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29. Juni 2012

European Commission
Enterprise and Industry

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Identification number in the register: 96315373291-29

Need for Simplification of the European Cooperative (SCE) Regulation 1435/2003

Opinions and comments on the list of articles presented by the Commission

Ladies and gentlemen,

the **DGRV** (German Cooperative and Raiffeisen Confederation) and the **GDW** (National Association of German Housing and Real Estate Enterprises) would like to give their opinions on the list of articles as follows[1]:

Table 1: Articles regulating issues that are common to the SCE and SE Regulations

SCE and SE pursue different aims and each of them embodies different values. The essential aim of the SCE is to provide benefits for the members (membership value maximisation). The SE intends to increase the value of shareholder investment (shareholder value maximisation). Provisions in the SCE and SE Regulation must therefore be amended in parallel only provided such proposed amendments do not affect the different aims of the two legal forms. Our opinion only answers the question of whether, and to what extent, it is meaningful to modify and supplement the SCE Regulation.

[1] Definition of terms/acronyms:
Legislator = German legislator
SCE = SCE based in Germany
GenG = German Cooperatives Act
UmwG = German Conversion Act
SCEAG = German SCE-Regulation Implementation Act

No. 1:
This option should continue to be available to the Member States. It helps enlarge the circle of potential founder members.

No. 2:
no proposals for amendment

No. 3:
no proposals for amendment

No. 4:
The existing system of referring back to relevant national legislation should be maintained. In the context of application, national laws applicable to cooperatives should in principle be given precedence over national laws applicable to public limited-liability companies. As regards references to national legislation for public limited-liability companies in detail, see opinion on table 2.

No. 5 and 6:
no proposals for amendment

No. 7:
According to the wording of Art. 35 or Art. 2 para. 1 tiret 5 (SCE Regulation) respectively, it is not clear whether subsidiaries of the cooperative may participate in the formation process of an SCE. However, recital 13 of the Preamble implies that a cooperative with (genuine) subsidiaries may participate in the conversion. Clarification is required on this issue under Art. 35 SCE Regulation.

No. 8:
The dualistic system has proved its worth for the cooperative under German law. It must continue to be available for the SCE as well.

No. 9
a) No. The system of linking the SCE to a Member State on the basis of its registered office and head office should be maintained.

b) No. The SCE should be formed like a cooperative in accordance with the laws of the Member State in which the cooperative has its registered office. This includes mandatory adoption of the regulations of that Member State provided they are in compliance with the SCE Regulation.

c) There is currently no practical need for this. We are not aware of any case in practice in which these issues have played a role.

d) Under § 25, the UmwG provides for liability for damages of the transferor's administrative organs (representative/supervisory bodies). § 27 of said law regulate

liability for damages of the transferee entity. In the case of the formation of an SCE by merger, these protective regulations equally apply according to Art. 28 para. 1 or Art. 8 para. 1 c) ii) SCE Regulation, respectively. From a German point of view, special legal remedies are therefore not required as part of the SCE Regulation.

Table 2: References to plc law

References to the national laws governing public limited-liability companies are meaningful and necessary only in the absence of any national cooperative regulations. Given the above-mentioned differences between the cooperative and the public limited-liability company, national cooperative legislation should in principle take precedence over national laws for public companies. Insofar as no objections are raised against also deleting a subsidiary reference to national laws for public companies following our statement, this will only apply to the SCE based in Germany.

No. 10:
The amendment would not affect the legal situation in Germany. However, the proposed amendment is to be welcomed since it gives priority to the application of the relevant laws governing cooperatives.

No. 11:
German cooperative laws provide for a comprehensive audit at the time of formation. Therefore no objections are raised against the proposed amendment.

No. 12:
The proposed amendment is supported.

No. 13:
Referring to national cooperative laws is to be welcomed. Yet the proviso "if equivalent" causes considerable uncertainty in the implementation. We therefore prefer to give priority to legislation governing cooperatives with subsidiary application of the laws for public companies.

No. 14:
analogous to opinion on No. 13

No. 15:
analogous to opinion on No. 13 and 14

No. 16:
The regulation should remain unchanged.

No. 17-24:
In case of doubt, the regulations should remain unchanged, even if they contain direct references to the relevant laws concerning public companies. The German law contains special regulations regarding cross-border mergers of public companies (§§ 122a-122l UmwG). These regulations are not applicable on cooperatives.

Table 3: Cooperative-specific options for MS and specific references to national cooperative legislation

Work on the SCE could only be completed after decades because the provisions represented a minimum consensus amongst the Member States. The options under discussion for Member States in this context and references to national cooperative legislation are an essential part of this compromise since they enable individual Member States to shape the SCE in accordance with national cooperative identity/self-perception. Member States should continue to have this option.

If reference to national regulations or a regulatory option is considered unnecessary in the following comments, this applies exclusively to the SCE based in Germany.

No. 25:
Reference to national regulations should be maintained.

No. 26:
The regulatory option for Member States should remain in place.

No. 27:
In accordance with § 4 SCEAG the SCE may admit investing members by regulation in its statutes. Additionally, in 2006 the German GenG (Cooperative Act) incorporated the option of admitting investing members by regulation in the statutes following the model of the SCE Regulation (see § 8, para. 2 GenG). The legislator has used the SCE Regulation as a „model law“ for orientation.

No. 28:
This back-up rule should remain in place. The GenG allows for the statutes to set out reasons for termination other than those covered in the law.

No. 29:
In the context of SCE formation, reference to legislation in the Member State with the registered office must remain in place. For Germany, this means that an audit is carried out by the cooperative auditing federation in connection with the formation prior to SCE registration (§§ 11, 11a GenG), among other things. All aspects of personal and economic conditions that might endanger the interests of members or

creditors are examined. This tried-and-tested system of Germany should also be applied in the case of SCE formation.

No. 30:
Reference to national legislation should remain in place since deletion might cause problems in Germany. According to § 81 para. 1 sentence 2 UmwG, the audit opinion regarding the merger might also be expressed jointly for several participating cooperatives. However, this applies only if the two cooperatives are affiliated to the same auditing federation. Otherwise a single report is ruled out according to the spirit and purpose of the regulation.

No. 31:
The legislator has used the option in § 12 SCEAG. The GenG provides for the board of directors to be elected and removed by the general meeting (§ 24 para. 2, sentence 1 GenG). In accordance with § 24 para. 2, sentence 2 GenG the statutes may also provide for another way of appointing and removing the board. Appointment by the supervisory board is often included as an option. There are no objections against wording Art. 37 para. 2 SCE Regulation as follows:

"The member/members of the management organ shall be appointed and removed by the supervisory organ. The statutes may provide for the member/members to be appointed and removed by the general meeting".

No. 32:
Reference to national legislation should be maintained. The GenG includes provisions that are deviating in this respect and should also be applied to the SCE. According to § 9 para. 2 GenG members of the board of directors and the supervisory board must be members of the cooperative and natural persons (principle of member governance). Should registered cooperatives have joined the cooperative their members may qualify for the board of directors or supervisory board of the cooperative provided they are natural persons; should other legal persons or business partnerships have joined, this applies to persons authorised to represent them.

No. 33:
This regulatory option should remain in place.

No. 34:
The legislator has not used the possibilities available under Art. 48 para. 3 SCE Regulation. The option may therefore be deleted.

No. 35:
In accordance with § 48 para. 1 sentence 3 GenG the general meeting must be held within the first six months of the financial year. The GenG does not stipulate a minimum number of meetings beyond this one meeting, but meetings may be

convened when certain conditions are given (§§ 44, 45, 60 GenG). The reference may therefore be deleted. The legislator has not regulated that the first general meeting be held 18 months after the formation of the SCE. The option may therefore be deleted.

No. 36:
Reference to national legislation should be maintained. § 43 para. 3, sentence 3 GenG, to which § 29 SCEAG refers, provides for multiple voting rights to be only granted in the statutes if certain conditions are met.

No. 37:
analogous to No. 36

No 38:
analogous to No. 36

No. 39:
Reference to national legislation should be maintained. Voting rights of investing members are regulated under § 8 para. 2 GenG. Appropriate measures must be put in place to ensure that investing members cannot under any circumstances outvote other members and that decisions of the general meeting that require, by law or by statutes of the cooperative, a majority of at least three quarters of the votes cast cannot be prevented by investing members. The SCEAG includes such regulation under § 30 para. 2.

No. 40:
Reference to national laws of the Member State in which the SCE has its registered office should remain in place. The GenG does not provide for participation of workers' representatives with voting rights in the general meeting, or the sectoral or sectional meeting respectively.

No. 41:
According to § 31 SCEAG the statutes may provide for a sectoral or sectional meeting to be held.

No. 42:
The GenG does not include binding provisions restricting regulations in the statutes about the use of the annual surplus beyond the requirements set out in the SCE Regulation (in particular the decision of the general meeting regarding the use of profits, Art. 67 SCE Regulation).

No. 43:
The GenG allows for asset distribution to be regulated in another way (§ 91 para. 3 GenG). The statutes may prohibit the distribution of assets or stipulate different ratios when dividing the assets.

Sincerely

DGRV – Deutscher Genossenschafts- und Raiffeisenverband e. V.

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