

Chapter 13

European initiatives for other corporate forms

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1. Introduction

In the past two decades the European Commission has implemented a programme for the creation of a series of European corporate forms, besides the European Company Statute (SE). In the vision of the European Commission, European company law provides a common set of rules that offers equivalent protection to shareholders, creditors and other stakeholders across the European Union. In the words of Internal Market and Services Commissioner Michel Barnier: ‘Shaping EU policy on European Company law is a challenge that we have to meet. Getting company law right makes it easier for businesses to develop across the EU to the benefit of their shareholders and customers’ (EC 2012d). The goal is to make it easier for companies to offer services and products to all customers in a market with an increasing amount of cross-border trade and e-commerce. The growth in cross-border activities is the main argument for the European Commission to work on a European legal framework.

In 1992, the Commission submitted to the Council three proposals for Regulations and Directives on the creation of the European Cooperative Society (ECS), the European Association (not for profit institution – EA) and the European Mutual. The Commission motivated the proposed Statutes by stating that the SE Regulation that was on the legislative agenda (and was still not concluded at that time) was not an instrument that suited the special features of mutual societies, associations and co-operatives. Each proposal was supplemented by a Directive on employee involvement and the whole package was modified in a proposal of July 1993 (Commission 1993). The ECS was established in the slipstream of the SE legislative process; the European Association and the European Mutual slowly vanished from the agenda. The mutual society proposal

was finally withdrawn by the Commission in 2006 due to lack of legislative progress. However, the Commission has not removed the subjects of the Association and the Mutual completely from the European agenda and is said to be ready to review the situation on the basis of new information. In the 2012 consultation views were divided as regards the need for future work in the areas of mutual societies and cooperatives (EC 2012b).

A proposal for a European Private Company Statute (SPE), a legal form for a limited liability company, was retabled in June 2008 after a first proposal that was formulated in 2003 failed. According to the European Commission the SPE was designed to address the onerous obligations on SMEs operating across borders, which need to set up subsidiaries in different legal company forms in every Member State in which these enterprises want to do business. In recent years the European Commission has submitted its proposal to the European Parliament and the Council, but without success. The proposal is pending and remains on the Commission's agenda. A new proposal for a European Foundation (FE) was finally tabled in 2012.

Until recently, most legal experts agreed on the merits of having a separate EU company law regime with European corporate forms that could serve as a 'better' alternative to the national forms. The European Parliament backed this approach. However, the objective to harmonise has shifted to the less ambitious ambition of completion: 'by creating a European form that is easily accessible next to the national forms the needs of business are fulfilled without overthrowing the legislative landscape' (AETS 2005, p223). In the 2012 public consultation on the future of European company law, improving the business environment and corporate mobility was chosen by two-thirds of participants as the main objectives of EU company law (EC 2012b). In the 2011 Reflection group *On the Future of EU Company Law* that was appointed by the EC, members agreed that the creation of company forms to supplement the existing national forms should be carefully based on practical evidence of a need by business and industry in the Union (Reflection Group 2011). The European trade unions have been, over the years, more sceptical and, for instance, the ETUC warned in its 2007 Seville Manifesto that the modernisation of company law should not be geared solely to the interests of the owners of capital (ETUC 2007).

In this chapter a brief overview and assessment of the political evolution of the different pending dossiers at European level around several cor-

Table 1 **Official proposals for European corporate forms**

Corporate form – §	First tabled	Actual stage
European Company Statute (SE)	1970	Concluded in 2001
European Mutual Society Statute – § 2	1992	Pending
European Association (not for profit, EA) – § 3	1992	Pending
European Private Company Statute (SPE) – § 4	2003	Pending
European Foundation (FE) – § 5	2012	Proposal tabled (spring 2012)
European Cooperative Society (ECS) – § 6	1992	Concluded in 2003

porate forms is followed by a section dedicated to the only other existing form, besides the SE, the Statute for a European Cooperative Society.

2. The European Mutual Society Statute

A mutual enterprise is an autonomous association of persons (legal entities or natural persons) united voluntarily, whose primary purpose is to satisfy their common needs and not to make profits or provide a return on capital. It is managed according to solidarity principles between members who participate in the corporate governance. It is therefore accountable to those whose needs it is created to serve. In common with other social economy enterprise forms, they operate according to the principles of voluntary and open membership, equal voting rights (one member, one vote; resolutions carried by majority), autonomy and independence and no share capital. Mutual societies can be differentiated from cooperatives by the fact that they operate with their own, collective and indivisible funds, and not with share capital. Rather than purchase shares, members pay fees (for example, based on insurance calculations).

Mutual societies, as a distinctive legal form of enterprise, exist only in a small number of Member States, while in some countries this kind of service is offered by cooperatives. The background can be very diverse: it was during the industrial revolution in the nineteenth century that the

concept of the mutual society really took off. This social transformation gave birth to new forms of solidarity and various provident society initiatives emerged. Workers grouped together to create welfare funds to finance the payment of daily allowances to sick or disabled workers, to pay for the care necessary for their recovery, to buy a house or to refund funeral expenses. These funds were for some time merged with strike funds. Some of these mutual societies later on became the cornerstones of the public social security systems based on social distribution and structured around non-profit organisations. They allowed workers who were at risk in terms of social welfare to be protected under a social security insurance scheme (EC 2003a).

The lack of reliable and exhaustive statistics makes it difficult to draw up an exact and accurate overview of the place of mutual societies at European level. In Europe there exist two main types of mutual societies:

- Health (provident) mutual societies, which predate modern social security systems and cover risks such as illness, handicap, infirmity and death. They are normally subject to specific legislation.
- Insurance mutual societies, which cover all types of risk (accident, life insurance and so on) and are normally covered in general legislation regarding insurance. Almost 70 per cent of the total number of insurance companies in Europe are mutual societies.

Mutual societies operate mainly in Nordic and Western European countries and they account for 25 per cent of the European insurance market. National rules are fairly homogeneous in respect of insurance mutual societies, but highly diverse in respect of provident mutual societies. The latter have tended to evolve according to the social security systems in each Member State. In some Member States they manage obligatory medical care insurance; in others they play a complementary role to obligatory regimes.

The first proposal for a European Mutual Society Statute, drafted in 1992, was amended in 1993 and formulated with a supplementing Directive on employee involvement (Commission 1993). According to the EC, further work was blocked due to irreconcilable differences between Member States concerning the SE Statute, in particular the directive concerning employee involvement. After the conclusion of the SE Statute the Swedish Presidency decided in 2001 to re-launch work on the other three statutes, starting with the SCE. By tacit agreement among

Member State delegations, the European association would follow, and then the mutual society (EC 2003a). In 2003 the Commission prepared a Consultation document on the possible impact of mutual societies in an enlarged Europe. The EC aimed to improve understanding of the sector by national and European authorities in order to ensure appropriate and suitable regulation, to consider the potential use of the proposed Statute for a European Mutual both to facilitate the cross-border activities of existing mutual societies and for the creation of new mutual societies and to analyse the potential contribution of mutual societies to enhancing competitiveness, achieving the Lisbon objectives and meeting the challenges of enlargement. Participation was relatively poor, however, and the answers do not give particularly conclusive results. The EC received 28 contributions in total; nine national mutual organisations and 13 mutual companies contributed (EC 2004). The contributions covered 10 of the then 15 Member States. Contributors stressed the importance of having a variety of alternative forms of enterprise and pinpointed several legislative obstacles to the creation of mutual societies. Some contributors stated that their national legislation is overall satisfactory, while others deplored the fact that many provisions applicable to mutual societies are generally made for other corporate forms. A majority of the replies considers a European Statute a formal recognition of mutuals at European level and essential to developing cross-border activities. According to the EC a clear picture of the mutual concept is missing, especially in the new Member States (EC 2004).

After the failure of the legislative initiative the European Commission developed a *Manual for Drawing Up Satellite Accounts of Companies in the Social Economy: Cooperatives and Mutuals*, published in December 2006 as a first step towards obtaining homogeneous, accurate and reliable data on the companies in the social economy in the EU. The purpose of this manual was to establish the necessary initial directions and guidelines for drawing up a satellite account of companies in the social economy (cooperatives, mutual societies and similar companies) in the EU in accordance with the central national accounting framework set out in the European System of National and Regional Accounts (1995 ESA or ESA 95). In November 2011 the European Parliament started an own-initiative procedure related to the European Mutual Society Statute. This initiative is currently awaiting the EP's first reading, forecast for January 2013.

3. The European Association

The European Commission defines associations as permanent groupings of natural or legal persons whose members pool their knowledge or activities either for a purpose in the general interest or in order to directly or indirectly promote the trade or professional interests of its members. On the EC website the main characteristics of associations are listed. These entities work with voluntary and open membership, with equal voting rights (and resolutions carried by majority voting) and with members' fees. There is no capital contribution and the entities act with great autonomy and independence. Associations provide services, voluntary work, sports and advocacy/representative work. Important associations are present in Member States as providers in health care, care for the elderly and children and social services.

A draft Statute for a European Association (EA) was proposed in 1992 to enable associations to take advantage of the single market in the same way as companies can, without having to forgo their specific character as groupings of people. The proposed definition covered all categories of 'association' by reference to who benefits from the services (that is, those aimed at the promotion of members' interests and those aimed at meeting the needs of third parties). The draft Statute provided for general characteristics of the EA:

- The EA could freely determine the activities necessary for the pursuit of its objectives, provided these activities were compatible with EU objectives and public policy, and the public policy of the Member States.
- The EA would be subject at national level to the application of the legal and administrative rules governing the carrying on of an activity or the exercise of a profession.
- Profits from any economic activity would be devoted exclusively to the pursuit of its objects. It is not permitted to divide these profits among the members.

The draft Statute was withdrawn in 2006 due to lack of progress in the legislative process. By that time, the European Commission declared itself ready to continue the dialogue on the subject and to review the situation on the basis of new information, but nothing has happened since. In practice it can be said that the EC, in the name of administrative simplification of its work programme, has withdrawn the statute for

a European association (and for the European mutual) from the legislative agenda. In several resolutions and reports on the social economy the European Parliament has stated that this removal of the proposals for a European Mutual Society Statute and a European Association Statute from the agenda has been a serious setback for the development of those corporate forms in the European Union.

4. The ongoing SPE debate

After the adoption of the SE legislation in 2001 the idea of creating a European company form as an alternative to the national limited liability form has been on the political agenda. In 2002 the High Level Group of Company Law Experts organised by the European Commission proposed the creation of the European Private Company, or *Societas Privata Europaea* (SPE), as a complementary form to the SE that should be targeted at small and medium-sized enterprises (High level Group 2002a and b). A proposal for an initiative was adopted by the Commission in its 2003 communication on *Modernising Company Law and Enhancing Corporate Governance in the European Union* (EC 2003b). The Commission financed the production of a feasibility study that was published in 2005 (AETS 2005). In the following years the European Parliament asked the Commission, in several reports and motions, to submit to Parliament, on the basis of Article 308 of the EC Treaty, a legislative proposal on a European Private Company Statute. In 2008 the EC formulated a proposal for a Council Regulation on the SPE Statute (EC 2008). The proposal was criticised heavily from many sides and is still pending after fruitless efforts by respective presidencies to get it through the Council. Several revised proposals for the SPE were not able to gain sufficient support from Member States.

In the consultations related to assessing the functioning of the SE Statute it has been noted that the compromise reached on employee participation in the SE has been thoroughly designed and that, without it, realisation of the SE statute would have been unthinkable. One of the key points of criticism has been the creation of empty and shelf SEs. It is not the intention of the SE statute that companies without economic activity and employees be created. This development is of critical importance and is related to another problematic aspect, the possibility of transferring a company's registered office.

These items have also been the subject of on-going debates on the creation of the SPE. For more than one reason serious problems with the SPE proposals came to the fore. First of all, the risk that a bypass might be created with regard to workers' participation rights; second, the thresholds for negotiations; and third, the possibility to split the registered office and the principal place of business. In the different draft proposals the basic principle of employee participation rights was laid down in a recital that formulated that employees' rights of participation should be governed by the legislation of the Member State in which the SPE has its registered office (the home Member State). It was further said that the SPE should not be used for the purpose of circumventing such rights. Where the national legislation of the Member State to which the SPE transfers its registered office does not provide for at least the same level of employee participation as the home Member State, the participation of employees in the company following the transfer should in certain circumstances be negotiated. Should such negotiations fail, the provisions applying in the company before the transfer should continue to apply after the transfer.

Although the Commission's explanatory memoranda on the SPE proposals gave the impression that the SPE statute was meant first and foremost as a vehicle for small and medium-sized enterprises, there is no reason why it could not be used by larger companies. According to the EC proposals, an SPE may transfer its registered office to another Member State. In order to prevent the complete abolition or a partial reduction of employee participation rights the SPE proposals, as drafted so far, contained a participation procedure in the case of the registered office being transferred. The general principle is that the law of the 'new' host Member State is applicable after the transfer of the registered office. To prevent the complete abolition or a partial reduction of participation rights, the proposals contained two exceptions to that general principle. In the rejected proposal of the Hungarian Presidency a transitional period of three years from the date of application of the Regulation was suggested, during which SPEs would be obliged to have their registered office and their central administration and/or principal place of business in the same Member State. After that period national law would apply.

After the last rejection the SPE draft stalled. It is expected that there will be no tabling of new proposals before the results of the general consultation on the future of European Company Law (initiated in the first half of 2012) are processed. In this consultation the EC signalled the lack of

progress on some simplification initiatives and on the proposed statute of the European Private Company. According to the consultation paper the EU company law forms, such as the Statute for a European Company (SE), the Statute for the European Cooperative Society (SCE), the European Economic Interest Grouping (EEIG) and the proposed Private Company Statute (SPE) must be seen as the '28-regime' to the extent that they introduce new legal forms that do not harmonise, modify or substitute the existing national legal forms, but provide an additional alternative legal form. Besides further efforts to get an agreement on the current SPE statute proposal the paper also comes up with another alternative: the scope of application of the SE Statute could be modified to allow smaller EU companies to benefit from it on the basis of more flexible requirements. In a first summary of contributions to this 2012 public consultation on the future of EU company law a majority of those who expressed an opinion were in favour of exploring alternatives to the SPE Statute, in particular supporting an instrument labelling existing national company law forms that meet a number of pre-defined harmonised requirements (EC 2012). The European Commission has announced an Action Plan setting out the main initiatives it will take in the coming years concerning EU company law and corporate governance. This Communication with concrete follow-up initiatives is scheduled for adoption by the European Commission before the end of 2012.

5. The European Foundation

In February 2012 the European Commission presented a proposal for a European Foundation Statute (FE) in order to facilitate the cross-border activities of public benefit foundations and make it easier for them to support public benefit causes across the EU. The EC launched a public consultation in February 2009 on a possible statute.

According to the European Commission, foundations pursue objectives benefiting the public at large independent of government or other public authorities. Foundations are active in social and health services; they foster research and promote culture. To this end, foundations award grants and run projects. Differences between and obstacles in national laws can make the conduct of their cross-border activities costly and cumbersome. For operations abroad foundations have to spend a part of their resources on legal advice and fulfilling legal and administrative requirements laid down by the different national laws in other countries.

This has motivated the EC to come up with a proposal for a uniform European statute.

In 1997, the EC published a Communication on promoting the role of voluntary organisations and foundations in Europe with the aim of initiating a dialogue between the EU and the key actors in the sector, including umbrella bodies, practitioners, academics, and national and local authorities (EC 1997). In 2003 the EC announced the assessment of the need for the creation of a statute for a European Foundation in its Action Plan on Modernising Company Law and Enhancing Corporate Governance in the EU (EC 2003b). In the slipstream of the talks on this Action Plan the European Parliament invited the Commission in 2006 to continue its preparation of Community legislation providing for legal forms of entrepreneurial organisation, such as the European Foundation. In 2009 DG Internal Market and Services launched a public consultation on the difficulties foundations face when operating cross-border (EC 2009a). The consultation was partly dedicated to the content of a possible European Foundation Statute and how this Statute might affect donors' and founders' attitudes. At the same time, the EC made public a feasibility study on its website that was commissioned in 2007 jointly to the Max Planck Institute for Comparative and International Private Law in Hamburg and the University of Heidelberg (von Hippel *et al.* 2008).

Participation in this consultation was considerably higher than in the consultation on the European Mutual Society (with only 28 contributions). In total, 226 responses were received from 27 countries and by far the largest number of responses (up to 70 per cent) came from foundations, charities and trusts: in fact, the organisations that are the subject of the consultation. According to the outcome of this consultation the European Foundation Statute should act as a potential role model for domestic foundations in terms of clear basic governance requirements, transparency and accountability. Among respondents the opinion was strongly backed that a European Foundation should have legal personality and be established by registration, combined with the dominant view that the supervision would best be arranged by an authority at European level (EC 2009b). Neither in the Consultation document nor in the answers received was there any reference to workers' involvement, although the feasibility study had referred to the fact that in some countries a substantial part of the workforce was employed by corporations under the control of private foundations.

In the 2012 proposal for a European Foundation Statute (FE), already announced in the Single Market Act, the EC has come up with only a Regulation (EC 2012a). There is reference in the proposed Regulation itself (in Chapter V) to rules concerning the information and consultation of employees and volunteers and, as a consequence, no parallel with the SE rules (combined in a Regulation and a Directive on workers' participation). The FE Statute should make it easier for foundations to support public benefit causes across the EU. The proposal seeks to create a single European legal form that would be fundamentally the same in all Member States and would exist in parallel with domestic foundations. It is planned that FEs have legal personality and legal capacity in all Member States with similar rules applied to them throughout the EU. Acquiring the status of a European Foundation would be entirely voluntary. FEs can be set up from scratch, by converting a national foundation into a European Foundation or through a merger of national foundations. The FE acquires legal personality on its registration in a Member State. Requirements include, for instance, that each FE proves its public benefit purpose and cross-border dimension and that it possesses minimum founding assets of €25,000. The FE acquires a legal personality upon its registration in a Member State.

In the feasibility study a distinction was made between employees of corporations that are controlled by private foundations and employees actually working in a foundation. For the first category no exact figures were provided, but in some countries – such as Denmark and Austria – the size of this workforce is claimed to be substantial. In Denmark commercial foundations employ one-quarter of all employees in private companies in the country.¹ The overall number of staff and volunteer involvement in European foundations was calculated at approximately 1.5 million full-time staff and 2.5 million volunteers (weighted by expenditure), with the workforce according to the study in 2008 ranging between over 14 per cent of the economically active population of the Netherlands and around 2–3 per cent in Scandinavian countries (von Hippel 2008). Serious question marks can be raised with regard to

1. Austrian Chancellor Gusenbauer, for instance, claimed in 2007 that approximately 500,000 employees worked in companies which are at least partly owned by private purpose foundations (von Hippel 2008: 30). In Denmark the number of people employed by companies controlled by the 76 largest commercial foundations totals 294,367, a share of 25.8 per cent of all employees. The employees actually working in all foundations directly only amount to 2.15 per cent of the total workforce von Hippel 2008: 35).

workers' involvement in several transnational companies that have allocated their power centre to private foundations (such as Bertelsmann, IKEA and the like). The proposal does not contain rules on employee participation in the board because 'board-level participation in public benefit purpose entities exists in very few Member States' (EC 2012a). Therefore, the EC does not come up with further provisions for board-level employee representation. However, at least in some countries, large foundations have mandatory rules including workers' involvement regarding supervisory boards. In other countries employees are entitled to invoke State supervisory action against the members of the board of directors of a foundation. Employees are explicitly excluded from board membership (whether mandatory or voluntary) in the Czech Republic and the Slovak Republic.

With no reference to workers' participation issues, the channel of worker involvement would be a European body for information and consultation like a European Works Council, which could be set up under specific conditions. Chapter V of the proposal formulates detailed provisions for information and consultation rights. Article 38 says: Where the total number of employees employed within the EU by the FE and its offices reaches or exceeds 50 and at least 10 in each of at least two Member States, the FE shall establish a European Works Council. The position of workers with regard to the transnational information and consultation of employees should be determined primarily by means of an agreement between the parties in the FE or, in the absence thereof, through the application of a set of subsidiary requirements contained in Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings. Volunteers shall be given observer status in this body (EC 2012a).

6. The European Cooperative Society – implementation and use

The first proposals on the European Cooperative Society (SCE) date back to the Commission's attempts to conclude a Council Regulation on the Statute of the European association, the European cooperative society and the European mutual society in 1992 and 1993 (Commission 1993). During the 1990s the European Parliament adopted several resolutions

on the contribution of cooperatives to the social economy. In the end the SCE proposal paralleled the proposal for the European Company. The EC argument was that the SE Statute was not an instrument suited to the specific features of cooperatives; therefore, the SCE proposal was tailored to the specific characteristics of cooperative societies.

Regulation 1435/2003 on the Statute for a European Cooperative Society (*Societas Cooperativa Europaea* – SCE) provides rules on the formation, structure and functioning of SCEs. It was adopted on 22 July 2003 and introduced jointly with Council Directive No. 2003/72/EC supplementing the Regulation and introducing the SCE rules on employee involvement. The rules came into force on 18 August 2006. The SCE complements the legislation on European Companies (SE) which has enabled companies to set up as a European public limited company. The SCE fills the gap regarding the transnational activities of cooperatives. The use of the SCE form is very limited. The ECDB database provided by the ETUI lists 27 created SCEs and 6 planned SCE establishments by November 2011.

In the Single Market Act, the Commission announced its intention to examine whether the SCE Regulation needed revision or simplification in order to better serve the interests of cooperatives (EC 2011). The Commission stated that the slow take-up of the Statute for a European Cooperative Society must be looked into. Before taking its final decision the Commission would have to consult stakeholders. DG Enterprise (SME section) of the European Commission launched a web-based consultation in mid-April 2011 on the functioning of the European Cooperative Society. The purpose of the consultation was to allow stakeholders to give their views on the findings and recommendations of a commissioned external study drafted by the EURICSE consortium from Italy (EURISCE 2010). EURICSE is a research foundation that is committed to promoting knowledge development and innovation for cooperatives, social enterprises and other non-profit organisations engaged in the production of general-interest goods and services. The Institute aims to deepen the understanding of these types of organisations and their impact on economic and social development, furthering their growth and helping them to work more effectively.

According to the Commission, the external study provided a comprehensive picture of the rules applied to the SCE in EU Member States and EEA countries, the Regulation's impact on national legislation on co-

operatives and its influence on the promotion of the cooperative movement. It identified only 17 existing SCEs. With the authors of the EURICSE report the European Commission concludes that the main reason for the limited success has been the lack of awareness of the existence of the SCE, as well as the complexity of the text of the Regulation. They call the European image the most positive factor affecting the setting up of an SCE. Next to the lack of cognitive awareness as the main potential dissuasive factor for the establishment of an SCE the lack of need and small scale of cooperative operations were also frequently mentioned by the interviewed stakeholders as dissuasive factors.

7. Results of the SCE consultation

The European Commission summarised the contributions received during the SCE consultation in a synthesis document and reported to the European Council and the European Parliament (EC 2012c). The synthesis attempts to give an account of the responses as they were presented. The consultation document contained twelve questions related to the most positive and most negative factors affecting the setting up of an SCE, the amount of its capital, the requirement of having founders from at least two Member States, the system of reference to national legislation, the number of options offered to Member States and the autonomy of the Regulation with regard to national rules and asked for suggestions for ways forward for the SCE. The European Commission received 32 responses; only three contributions criticised employee involvement.

The consultation outcome can be sketched in a few lines:

- the most important point is that there is a serious lack of awareness, combined with inadequate promotion by Member States;
- respondents declare that the SCE has only a symbolic character;
- implementation has been late in several countries and with a strong reference to national legislation; as a consequence, the SCE is or can become the ‘prisoner’ of national law;
- the existing national cooperative form is mainly used by national entities that are well anchored in their local territory, largely with activities that have a domestic dimension;
- most respondents question the added value; there are neither real legal nor fiscal advantages and national laws are seen as more flexible and simple.

The reference to national laws and the number of options based on a broad range of national legal forms and traditions can be seen as real obstacles to SCE creation. However, one must realise that the SCE cannot operate properly without the contribution of national law provisions. Taking into account other items that are popular in European debates on modernised company law it is remarkable to read that neither the possibility to proceed to a legal merger of national cooperatives in order to create an SCE nor the possibility to transfer the registered office to another Member State were mentioned as advantages offered by the Regulation by any of the contributing associations representing cooperatives at EU or national level. The conclusion is formulated that all cross-border activities may be performed nowadays by means of national cooperative forms.

The ETUC stated in its contribution to the consultation that the SCE should not be seen as an end in itself but rather as a means to achieve broader interests in the context of Social Europe. According to the ETUC, a thorough needs assessment with regard to the SCE is still lacking and the Commission has not touched upon the basic question of whether there is a real need to develop this kind of EU legislation. Given the small number of SCEs and the fact that the phenomenon is unknown to a broader audience this is a legitimate question. The ETUC also took note of the fact that the related Directive had not been assessed. Although the exact aim of the call for tenders was to award a contract for a study on the implementation of Regulation 1435/2003 on the Statute for European Cooperative Society in the EU Member States and EEA countries (Norway, Iceland and Liechtenstein), the EURISCE study contained some fairly strong statements about the negative effect of worker participation provisions on the use of the SCE in different countries without serious examination of the Directive. According to the ETUC, simplification should always be seen in the context of its impact on the goal of protecting stakeholders, including workers' rights, and on national culture and traditions. Areas for possible reform and simplification have to be tackled without jeopardising essential guarantees of transparency.

As already mentioned, the workers' participation element was not a big issue in the consultation set up by the European Commission: three respondents declared that employee participation 'may be an obstacle' to SCE creation. One respondent considered negotiations as cumbersome and board-level representation as 'an impediment' to the smooth management of the company.

8. Is a new SCE policy topical?

The SCE consultation and the underlying report can hardly be considered to deliver strong arguments in favour of or against any new policy. Although the commissioned EURISCE report is very long (320 pages) the actual evidence amounts to only a few cases. And the participation in the EC consultation is very unbalanced, with 32 contributions from 11 countries. There was no contribution from 16 countries, seven countries came up with one contribution, two countries (Italy and Denmark) delivered two contributions each, Germany came up with four contributions and France with 11 contributions. The rest came from organisations active at EU level. Indicative of the poor evidence is the fact that, with the exception of one reply, respondents to the consultation made no arguments in favour of (or against) creation.

One might even find it embarrassing how the EC tried to engineer a list of negative factors or drivers artificially. It would have been equally legitimate to neglect, for instance, the remarks of one respondent (the Danish public administration) related to the complexity of the Directive on employee involvement in SCEs. Against this background it is relatively easy to dismiss one of the main conclusions, namely that the complexity of the Regulation together with the multiple references to national legislation constitutes a disincentive to potentially interested entrepreneurs for organising their activities through an SCE. In addition, it must be noted that next to the low participation the contributions to the consultation are very contradictory. One of the contributors to the consultation might be right to assume that the perceived complexity of the founding process is not a sufficient reason. This presumption is totally dismissed by others, however.

The limited use of the SCE form certainly raises questions about the need of this type of European corporate form. However, the European Commission does not really question this. In its documents the Commission stresses the 'positive' aspects of the form, first of all the symbolic character whereby the European image 'offers visibility to the cooperative type of business, based on the democratic management and solidarity among members' (EC 2012c). At the same time the EC has to admit that taxation is classified at the top of the ranking when deciding to create either a national corporate form or a European one. The explanation of the limited use is perhaps simple as there are neither real legal nor fiscal advantages. In some countries there is no specific legislation on coopera-

tives. The EC is faced with the fact that since all cross-border activities may be performed conveniently nowadays by means of national cooperatives the SCE's added value has not been demonstrated.

Cooperatives' founders tend to rely on their own, better known, national laws that are for them more flexible and simple. National cooperatives can easily accept foreign members. Notwithstanding the fact that large cooperatives exist the overwhelming majority of cooperatives are SMEs whose activities have a domestic dimension. This is an additional reason why it is questionable whether the SCE legal form may be of any need to them. But none of the large cooperative groups which have or plan to have industrial or service operations at the EU level have used the SCE form so far, either.

The text of the consultation synthesis is a summary of the contributions received and attempts to give an account of the responses. So far, Commission Services has not taken a final position on the comments expressed and summarised in the synthesis. The results of the procedure served, together with the findings of the study, 'as a basis for the Commission report to the European Parliament and Council' on SCE application. In a conference, held in April 2012 in Brussels this EC report on the SCE implementation that was produced in February 2012 was presented. According to this report the most important benefit of setting up an SCE is to have a European image, because it allows people to stress their affiliation with the cooperative movement. The most important negative drivers to the success of the SCE statute are the set-up costs, the complex procedures to be followed, the numerous references to national law, the minimum capital requirement and the legal uncertainty as to which law applies in each case. The EC is considering revising the provisions of the SCE rules and has announced further consultation with stakeholders. In the near future the European Commission plans to organise activities that might help to further clarify whether the regulation needs revision or simplification in order to better serve the interests of cooperatives.

9. Outlook

With reference to the internal market the European Commission has initiated over a long period of time a programme for creating a package of European corporate forms, next to the European Company Statute (SE). The first SE initiative goes back to as early as 1970. However, the

real boost came in 1989 with a completely new SE proposal split into a Regulation and a Directive supplementing it with regard to employee involvement. In the slipstream of the SE comparable proposals for the European Association, for the European Mutual Society and for the European Cooperative were formulated in the early 1990s, all three with intertwined Regulations and Directives. The blockade in the Council of Ministers with regard to the conclusion of the SE Statute in that period also made it politically impossible to finalise the deduced forms.

The conclusion of the SE rules was seen as a prerequisite for progress in the other files. Thus, the outlook changed in 2001. Shortly after the SE conclusion the then Swedish Presidency decided to re-launch work on the other three statutes, starting with the SCE. By tacit agreement among Member State delegations, the European association would follow, and then the European mutual society (EC 2003a). The SCE was concluded along the same lines as the SE, but with regard to the other proposals there was a clear lack of interest, apart from some lobby groups that continued to plead for a European framework. And it has to be noted that also the European Parliament kept asking for corporate forms that could do justice to organisations in the ‘social economy’ field. However, agreement among the now 27 Member States could not be reached. In 2005 the time was ripe to put the European Association and the Mutual Society on ice. The proposals disappeared from the legislative agenda and were not listed in the Simplification Rolling Programme that was formulated for 2005–2008 to implement the Lisbon programme (EC 2005). But in the meantime there was a new runner-up. With a European policy that more and more took care of the interests of small and medium-sized companies the call for a European company form for SMEs was getting louder; in fact, the starting point for the still pending SPE proposals.

To a certain extent the EC legislative agenda related to the pending corporate forms looks like a perpetual motion machine. During consultations the EC is selective in its observations and is desperately sticking to its own agenda. To give just one example: in the summary report of the last consultation on the future of European company law the EC proudly presents that the European image and label which EU legal forms offer, and savings in the costs of cross-border transactions were mentioned most often by respondents as examples of added value that EU legal forms can bring to European companies, each of those being mentioned by at least one-third of all respondents (EC 2012b). If this means that two-thirds of the respondents do not share this view, what must be the

conclusion? And all other examples of added value (solution to cross-border related issues, transfer of seat, workable alternatives to national company law forms) scored even lower, while a clear 30 per cent of the respondents bluntly questioned whether the EU legal forms brought added value to European businesses. So, where is the evidence that can serve as a building block for this legislative track?

The most convulsive position is still taken with regard to the hopeless SPE files. While there is neither interest from the majority of Member States nor from SMEs in most countries the proposals of the European Commission give the full floor to a few believers in the Council of Ministers and in the other European Institutions (including the European Parliament and the European Economic and Social Committee). To give just one example, in the feasibility study commissioned by the EC on a possible SPE Statute over 80 per cent of the SMEs questioned stated that they did not wish to adopt a European statute (AETS 2005). The legitimate question, then, is who is supporting what? In this respect it is wise to end with a quote from the EC's summary of the 2012 consultation on the future of company law that refers to the SPE, although the question raised (*Should the Commission explore alternative means to support European SMEs engaged in cross-border activities?*) was of a more general nature:

'A majority of those who expressed an opinion were in favour of exploring alternatives to the SPE Statute, in particular supporting an instrument labelling existing national company law forms that meet a number of pre-defined harmonised requirements. The second most favoured option was the continuation of work on the current SPE proposal. The support was lower for initiatives such as modifying the Statute of the European Company or the creation of a simplified single-member company charter. The support for further work on the SPE came in particular from companies and business federations. Some business federations mentioned also means other than company law which could be used to improve the legal environment for SMEs. Some voices argued for the revision of the 12th Company Law Directive in order to introduce a simplified company charter to facilitate the organisation of groups (i.e. single member private limited-liability companies would be exempted from certain harmonised rules, not indispensable for a single member company). Trade unions supported the labelling initiative and expressed concerns about the possible negative impact of the SPE Statute on

employee rights. Most lawyers were also in favour of the labelling, although some stated that the major difficulties for SMEs were due to the complexity of national legislation in the field of taxation and social law.’ (EC 2012c: 8)

It is quite a tough job to deduce unambiguous support for a new SPE proposal from these sentences.

Regarding the future of the SE, these developments are instructive in at least two ways. First, the political barriers to the passage of European company legal forms appear quite high, as the impact on national institutions and practices can create opposition, especially while benefits for the Member States are not clear. After the adoption of the simplification agenda more and stronger arguments are needed to tackle the subsidiarity claim.

Second, European company legal forms cannot create a ‘magic solution’ to the problems of business, a fact that appears to be clear to the business community itself. Member States have initiated reforms of their national legislation in a patchy process of transnational legal pluralism. As a result, even if some new European company legal forms are adopted, the national corporate forms that in recent years were made more ‘attractive’ to the business environment will remain the predominant company legal form (Cremers and Wolters 2010). The SE might remain a lonely ‘second best’ on the European level.

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