

The impact of the European cooperative society Regulation on cooperative legislation and agricultural cooperatives in the Member States

Franci Avsec

ABSTRACT

Since 18 August 2006, the Regulation 1435/2003/EC on the Statute of European Cooperative Society has been applicable in all 28 States of the European Economic Area (EEA States). Each EEA State had to adopt provisions necessary for the implementation of the Regulation before that date.

Since the European Cooperative Society (Societas Cooperativa Europaea, SCE) derives its legal personality from the European Community law, it is a supranational legal body, able to transfer its registered office from one EEA state to another.

The capability of SCE to transfer its registered office has already led some national legislators to adopt certain options, for instance, concerning investor members, in order to attract more SCEs to have registered office on their territory.

Although the SCE Regulation does not require harmonisation of national legislation about cooperatives in the EEA States, some national legislators have amended their national cooperative laws introducing some provisions from the SCE model also for cooperatives formed under national cooperative law, at least as options (for instance, regarding minimum capital and investor members), as cooperatives formed under national law are able, under certain conditions and after prescribed formalities, to convert into SCE and transfer thereafter their registered office in another EEA State.¹

INTRODUCTION

The Regulation of the Statute of the European cooperative Society was adopted on 22 July 2003 (Council Regulation (EC) No 1435/2003 ..., 2003) introduced a new, optional supranational legal framework for cooperative organisations with a cross-border dimension in the EEA States.

The choice of the SCE form is completely optional in that sense that the interested individuals and legal bodies, if requirements to form a SCE from the SCE Regulation are met, can choose between a cooperative in the form of the SCE and a cooperative formed under a national cooperative law.

The SCE Regulation does not require EEA States to harmonize their national legislation about cooperatives. They were obliged only to adopt

measures necessary for effective application of the SCE Regulation before 18 August 2006 when the SCE Regulation became applicable.

The main impacts the SCE Regulation will have on the national cooperative legislation and the agricultural cooperatives in particular, arise from the competition between the legal models of the SCE in different EEA States as well between the SCE form and the model of a cooperative formed under the national law in a given EEA State.

SOURCES AND METHODS

In order to find out the main competitive advantages of the SCE form, basic provisions about SCE were compared with the corresponding provisions in the national law about agricultural cooperatives or about cooperatives on general (if there is no special agricultural cooperative legislation).

In order to find out advantages of legal models of cooperatives, following provisions were compared: (1) provisions about the transfer of registered office of a cooperative, (2) provisions about possible activities of a cooperative, (3) provisions about equity formation in cooperative and (4) provisions about various options for the governance of a cooperative.

The transfer of registered office without winding up of a cooperative is important since the cooperative can move to another EEA State which offers a more favourable business environment (for instance, tax system).

The comparison of the SCE Regulation and the national law about agricultural cooperatives or cooperatives in general was based on the legislation in several EEA States adopted or proposed for the application of the SCE Regulation.

MAIN FINDINGS

SCE may transfer its registered office to another Member State without winding up and creation of a new legal person if certain formalities to protect the interested stakeholders (for instance, creditors, minority members etc.) are met. Apart from the SCE, which derives its legal personality from the EC law, cooperatives in EEA States are creatures of national law and exist only as legal persons governed by the national law. Therefore the

Franci Avsec is assistant professor at the Chair for Agricultural Economics, Policy and Law at the Zootechnical Department of Biotechnical Faculty, University of Ljubljana (franci.avsec@siol.net).

cooperatives formed by national law of Member States do not enjoy that option. The capability of the SCE to transfer the registered office option has led some national legislators to introduce some options (especially regarding investor members) for SCEs in order to attract more SCEs to have their registered office on the territory of that state. This option has also led certain legislators to introduce, parallelly with the provisions for SCE, similar solutions also in their national cooperative law, in order to give no reason to domestic cooperatives to convert into SCE and to transfer the registered office in another Member State afterwards (see, for instance, Entwurf eines Gesetzes ..., 2006).

Since the national rules which provides for specific rules or restrictions to the nature of businesses carried out by an SCE, apply in full to the SCE (Art. 8(2) of the SCE Regulation), SCE can not have a broader object of business than cooperatives formed under the national law in a given EEA state. If, for instance, the national rules exclude cooperatives from carrying out banking activities, the SCE with registered office in that state has no advantage in that respect.

The SCE Regulation prescribes the minimum capital as a sum under which the subscribed capital may not fall as a result of repayment of shares to members who leave the cooperative (Art. 3(4)). The capital represented by the shares is still variable, but only above the minimum capital, which is established by the statutes and can not be lower than the sum prescribed by the Regulation.

This provision is not original since some EEA States had introduced the minimum capital for cooperatives before the SCE Regulation was adopted (for instance, Belgium, France, Portugal, Spain).

The minimum capital of a SCE is connected with the gradual introduction of the International Financing Reporting Standards in the EU accounting law. According to the International Financial Reporting Interpretation Committee (IFRIC), members' shares are equity if the entity has either an unconditional right to refuse redemption of the members' shares or if local law, regulation or the entity's governing charter imposes unconditional prohibitions on the redemption of members' shares. These prohibitions may be absolute (covering all redemptions) or only partial (redemption of members' shares is prohibited if it would cause the number of members' shares or amount of paid-in capital from members' shares to fall below a specified level, Commission Regulation (EC) No 1073/2005..., 2005).

The second aspect of the capital formation regards the possibilities and ways of capital increase.

In that respect, the SCE Regulation lays down that the non-user investor members can be admitted by the statutes of a SCE if the laws of the EEA State where the SCE has its registered office so permit (Art. 14(2)).

Also the figure of investor member had been introduced in some national legislations (for instance, in France, Italy and Spain) before the SCE Regulation was adopted. Some EEA States where investor members in cooperatives had not been foreseen, resolved to allow not only SCEs with registered office on their territory but also the

cooperatives formed under their national cooperative law to admit investor members, in order to improve the capital base of cooperative enterprise (so, for instance, Austria, Germany and the Netherlands). In Sweden, however, the national legislator explicitly refused such option on the ground that each cooperative is based on members as users and not investors, so the capital increase from non-users should not give investors a voting right (Europakooperativ, 2005).

The SCE Regulation lays down the principle of equal voting right for all members, permitting only limited exceptions for all cooperatives save those the membership of which consists prevalently of other cooperatives. The principle of the self-management (in the sense it has in Austrian and German cooperative legislation) is abandoned, since the SCE Regulation does not require that only members are eligible in the supervisory and the management organ (in two-tier system) or in the administrative organ (in one-tier system). On the other hand, the SCE Regulation had to limit the influence of investor members to make the corporate governance consistent with satisfying members' needs and promoting of their economic and social activities as the principal object of the SCE.

The complicated provisions about governance rights of user and investor members in SCE could be considered as a cost for providing additional capital from the investor members. It is interesting that some EEA States (for instance, Italy and Spain) allow higher percentage of voting rights belonging to investor members than the SCE Regulation.

CONCLUSIONS

The SCE Regulation has triggered a certain regulatory competition between various legal models of a cooperative between EEA States as well within each EEA state. The already adopted amendments of national legislation in some EEA States mark only a beginning of a process which will probably lead to a gradual and silent harmonization between the national cooperative laws in EEA States.

REFERENCES

- Commission Regulation (EC) No 1073/2005 of 7 July 2005 amending Regulation (EC) No 1725/2003 adopting certain international accounting standards in accordance with Regulation (EC) no 1606/2002 of the European Parliament and of the Council, as regards IFRIC 2. Official Journal L 175, 8. 7. 2005, p. 3-7.
- Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE). OJ L 207, 18.8.2003, p. 1-24.
- Entwurf eines Gesetzes zur Einführung der Europäischen Genossenschaft und zur Änderung des Genossenschaftsrechts. Gesetzentwurf der Bundesregierung. Deutscher Bundestag, Drucksache 16/1025, 16. Wahlperiode, 23. 03. 2006.
- Europakooperativ. Departementsserien (Ds), Ds 2005:45, Justitiedepartementet, Stockholm, 24 oktober 2005.