

I: INTERNATIONAL CO-OPERATIVE LAW

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Co-operative Law, understood as a set of rules that regulate the formation and functioning of co-operatives, has a long tradition in European countries. For example, the *Industrial and Provident Act* in the United Kingdom was passed in 1852 and the Prussian Co-operatives Act (the Schulze-Delitzsch Law) in 1867.

At present, co-operatives exist in all European Union countries. According to Co-operatives *Europe* data there are 160,000 co-operative societies in existence, with 123 million members.

The European Union (EU) was born with the aim of creating a common market governed by certain principles, such as freedom of establishment. This principle implies, amongst other things, the freedom to form and manage companies in any part of the EU under the same conditions that the legislation of the country of establishment applies to its own nationals, according to Art. 49 of the Treaty on the Functioning of the European Union (TFEU). The Treaty uses the term 'companies' in a broad sense and specifically includes co-operatives (Art. 54 TFEU).

However, it is not the aim of the EU to create a common law to replace that of the Member States nor, therefore, to create a European law of companies or co-operatives. Nonetheless, European institutions have been given the power to issue the necessary regulations (Directives) to remove restrictions on the freedom of establishment and make the safeguards required by Member States of companies for the protection of the interests of members and others equivalent throughout the Union (Art. 50 TFEU).

This is how the process of harmonization or approximation of European company legislations began. In time, this process has proved unsatisfactory due to its slowness and to the high margin of discretion the Directives allow the states in adapting their laws. For this reason, from the *Memorandum* of 1966 onwards the EU strategy regarding companies moved towards creating a model of entity governed by a European statute, common to all the states and outside the national systems of law. The result of this new orientation was Regulation 2157/2001 on the Statute for a European Company (SE), supplemented by Directive 2001/86/EC on the involvement of employees.

European co-operative law has followed a similar process. Initially a harmonization approach was intended, as with the law for public limited



companies, but due to the failure of this procedure the intent was abandoned, and it was decided to create a European co-operative. Hence in 2003 the Statute for a European Co-operative Society (SCE) (Regulation 1435/2003) was approved, supplemented by Directive 2003/72/EC on the involvement of employees, but harmonization of European co-operative legislation was never carried out, not even for its most important distinctive elements, unlike the case of public limited companies, which have been harmonized through a number of Directives.

Therefore, the Statute for a European Co-operative Society (SCE) was not born with the aim of harmonizing co-operative legislations, as confirmed by the sentence of the Court of Justice of the European Union of 2 May 2006, but with the aim of providing co-operatives with a specific legislative instrument that allows them to undertake cross-border co-operation and integration operations.

The SCE's main objective is to satisfy its members' needs and develop their economic and social activities through: a) concluding agreements with them for the supply of goods or services or the execution of work of the kind that the SCE carries out or commissions; b) promoting their participation in economic activities, in the same manner, in one or more SCEs or national co-operatives. The SCE can carry out its activities directly or through a subsidiary (Art. 1.3).

The SCE can be formed by a merger between co-operatives from different states; by conversion of a co-operative with an establishment or subsidiary in another state; or as an *ex novo* creation by natural or legal persons from at least two Member states (Art. 2.1).

The Statute for a SCE and the Statute for an SE have not been able to create a complete 'European' framework for these companies and frequently refer to the national law of the state in which their registered office is situated. In the case of co-operatives, that legislation has not been previously harmonized.

On 23 February 2012 the European Commission presented a report about the application of the SCE Regulation. This report reveals that despite the fact that European co-operatives can now engage in cross-border mergers, move their registered address to another state or form cross-border co-operatives, the Statute has had relatively little success. This is mainly because of the way the co-operatives themselves function, conducting their activities in local environments with the direct participation of their members.

On the other hand, the Statute for an SCE has been very important in making it possible to justify that the particular tax treatment of some



co-operatives in EU countries is compatible with the characteristics of these organizations, as reflected in the Statute for an SCE, and therefore this particular treatment does not violate the European rules on state aid (ECJ sentence of 8 September 2011).

In any case, one of the tasks that is still pending is to harmonize the European co-operative laws, as the European Parliament recalled in its Resolution of 2 July 2013 on the contribution of co-operatives to overcoming the crisis (Section 15). The fact is that the differences between the different legal systems are considerable, both in form and in content. Some states do not have a specific regulation for co-operatives (Ireland, Denmark), whereas others have a number of laws, whether by region (Spain) or by type of co-operative (France, Portugal). In some states co-operatives are associations, in some they are partnerships or corporations, and in others they are in a category of their own. The concept of co-operative also varies: in some states it has a primarily economic function (to further the economic interests of its members), whereas in others it has a more social function (to satisfy the needs of its members and of the community).

In its Communication of 23 February 2004 on the promotion of co-operative societies in Europe, the Commission expressed its intention not to carry out the harmonization of the European co-operative legislation directly, but to support the harmonization proposals that the co-operative sector presented to it. Since November 2011, the Study Group on European Co-operative Law (SGECOL), composed of independent legal experts, has been working on drawing up some general principles of what European co-operative law should be, based on the experience of the different European co-operative legislations.

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