

Opinion on:

- the proposal for a Council Regulation (EEC) on the Statute for a European Mutual Society, and
- the proposal for a Council Directive supplementing the Statute for a European Mutual Society with regard to the Involvement of Employees⁽¹⁾

(92/C 223/15)

The Council decided on 26 March 1992, in accordance with Articles 54 and 100 A of the EEC Treaty, to ask the Economic and Social Committee for an Opinion on the abovementioned proposals.

The Section for Industry, Commerce, Crafts and Services, which was responsible for the preparatory work, adopted its Opinion on 6 May 1992. The Rapporteur was Mr Ramaekers and the Co-Rapporteur Mr Flum.

At its 297th Plenary Session (meeting of 26 May 1992) the Economic and Social Committee adopted the following Opinion by a majority, with 8 votes against and 15 abstentions.

- I. The Committee approves the proposal for a regulation subject to the following comments:

1. Introduction

1.1. The Committee is pleased at the interest in the mutual sector shown by the European institutions, as evidenced by the Commission's proposal for a regulation.

1.2. After the various resolutions of the European Parliament (1982 Mihr Report, 1987 Avgerinos Report) and the ESC Opinion of 19 September 1990 (which stressed the importance of cooperatives, mutual societies and associations and advocated a greater awareness of the particular problems facing such enterprises during the construction of Europe), the text proposed by the Commission is an additional and decisive step towards obtaining Community-level recognition of the sector's specific nature.

1.3. The proposed statute for a European mutual society (ME) covers both provident societies (MPs) and insurance enterprises (MAs); the two types have some features in common and others which set them apart.

1.4. Both types follow the principles of mutual democracy (management by the insurees themselves) and solidarity (non-selection of risks); neither distri-

butes surpluses or pays people to canvass for business. As regards differences, the two types are generally handled by different ministries (social affairs for MPs and economic affairs for MAs), cover different risks (personal injury for MPs and all risks, such as damage or death, for MAs) and are subject to different rules. The national laws covering MAs are fairly similar but those governing MPs have developed differently in each country according to local social security schemes: some cover compulsory sickness insurance while others are complementary to or alternatives for compulsory schemes.

1.5. The Committee considers it absolutely essential that the three regulations on the statutes for a European association, a European mutual society and a European co-operative be examined and adopted simultaneously.

1.6. The Committee urges maintenance of the 'linkage' principle, which it also considers essential, i.e. the possibility of setting up one of these three European entities through a national association, mutual society or co-operative.

1.7. To take account of the evolutionary nature of the matters dealt with by the regulation, the Committee would like it to include a flexible revision clause enabling, for instance, the exhaustive annexes to be modified.

⁽¹⁾ OJ No C 99, 21. 4. 1992, p. 40-57.

1.8. Moreover, because of the frequent referrals the draft regulation makes to Member States' legislation, the Committee urges the Commission to continue its comparative studies into the different national laws.

2. The ESC's Position

2.1. The ESC's position on the ME Statute was set out in detail in an Opinion adopted on 19 September 1990; it may be summed up by the following six proposals:

2.1.1. Establishment of an optional, alternative specific legal instrument. This instrument will also take account of the specific nature of mutual societies.

2.1.2. Clarification of financing techniques for consolidating or boosting own funds.

2.1.3. Compliance with the 'one person, one vote' principle, adaptable for legal persons.

2.1.4. Provisions, in the event of liquidation, for the distribution of assets to bodies pursuing similar objectives.

2.1.5. Accessibility of the Statute to both legal and natural persons.

2.1.6. The possibility of establishing a European company of this type by merger, setting-up a subsidiary, conversion of a national company or from scratch.

3. The Responses Contained in the Proposal for a Council Regulation

3.1. The response to this recommendation is provided by the draft regulation as a whole and, more specifically, by certain recitals preceding the actual statute.

3.2. The financing of MEs is covered by Article 44, which states that an ME may make use of all forms of financing in the state in which it has its registered office under the same conditions as those applying to the legal entities which founded it.

3.2.1. The Committee feels that as a result of this provision, discrimination could occur in connection with an ME's future location.

3.2.2. In such a Community context, the—possibly utopian—ideal would be to guarantee any ME, regardless of the location of its registered office, access to the forms of financing provided for by one of the national legislations.

3.2.3. Whilst this would obviously entail both practical difficulties and the risk of distortions of competition between MEs and national mutual societies, it should not be forgotten that one of the objectives of this statute is to enable MEs to engage in transnational activities on an equal footing with joint stock companies. If, however, this proposal is not viable, could not MEs at least be given access both to the forms of financing available in the country in which they have their registered office and to the financial instruments of the countries in which they have establishments?

3.2.4. The Committee urges the Commission to continue its work so that a European solution might be found to the problem of financing, bearing in mind the major difficulty that mutuals have in developing their own funds.

3.3. Article 20 entitles each member of an ME to one vote. The Committee proposes that the article be amplified by introducing multiple votes for members who are legal persons, in proportion, for example, to their actual membership. However, there should be a single limit on this laid down by statute to prevent any one member from holding an absolute majority.

3.4. Article 52 states that the assets of an ME are to be distributed either to other MEs or mutual societies, except where otherwise stated in the rules.

3.4.1. The explanatory memorandum justifies this derogation by the need to take account of certain national legal systems which do not recognize the principle of disinterested devolution. If this is the reason, why should it not be possible to provide that assets should be distributed in accordance with the principle of disinterested devolution in the Member States where that principle is recognized, and, as an exception, in accordance with national legislation in the case of MEs established in Member States where a different principle is recognized? Such an arrangement would have the advantage of removing this statutory exception in Member States which apply the principle of disinterested devolution or where the law is silent.

3.5. It seems astonishing that the draft regulation (Article 2) does not provide for the formation of MEs by natural persons. The ME is, in fact, defined as a group of persons. (Explanatory memorandum: Article 1 and recital 7.)

Other arguments have been put forward in support of this recommendation:

3.5.1. Firstly the ESC pointed out in its Opinion of 19 September 1990 (point 3.3 *et seq.*) that the European company as a legal instrument of trans-frontier cooperation was not suitable for the three types of companies in the cooperative/mutual/non-profit sector. One of the reasons for this was that the European company is not accessible to natural persons, which meant that they could not be organized on a Community-wide basis, particularly in frontier areas. Consequently, the ESC requested that future statutes for cooperatives, mutual associations and non-profit bodies be accessible both to natural and legal persons.

3.5.2. Secondly, Commissioner Cardoso e Cunha, responsible for the cooperative/mutual/non-profit sector, declared in his Communication to the Commission in September 1991 that the aim of this move was to facilitate cooperatives', mutual associations', and the non-profit bodies', access to the Single Market and, in addition, to contribute to completion of the Citizens' Europe by allowing natural persons to set up cooperatives, mutual associations and non-profit bodies with a European Statute.

3.5.3. Thirdly, natural persons could no longer form an SCE, while the statutes of the European Association did offer this possibility (Article 3) if there were a minimum of 21 natural persons from two Member States and if the SCE (according to the Commission's interpretation) were made accessible to natural persons after its formation. It would be desirable if the three kinds of companies in the cooperative/mutual/non-profit sector were to benefit from the same approach and be aligned on the most attractive scheme, i.e. that of the European Association.

However, as there are two types of mutual (the MP and the MA), the Committee proposes a two-speed approach as regards access for natural persons:

- on the one hand, natural persons should be admitted as founder-members of an MA (Annex 1) as soon as the Statute comes into force, and
- on the other hand, there should be a transitional period of, for example, 5 years as regards the setting-up of an MP (Annex 2) by natural persons, with the possibility of re-examining the conditions of access at the end of this period.

3.6. First of all the Committee would like Article 2 to include the creation from scratch of an ME by natural persons (bearing in mind the comment in the previous point).

4. Proposed Changes to Other Provisions in the Proposal for a Regulation

4.1. Article 1 (2), second indent

This provides for derogation from the principle of non-remuneration of non-professional managers and administrators, which is completely contrary to the basic principles of the cooperatives/mutual/non-profit sector. The Committee proposes that all forms of direct remuneration be prohibited, whilst at the same time providing for reimbursement of administrators' expenses (transport, subsistence, etc.).

4.2. Article 2 (2), first indent

The Committee would like the Commission to say exactly what it means by 'carrying on genuine and effective cross-border activities' when an ME is created by conversion.

4.3. Article 7 (4), second indent

The Committee proposes that re-insurance should be added to the activities of credit or insurance.

4.4. Annexes

4.4.1. The Committee considers that the two following types of German mutual society, which should be eligible for the statute, should be included in the Annexes:

- *die gesetzlichen Krankenkassen gemäß dem Sozialgesetzbuch (SGBV),*
- *die gewerblichen Berufsgenossenschaften gemäß Art. 545 und 762 der Reichsversicherungsordnung (RVO).*

4.4.2. As regards Spain, the following should be added to Annex I:

- *Mutuas de Accidentes de Trabajo, reguladas por la Ley de Seguros Privados, de 2 de agosto de 1989.*

II. The Committee approves the proposal for a directive, subject to the following comments:

1. The ESC welcomes the Commission's desire to take appropriate account of the role of employees when supplementing the Statute for a European mutual society.

The proposed directive co-ordinates national provisions concerning the participation of employees, the provision to them of information and their consultation and constitutes an indispensable complement to the Statute for a European association.

1.1. This directive is an important component of a policy to promote economic and social cohesion in the Community.

1.2. Through this directive employees should be provided with a information and consultation process and be involved in the corporate planning of the European mutual society.

1.3. The ESC considers it absolutely vital that the proposed regulation and directive both come into force at the same time.

2. Even in its Opinions on the statute for a European Company the ESC repeatedly affirmed its agreement in principle and stressed that the involvement of employees was an important precondition for the development of a democratic society and a Citizens' Europe.

2.1. In this connection the ESC affirms once again that employees must be assured of joint representation of their interests within the enterprise and be involved in certain business decisions, though without influencing the responsibility or efficiency of management. The ESC has already stated this view in its Opinions

of 25 October 1972, 29 May 1974 and 28 March 1989 on the European Company.

2.2. However, in view of the political, social, historical and philosophical concepts of the different Member States, employee involvement has neither taken the same forms nor reached the same stage in all Member States.

3. The Committee also believes that, as in many other fields, it will initially be impossible to achieve uniformity as regards European mutual societies.

3.1. To this extent the Commission's suggestion of making a flexible offer which takes account of actual legal circumstances in the Member States can be accepted.

3.2. But the ESC considers that the level of employee involvement or co-determination reached in the Member States should in no way be endangered or undermined.

3.3. Efforts should therefore be made to see that the co-determination options proposed by the Commission are equivalent as regards content.

Done at Brussels, 26 May 1992.

*The Chairman
of the Economic and Social Committee*

Michael GEUENICH

APPENDIX

to the Opinion of the Economic and Social Committee

The following amendment, which received at least one quarter of the votes cast, was rejected during the proceedings:

Part II, point 1

Add the following to the first sentence:

'...although it would stress that in the context of the emphasis on subsidiarity this would primarily be a matter for agreement between the employers and employees of the individual organisations.'

Voting

For: 20, against: 65, abstentions: 9.