negotiations in the Council. All three proposals were part of an package on the promotion of ‘Social Economy’ enterprises; the drafts constituted the reply to the claims of ‘social economy’ to be granted the possibility to create their own European legal forms, and thus to ensure equal terms of competition with the traditional capital companies.

It may be a one- or two-tier system; the Board of Directors may or may not have a supervisory committee.

Article 79 of the SCE Regulation requires the Commission to present a report on its application five years after its entry into force. This report has to include, where appropriate, proposals for amending the Regulation. The application of the Directive, which provides for arrangements for the involvement of employees in the SCE, was reviewed in 2010⁵.

To gather the necessary data for this report, the European Commission's Directorate-General for Enterprise and Industry (DG ENTR) commissioned an external study⁶, which was delivered in September 2010. In April 2011, DG ENTR launched a public consultation on the results and recommendations of this study. At the same time, in the Single Market Act⁷, the Commission said it intended to examine whether the SCE Regulation needed revising or simplifying to serve the interests of cooperatives better.

In its Communication on the Social Business Initiative – adopted on 25 October 2011⁸ – the Commission said that, depending on the results of the public consultation, it might propose simplifying the SCE Regulation, making it more independent of national laws and making it easier to set up social cooperatives.

The findings of the public consultation were published soon afterwards, in November 2011⁹. This report is based on those findings.

3. APPLICATION OF THE SCE STATUTE: THE INVENTORY OF SCES

In November 2011, 24 SCEs were registered in the 30 EU/EEA Member States, as follows: five in Italy; seven in Slovakia; one each in France, Liechtenstein, the Netherlands, Spain and Sweden; three in Hungary, two in Germany and two in Belgium. The SCE Regulation was due to enter into force in 2006. However, the large majority of Member States failed to meet this deadline. As of December 2011, three Member States had not yet taken the necessary steps to ensure the effective application of the Regulation.

The Annex to this report contains more detailed information on the inventory of SCEs and their characteristics.

5 Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions on the review of Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees (COM(2010)0481 of 16.9.2010)

6 Study on the implementation of the Regulation 1435/2003 on the Statute for a European Cooperative Society (SCE): Executive Summary and Part I: Synthesis and comparative report: http://ec.europa.eu/enterprise/policies/sme/files/sce_final_study_part_i.pdf and Part II: National Reports: http://ec.europa.eu/enterprise/policies/sme/files/sce_final_study_part_ii_national_reports.pdf

7 COM(2011) 206: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0206:EN:NOT>.

8 COM(2011) 682: http://ec.europa.eu/internal_market/social_business/index_en.htm.

9 Summary of responses: http://ec.europa.eu/enterprise/policies/sme/files/public-consultation-files/summary_replies_en.pdf

4. POSITIVE AND NEGATIVE FACTORS AFFECTING THE SETTING UP OF AN SCE, ACCORDING TO THE PUBLIC CONSULTATION

4.1. General trend

According to the professional organisations, there is no general trend applying to all cooperatives. When deciding whether to create a national cooperative or an SCE, or when assessing the best country in which to register an SCE, one of the most important issues to consider is taxation. The SCE Statute however, does not regulate taxation, since this is governed by the laws of the country where the SCE is based. Thus, the taxation of cooperatives' revenues and corporate tax, taxation of profits or surpluses within the hands of the co-operators and taxation of indivisible reserves still differs from one country to another.

After taxation, the other issues to consider - in descending order of importance - are national labour law requirements, and the complexity and relative strictness of the national legislation on cooperatives. When deciding where to register a cooperative, business people will also prefer a country with good communication networks and a business-friendly administrative environment.

4.2. Positive and cooperative-specific drivers for setting up an SCE

Cooperatives and professional organisations say that the most important benefit of setting up an SCE is to have a **European image**. This image may help the founders of a cooperative to penetrate markets where a European brand is more marketable than a national one. This applies mostly in areas such as the provision of social services.

A number of organisations also say that the right to create an SCE is an advantage for cooperative operators, because it allows them to stress their **affiliation to the cooperative movement** in general when they want to set up a subsidiary in another country, or a cross-border joint venture. Some stakeholders see the SCE Statute as having a symbolic character, because it raises the profile of social-economy businesses. Cooperatives point out that their business model differs from traditional capital based companies. It relies on solidarity, democratic governance, members' participation and proximity to members and customers – seeking to satisfy their interests rather than the interests of managers.

4.3. Evaluation of other alleged advantages

Most stakeholders do not see the **supra-national character** of an SCE as a potential advantage when carrying out cross-border structural changes in a group. Only large cooperative financial establishments and mutual insurance societies seem interested in that feature of the SCE, seeing it as helpful in **reorganising and simplifying their group structure**. As of December 2011, however, no such SCEs had been created.

The **possibility of transferring the registered office** to another Member State is seen neither as an essential driver nor as a real comparative advantage of the SCE compared to national companies. This question was raised in the public consultation, but there were no replies. In practice, no SCE had transferred its registered office as of December 2011.

The public consultation also asked stakeholders whether they valued the opportunity to create an SCE in order to carry out a **cross-border merger**. None of them saw this as an important driver. As of December 2011, the Commission has no information on any such operation.

Nor do firms appear interested in **converting** a national cooperative into an SCE: stakeholders made no comments on this option.

4.4. Negative factors

The consultation with stakeholders has revealed several problems in applying the SCE Regulation. These apply to both setting up and running an SCE.

The most significant problem for setting up SCEs is **lack of awareness about the SCE** among the business community. The most important negative drivers are **set-up costs**, the **complex procedures** to be followed (because of the numerous references to national law) and **legal uncertainty** as to which law applies in each case.

A number of stakeholders also see **the minimum capital requirement of €30 000** as an obstacle, at least for natural persons wishing to set up small SCEs in order to cooperate across borders. However, the alternative view is that having sufficient capital shows that a business is serious.

Some respondents consider the rules on **employee involvement** as a negative driver as, in their view, they are cumbersome and complex. These rules are also considered disproportionate where only few employees are concerned. However, workers' organisations and other respondents do not point to problems in this area.

5. REASONS FOR THE RELATIVE LACK OF SUCCESS OF THE SCE STATUTE

People responding to the consultation argue that the SCE statute has been relatively unsuccessful not only because it is complex but also mainly because firms that choose to operate as a cooperative tend to be well anchored in their local territory. After all, the purpose of a cooperative is to serve the members who participate directly in the democratic management of the firm.

The overwhelming majority of cooperatives are small businesses operating within national borders. A number of stakeholders' organisations therefore doubt whether the SCE statute offers any advantage. In addition, people setting up cooperatives tend to rely on their own national laws, which they know better.

Some also point out that the SCE Regulation was implemented very late (indeed, several years too late) in many Member States, even in countries such as France, Italy and Spain where the cooperative movement is very strong,

6. THE QUESTION OF SIMPLIFICATION

All stakeholders tend to believe that the complexity of the instrument is a major obstacle to the success of the SCE. The European organisation representing all national and sectoral federations of cooperatives in the EU says that national cooperative laws seem simpler and more flexible. According to several stakeholders, the complexity of the Regulation (with its multiple references to national legislation) deters not only cooperatives but also other types of firm that might otherwise be interested in organising their activities through an SCE.

Stakeholders are unanimous that the SCE Regulation badly needs simplifying if it is to be more widely used by firms both large and small. Because of its many references to national law, this type of Regulation does not offer any real benefit for cooperatives.

In fact, as of December 2011, none of the large cooperative groups, which operate, or plan to operate, at European level has used the SCE instrument. One very large group in the retail distribution sector, bringing together national cooperatives, which are leaders in their home markets, has chosen to create a cooperative under Belgian law rather than an SCE. Similarly, an important merger of farm and dairy sector cooperatives in Belgium, Germany, and The Netherlands did not take place via an SCE¹⁰.

7. TRENDS ON THE DISTRIBUTION OF SCEs

There is no positive correlation between the strength and importance of the cooperative movement in a country and the number of SCEs in that country. France, Germany, Italy and Spain are examples of countries where firms have shown little interest in setting up SCEs, even though the national authorities actively promote the cooperative movement, and national organisations give cooperatives strong technical and legal support.

Furthermore, a small number of Member States seem to be hosting a number of 'shelf' or inactive SCEs, following the similar practice on 'shelf' SEs. These are companies with no activities, created by professional providers in these countries and available for sale. It seems that operators from abroad buy ready-made shelf SCEs mainly to save time and costs, and to avoid the complex set-up procedure and negotiations on employee involvement. The Commission has little information on what becomes of shelf SCEs once they have been activated.

8. REPORTING ON SPECIFIC ISSUES AND POSSIBLE AMENDMENTS TO THE REGULATION

8.1. Reporting on specific issues referred to Article 79 of the Regulation

Under Article 79 of the SCE Regulation, this report must examine whether it is appropriate to allow an SCE's head office and registered office to be located in different Member States. It must also consider whether provisions in the statutes of an SCE should be allowed to deviate from, or complement, the national laws on cooperatives, even when such exceptions are not granted to local cooperatives.

These two questions are raised in an identical way by the SE Regulation, since they relate to the functioning and operation of both European Companies and European Cooperatives.

Under Article 79, this report must also consider whether it is appropriate to allow provisions that enable an SCE to split into two or more national cooperatives, and whether to allow for specific legal remedies in the case of fraud or error when registering an SCE created by a merger. These two questions specifically relate to SCEs, since there is no legislation in this

¹⁰ Coopernic (COOPérative Européenne de Référence et de Négoce des Indépendants Commerçants) Srl is a European purchasing cooperative of independent retailers and traders (Centres E. Leclerc, Colruyt, Conad, Coop and Rewe). The aim of the alliance is to allow independent retailers to exchange know-how, reduce supply chain costs. In December 2007, Friesland Foods and Campina announced their intentions to merge. One year later, in December 2008, they received the approval of the European competition authorities to become Friesland Campina.

area similar to the 3rd, 6th and 10th company law directives¹¹ applicable to public limited companies.

On none of these questions does the Commission have sufficient evidence from which to draw clear conclusions. This is because so few SCEs have been created and because the Regulation was brought into force very late in the Member States. The following points, however, stand out:

- The question of whether to allow the head office or main administration of an SCE to be located in a country other than that of its registered office does not seem to be of concern to the cooperative movement. There were no comments on this point from stakeholders who replied to the consultation. Cooperatives are enterprises with strong links to local communities and need to maintain a strong relationship with the territories in which they operate, just as traditional capital companies do.
- The question of whether to allow the articles of association of an SCE to deviate from local laws on cooperatives is an issue that preoccupies all stakeholders. Opinion is divided on whether SCEs should be given more autonomy from national laws. The majority of respondents believe that the SCE Regulation should give cooperative members the flexibility to choose the governance model and structure that will best serve their objectives and needs. However, a number of replies expressed serious reservations, saying that this autonomy may allow an SCE to deviate from the principles and values of the cooperative business model. Respondents also said that SCEs should not be exempt from mandatory rules on the protection of minority members' or employees' rights.
- The questions on the division of an SCE into two or more national cooperatives and on remedies if a merger is cancelled do not seem to concern cooperatives, at least until now. As of December 2011, no SCE appears to have been created by merger.

8.2. Simplification of references to national laws

The SCE Regulation was partly based on the SE statute adopted two years earlier. A large number of the SCE rules which are of general application, and not cooperative-specific repeat the similar provisions agreed in the Council and the EP at the time of the adoption of the SE. These include the rules on mergers, on the hierarchy of applicable laws and on transferring the headquarters of a company, as well as the requirement for a cross-border element.

The text of the SCE Regulation also contains many references to the national legislation on either cooperatives or public limited companies with share capital. For example, an SCE must hold a shareholders' general meeting at least once a year, unless the national law on national cooperatives provides for more frequent meetings, or if there is a merger to protect creditors, it must be governed by the national law on mergers of public limited-liability companies.

In addition, the SCE Regulation contains a series of options or references that allow Member States to dictate a particular behaviour to the SCE. These often begin with the words '*a Member State may provide*'. For example, in the event of a merger, a Member State may adopt provisions to ensure appropriate protection for members who have opposed the merger.

11 http://ec.europa.eu/internal_market/company/official/index_en.htm#directives

Others use wording such as *'Where the laws of the Member State of the SCE's registered office so permit'*.

To simplify the Regulation, the more than 30 Articles containing such options and references can be grouped into three main categories. First, there are articles regulating issues that are common to the SCE and SE Regulations. Second, there are provisions that make a direct reference to public limited company (plc) law. Third, there are rules containing references and options that regulate cooperative-specific activities and issues.

- For articles in the first category, the Commission intends to propose amendments of these provisions, if appropriate, in line with the ongoing reflection on potential amendments to the corresponding articles in the SE Regulation. The issues are identical and solutions should be the same for both Regulations.
- For articles in the second category, the Commission believes it should extensively consult stakeholders on whether the references to public limited companies are still necessary. Some stakeholders have said that these references tend to neglect the existing national legislation on cooperatives. Furthermore, not all Member States have legislation specific to cooperatives.
- For articles in the third category, where the Regulation says that a given rule will apply to an SCE only if this is permitted by national law, the Commission will consult stakeholders on ways to make the SCE Regulation more independent of national laws.

9. CONCLUSION

Following this report, the Commission intends to consult stakeholders on whether and how to **simplify the SCE Regulation**. For this purpose, it is co-hosting two large conferences to celebrate the 2012 UN International Year of Cooperatives. The first, in April 2012, will be held in Brussels and will be attended by stakeholders' organisations. The second will take place in September 2012, during the Cyprus Presidency, and will bring together representatives of the Member States.

In these fora, the Commission will ask stakeholders whether individual articles should be simplified by deleting and replacing the references to public company law, and whether the SCE Regulation can be made more independent of national laws.

In a broader context, the question of the European legal forms, such as the SE or the SCE, and the need for their review also forms part of the ongoing reflection on the future of EU Company Law. The results of this reflection will help the Commission's assessment on the necessity and, if appropriate, on the instruments to be used in order to meet the demand of business in Europe for a more level playing field, better regulation and simplification.

ANNEX

The application of Council Regulation 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)

1. INTRODUCTION

This Annex accompanies the Commission Report on the implementation of the SCE Regulation. It provides an inventory and a description of existing SCEs.

2. INVENTORY OF SCEs

According to the information received by the study¹² and the data contained in the list on existing SCEs of Libertas Institute, Germany¹³, by 22 November 2011, 24 SCEs were registered in the EU/EEA Member States.

Information on the number of existing SCEs was obtained mainly by national experts engaged in the SCE study. This number has been matched with the information from the Official journal of the EU (OJEU see below) and TED (Tender Electronic Daily). In the OJEU some SCEs (two out of 24) do not show up at all; 13 appear under the “SE” label; another 3 under the “EEIG” label; only seven under the “SCE” label. The fact that the OJEU misses many European forms of legal entities is a point which other researchers have already raised while investigating SE Regulation implementation¹⁴.

The number of SCEs increased from 2006 to 2009. In 2010 and 2011 fewer new SCEs were created than in 2009. The number of new SCEs set up each year from 2006 to November 2011 was 1 in 2006, 5 in 2008, 8 in 2009, 7 in 2010 and 3 in 2011.

3. SCEs AND THEIR CHARACTERISTICS

3.1. Nationality of founders

There is very few information on the nationality of the founders involved in the creation of the existing SCEs. The Regulation does not require such data to be published when the SCE is registered. According to Article 13, notice of an SCE's registration shall be published only for information purposes in the Official Journal of the EU, comprising the name, number, date and place of registration of the SCE, the date and place of publication in its home country, the registered office and its sector of activity. These data are normally forwarded to the Office for Official Publications of the EU by the national register within one month of the registration of the SCE in its home country.

According to the study, out of the five Italian SCEs one is created with a Finish and a Spanish partners, a second with a French mutual, and a third with a Maltese co-founder. There is no detailed information other than the one required by the Regulation about 9 SCEs (six Slovak, one French, one German and one Hungarian). Missing information is due to the fact that either some of the concerned SCEs are newly established or that SCEs refused to provide requested information to national experts when the study was performed.

3.2. Geographical mapping

12 The table in Appendix 4, Part I of the Study, presents the most relevant data concerning the existing SCEs: http://ec.europa.eu/enterprise/policies/sme/files/sce_final_study_part_i.pdf

13 Libertas – Europäisches Institut GmbH: http://www.libertas-institut.com/de/EWIV/List_SCE.pdf

14 Eidenmüller, Engert, Hornuf, Incorporating under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage, 10th European Business Organisation Law Review (2009)

Slovakia is the country with the most registered SCEs - 7, but at the same time 6 of them could be considered as shelf SCEs as they are registered on the same address and have the same activity. Italy ranks second with 5 SCEs, which is consistent with the fact that Italy is a country where cooperatives are well developed and promoted by the State pursuant to the constitutional provision of art. 45. The absence of a national implementation law has not discouraged people to set up an SCE in Italy. Belgium and Hungary follow. In 20 countries (18 MSs and 2 EEA countries) no SCEs have been established.

3.3. Methods of creation

Concerning the 14 SCEs on which there are available data in this regard, all of them have been formed *ex novo* (or *ex nihilo*) in accordance with the first, second and third indents of Art. 2, par. 1, SCE R., that is,

- (a) “by five or more natural persons resident in at least two Member States”;
- (b) “by five or more natural persons and companies and firms ...resident in, or governed by the law of at least two different Member States”;
- (c) “by companies and firms ...which are governed by the law of at least two different Member States.

To be more precise, six SCEs have been formed in accordance with (a) above; another six in accordance with (b) above; and yet another two in accordance with (c) above. The method of formation of other SCEs is still not known. Formation via merger or conversion did not take place.

There is no information about transfer of registered office. There is no information about liquidated SCEs or converted to a national legal form SCEs.

Article 1, par. 2 of the Regulation states that “unless otherwise provided by the statutes of the SCE when that SCE is formed, no member shall be liable for more than the amount he/she has subscribed. Where the members of the SCE have limited liability, the name of the SCE shall end in ‘limited’”. Regarding the legal form, 13 of 24 SCEs are registered as “limited”: 7 in Slovakia, 3 in Italy and 3 in Hungary. However, it is not certain what the degree of liability of the other SCEs is.

3.4. Fields of activities, board structure, subscribed capital, number of employees

According to the information available most of the existing SCEs provide services. Seven SCEs could be considered as “social cooperatives” or social enterprises in the sense of the Social Business Initiative¹⁵ and have objectives like employment of disadvantaged people, medical consulting, and services in the area of health. Another seven have real estate activities, two are in the construction sector and three provide business consulting.

Concerning the **board structure**, 5 SCEs had chosen the one-tier¹⁶ board structure and 10 the two-tier¹⁷ one. All Italian SCEs had chosen the two-tier system.

15 SCEs were created with a **subscribed capital** equal or close to the minimum capital requirement of € 30,000. One SCE was created with € 110,000 of subscribed capital. An average **balance sheet** cannot be provided for the existing SCEs due to the lack of information. The **net turnover** is known for two SCEs: for 2009 one of them had € 1,000 net turnover and another one less than € 15,000.

The number of **employees** in the 12 SCEs for which there is available data in this regard, counts 32 in total. These people are prevalently employed by two SCEs (one has 13 employees, the other 10). Six SCEs have only one or two employees. Four SCEs declared that they do not have any employees.

15 COM (2011) 682 : <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0682:FIN:EN:PDF>

16 A board structure with only one administrative board.

17 A board structure with a management board and a supervisory board.

Table. Existing SCEs (as of 22.11.2011)

Country	Number of SCEs
AUSTRIA	0
BELGIUM	2
BULGARIA	0
CYPRUS	0
CZECH REP	0
DENMARK	0
ESTONIA	0
FINLAND	0
FRANCE	1
GERMANY	2
GREECE	0
HUNGARY	3
ICELAND	0
IRELAND	0
ITALY	5
LATVIA	0
LIECHTENSTEIN	1
LITHUANIA	0
LUXEMBOURG	0
MALTA	0
NETHERLANDS	1
NORWAY	0
POLAND	0
PORTUGAL	0
ROMANIA	0
SLOVAKIA	7
SLOVENIA	0
SPAIN	1
SWEDEN	1
UK	0
TOTAL NUMBER SCEs	24