

SOCIEDAD COOPERATIVA EUROPEA - PROBLEMÁTICA DE LA IMPLANTACIÓN EN LOS ESTADOS MIEMBROS



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El objetivo de la ponencia es responder a varias cuestiones, principalmente de naturaleza legal, que pueden surgir durante el proceso de implantación de la Regulación por parte de los Estados Miembro.

Definición de Cooperativa

La Regulación contiene una definición muy precisa y exhaustiva de cooperativa. Los textos de implementación no necesitan repetir la definición de cooperativa incluida en la Regulación. España no tendrá dificultades en implementar la

legislación Europea, dado que las cooperativas son bien conocidas en la península ibérica, así como en la mayoría de los antiguos estados europeos.

Sin embargo, se debe mencionar que esta estructura empresarial no tiene el mismo apoyo y conocimiento en los nuevos Estados Miembro, ni en los países candidatos, donde las cooperativas tienen connotaciones negativas.

La legislación sobre cooperativas en Europa y sus formas legales

Aunque el concepto de cooperativa es bien conocido en la UE de los 15, las leyes nacionales a este respecto son bien diferentes. Podemos distinguir tres tipos de categorías:

Países como Portugal e Italia donde la legislación sobre cooperativas está anclada en la Constitución y donde existen leyes específicas y un formato definido de cooperativa.

Países donde existe un marco legal general pero no una regulación específica sobre cooperativas como es el caso de Francia, Reino Unido, Irlanda, Países Bajos o Grecia.

Países donde no existen leyes sobre cooperativas y donde la naturaleza de las mismas resulta exclusivamente de sus estatutos, como es el caso de Dinamarca.

Aplicación de la legislación nacional sobre cooperativas

La falta de una legislación apropiada puede verse como un problema ya que varias disposiciones de la Regulación hacen referencia a las leyes nacionales que regulan las cooperativas, lo que significa que las leyes nacionales sobre registros de los Estados Miembros se aplicarán a las Sociedades Corporativas Europeas. Desde este punto de vista, se pueden entender las dificultades de países que, como Dinamarca, carecen de legislación nacional al respecto.

Grupos de Trabajo de la Comisión

Para aclarar los problemas que pudiesen surgir de la aplicación de la Regulación, se han organizado varios grupos de discusión para abordar temas como la naturaleza de las cooperativas, la desmutualización o asuntos contables.

La Regulación no es una medida de armonización de leyes. Puede únicamente influenciar a los Gobiernos a adoptar medidas más modernas o a enmendar sus legislaciones referentes a las cooperativas nacionales, si consideran que el sector necesita nuevas medidas para hacer frente a la competencia de otro tipo de compañías basadas en el capital.

Tendencia Actual

Inicialmente, la estructura interna de la organización de las cooperativas estaba basada en principios con connotación social. Hoy en día, sin embargo, la mayoría de los llamados principios mutualistas en las cooperativas más importantes se aplican de una forma menos rigurosa, debido a consideraciones prácticas y pragmáticas. La Regulación debe seguir esta tendencia que es más fuerte en los Estados Miembros del Norte de Europa con una cultura protestante, que en los países católicos del Sur de Europa.

Reforzar la efectividad económica de las Sociedades Cooperativas Europeas (SCE)

La Regulación contiene una serie de disposiciones que permiten a las SCE incrementar su rendimiento económico. De esta forma, está previsto que las SCE puedan participar en actividades económicas en una o varias cooperativas nacionales y/o europeas y crear de este modo grupos que puedan unirse, que puedan conducir sus actividades a través de un subsidiario, que puedan extender los beneficios de sus actividades hacia no miembros o permitirles participar en sus negocios,...

Opciones para los Estados Miembro

La regulación permite además con el objetivo de expandir las SCE:

Atraer inversores que sean no usuarios de sus servicios pero que puedan tener un número limitado de votos, hasta un cuarto del total de los derechos de voto

Permitir a los miembros tener más derechos de voto determinados por su participación en actividades o en el capital de las ECS involucradas en las actividades financieras.

Sin embargo, siendo la Regulación fruto de un compromiso, la Comisión lamenta que estas excepciones se permitan sólo si la ley del país de la oficina central de la SCE lo permite. Dada esta circunstancia, se puede temer situaciones de “*forum-shopping*”.

En este contexto, se debe mencionar que el objetivo principal del estatuto es facilitar el desarrollo de las actividades transnacionales de las cooperativas. Por esta razón, se invita especialmente a los Estados Miembro a introducir en su legislación nacional las normas pertinentes de forma que las SCE pueden beneficiarse de ellas.

Participación de los trabajadores en la toma de decisiones

Los empleados y directores de la cooperativa creada tienen que iniciar negociaciones con el objetivo de fijar el sistema y el nivel de participación libremente. En caso de que las negociaciones fracasen, y las compañías persistan en la constitución de una nueva SCE, tendrán que implementar un sistema de consulta y participación de los trabajadores establecido por cada Estado Miembro.

Actividades permitidas a una SCE

Una SCE establecida en un Estado Miembro es tratada como una cooperativa nacional. La Regulación estipula que las restricciones en el ejercicio de una actividad impuestas a las coo-

perativas nacionales se aplican a las SCE. Sin embargo, esta disposición de la Regulación tiene que ser interpretada de forma muy restrictiva en vista de casos legales recientes como el de la Caixa (C-442/02 del 05/10/2004).

Junta Directiva

La Regulación contiene disposiciones similares a las de las sociedades europeas.

Auditorias

La Regulación prevé que la auditoría legal de las cuentas de las SCE debe realizarse por organismos nacionales, cuya particularidad es que son creados por la propia cooperativa. Este hecho a provocado reacciones referentes a la independencia de estas organizaciones. La principal particularidad radica en el hecho de que las cooperativas tienen un capital variable.

Base Legal

El Consejo adoptó por unanimidad la Regulación de las SCE como la de las Sociedades Europeas (SE), en base al Artículo 308 TCE. Por consiguiente, no se aplicó la disposición que otorga al Parlamento Europeo (PE) el derecho de decisión conjunta. Este procedimiento está previsto en el Artículo 95 TCE, base inicialmente escogida por la Comisión para ambas regulaciones.

En 2001, en el momento de adoptar el estatuto de la SE, el PE, decidió no cuestionar la Regulación, sin reconocer, sin embargo, la adecuación de tal cambio en la base legal. El escenario, habiendo sido recurrido en el momento de adoptar el estatuto de la SCE, el PE decidió esta vez llevar el caso a la Corte para solicitar la anulación de la Regulación. Se quiso, sin embargo, que sus efectos legales se mantuviesen hasta la adopción de una nueva regulación sobre este tema con la base legal apropiada. El caso está aún pendiente.

Implementation by Member States of the statute of the European co- operative society

Introduction

The statute of the European co-operative Society (SCE) was adopted by the Council on 22 July 2003. Like the statute of the European Company (SE), it is composed of a Regulation on the creation of the SCE and of a Directive which contains rules on the workers participation.

Member States need to produce the relevant legislation until August 2006, in order to enable the creation of European Cooperatives.

The aim of my speech is to present you the various questions mainly of legal nature that may eventually be raised during the process of the implementation of the Regulation by Member States.

Member states are therefore invited to take two separate acts aiming at the implementation of the Statute: one for the regulation and one for the directive. However a lot of Governments decided to go for a single bill which will contain all national provisions necessary for the implementation of both the Directive and the regulation.

The definition of the cooperative

I do not think that it is necessary to recall to the entrepreneurs of the Basque Country, where the largest cooperatives in Europe exist what are the cooperative's characteristics which make it different from the other legal forms of companies. From this point of you I am certain that Spain will not have any difficulties in implementing the European legislation.

It is true however that this entrepreneurial structure suffers from a lack of comprehension in Europe, in particular in the new

Member States and in the applicant countries. Co-operatives have faced particular problems in the former planned economies of central Europe. Although they were often the most free form of enterprise permitted under central planning, they have since suffered from their identification with the old system imposed by communism.

Co-operative legislation in Europe and legal forms used.

In the EU-15 countries the cooperative is a rather well known enterprise form. In these MS the rules on the operation and structure of coops are more the product of a social movement developed against the capital profit doctrine than a need of the market operators to introduce new legislation regulating their economic relations. Thus, on the basis of different national traditions, the legal forms used to incorporate cooperatives are sometimes close to those of the partnerships or personal unlimited companies and associations, while sometimes they are closer to the forms of the capital companies. According to the legislative approach one can distinguish three categories of the countries.

Firstly those countries like Portugal and Italy where co-operative legislation is anchored in the Constitution and where there is a specific law and a defined form for the cooperatives.

Then, countries where there is a general legal framework but there is no specific legal form e.g. in France are used mainly the forms of the companies with share capital or where there are specific forms but not a general framework like in the United Kingdom and Ireland where the form of the “provident society” is used (which is a company with societal and social objective or in the Netherlands where is used the form of the non-profit-making associations and where there are like in Greece separate statutes according to the sector and the aims of the cooperative.

Lastly, there are States where there are no laws on the cooperatives and where the co-operative nature of the company results exclusively from its statute, as it is the case in Denmark.

The problem is that in several provisions of the Regulation there are references to the national law regulating national companies. Therefore there will be a series of provisions of national laws that will apply to European Co-operative Societies according to the Member State of registration. From this point of view you may understand the difficulties which countries like DK may have in implementing the legislation. However, this country decided not to introduce national legislation believing that the customary law and the case law may be sufficient for the purposes of implementing the Statute.

This heterogeneity may result in obstacles to efficient operation of co-operatives on a cross-border or European level as the rights and obligations of members, directors and third parties become unclear.

Therefore, the Commission organised a series of working groups in order to see with co-operative organisations and national authorities cases where the differences in national laws can create problems to the effective application of the ECS Statute.

It is believed that such an exercise is able to lead to an indirect approximation of national laws.

The current tendency

On this point of harmonisation of national cooperative legislation I need to make myself clear. The Regulation is not a measure of harmonisation of laws.

Initially the cooperative's internal –organisational- structure was based on principles which had a social connotation and which aimed at developing among the members solidarity and a mutual duty of promotion of the common interests of all members and of their families. Today however the majority of the so-called “mutual” principles in large cooperatives are applied in a less rigorous way, owing to practical and pragmatic considerations. We see for instance cooperatives which recognize the right to multiple votes for the important members etc. The Regulation follows this ten-

gency, which is stronger in the MS of the north of Europe with a Protestant culture than in the catholic countries of Southern Europe, where the exceptions in the cooperative's mutual nature are more recent.

The best example is the Italian Civil Code, reformed in 2003, which refers to cooperatives without "predominant reciprocity", namely those the majority of the activities of which is not done with the associates.

Strengthening of the economic effectiveness of the SCE.

The Regulation contains a series of provisions which enable the SCE to increase its economic efficiency. Thus it is foreseen that the SCE can i. participate in economic activities in one or more SCE or national cooperatives and to create in this way groups, to merge, to conduct its activities through a subsidiary, to extend the benefits of its activities to non members or allow them to participate in its business, to have a limited or unlimited liability, to increase the capital by successive subscriptions by members or by admitting new members, or by capitalisation of the reserves available for distribution, to issue more than one class of shares conferring different entitlements with regard to the distribution of surpluses, to issue investment certificates, even negotiable to the Stock Exchange, for members and non-member, to issue additional shares in proportion of the members' transactions with their cooperative, to provide a return on capital, to engage professional managers non-members and to confer them major autonomy in relation to the Board of Directors, to allow general meetings of delegates in various places etc;

All these measures are allowed to ECS even if they are not allowed to national coops.

Options for MS

In addition, the Regulation in its effort to facilitate the ECS's expansion and development provides for the possibility

to attract investors who are non users of its services but who may have a limited number of votes up to ? of the total voting rights or

to permit a member to have more voting rights determined by his participation to the activities or to the capital of ECS involved in financial activities.

However, the Regulation being the fruit of a compromise, it is regrettable that these exemptions are permitted only if the law of the country of the head office of the SCE already allows these exemptions for the national cooperatives. These possibilities not being allowed by all national legislations, one can fear a “forum-shopping” situation.

In this context it is worth mentioning that the main aim of the statute is to facilitate the development of the trans-national activities of cooperatives. For this reason MS are invited to introduce in their national legislation the relevant rules in order that the ECS can use them. Allow me to refer to a good practice: Germany has no rules allowing investor members and plural voting rights and non users. However, the German draft text of the implementing legislation allows this possibility which will be also offered to national cooperatives in order to facilitate the participation of German co-operatives in the creation by merger of ECS established in Germany.

The legal basis

The Council adopted unanimously the Regulation SCE, like that of the SE, on the basis of Article 308 TCE. Consequently it did not apply the procedure which gives to the European Parliament (PE) the right of joint decision. This procedure is foreseen in Article 95 TCE, basis initially chosen by the Commission for both Regulations. In 2001, at the time of the adoption of the statute of the European Company, the EP had decided not to challenge the Regulation without however recognising the correctness of such a change of legal basis. The scenario having recurred at the time of the adoption of the SCE statute, the EP decided this time to bring a case to the Court to require the annulment of the

Regulation; it wished however its legal effects to be maintained into force until the adoption of new regulation on the matter with the suitable legal basis. The case is still pending Case C-436/03.

Participation of the workers in the decision-making

The Regulation stipulates that the constitution of a new SCE can take place only when the provisions provided for by the “directive on participation” are applied. It should be noted that the directive is modelled on the rules which exist in the statute for a European Company. The employees and the directors of the founder cooperatives have to start negotiations with the aim of fixing the system and the scope of the participation freely; in the event of failure of the negotiations, and if founder companies maintain their will to constitute the new SCE, they will have to set up a system of consultation and participation of the workers established by each MS.

Activities allowed a SCE

A SCE established in a MS is treated as a national cooperative. The Regulation stipulates that the restrictions on the exercise of an activity imposed on the national cooperatives apply fully to the SCE. However this provision of the Regulation has to be interpreted in a very restrictive way in view of recent case law (Caixa Bank C-442/02 du 05/10/2004 + case C-140/03 of 21/4/2005 Greek opticians). Until now the Commission did not have to examine complaints concerning cases of compatibility of national practices with the provisions on the free establishment, although there are some problems; in fact in some countries, certain sectors, such as insurance or the supply of the pharmaceutical products appear to be prohibited to the cooperatives.

Boards of directors

For a whole series of the matters relating to the operation of the SCE the Regulation contains provisions similar to those of the SE. This is the case for the administration of the ECS: it can

freely choose between an one-tier or two-tier administration system. Even if the country foresees for national coops only one of the systems.

Auditing

The Regulation foresees that the legal audit of annual accounts of the SCE may be exercised by national organisations, the particularity of which lies on the fact that they are created by the cooperatives themselves, a situation which have raised some questions as to their independence, but it has been settled by the Council of Ministers in the context of the directive on the independence of the accountants. The most important particularity lies on the fact that cooperatives have a variable capital.

The advantages of the SCE statute for the co-operative movement

The heterogeneity of the cooperatives' legislation can hinder their activities at cross-border level. Unlike those of the cooperatives, the cross-border operations of the companies with share capital were largely facilitated by the adoption of a series of directives of harmonisation of national laws and of the Regulation SE. For the cooperatives which are organisations generally centred on the members and consequently often established in a small community or a region, it was not considered useful to carry out a harmonisation of legislation similar to that of the public limited liability companies. However, having regard to the increasing number of cooperatives performing beyond the national borders, it was essential to endow the sector with a modern legal instrument similar to the statute the SE, which a) will facilitate the cooperation across the borders and b) will give the coops access to financing mechanisms which until now were accessible only in the only plcs. At a more general level, one expects that the Regulation will have indirectly an effect of harmonisation, in the sense that the work which will be undertaken for its application will urge the national authorities to take the opportunity to modernise, if necessary, the legislation which applies to the national cooperatives.

Council Regulation EC n° 1435/2003 of the 22/7/ 2003 relating to the statute of the SCE and Council Directive 2003/72/EC of the 22/7/2003 on the involvement of the workers of a SCE; OJ L 207, 18.8.2003.

The latter element could constitute a major disadvantage for the cooperatives since from accounting point of view, in accordance with the “International Accounting Standard 32”, soon endorsed by the Community (pursuant to the Regulation n° 1606/2002 of the EP and pursuant to the Council of the 19/7/2002, L 243 of the 11/9/29002) the cooperatives’ capital could have to be regarded as a debt unless the export duty is limited or subject to special conditions which aims at maintains it of the capital. This problem has to be resolved by an interpretative note of the Commission.

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