



INTRODUCTION

1.1 The European Council adopted Council Regulation 1435/2003 (the “EC Regulation”) and the Council Directive 2003/72/EC (the “EC Directive”) on 22 July 2003. The EC Regulation creates a new type of cooperative, the European Cooperative Society (the “SCE”), which will be able to operate across the EEA on the basis of registration in one Member State. The EC Directive specifies the employee involvement arrangements that apply to an SCE.

1.2 Cooperatives are businesses that are owned and democratically controlled by their members- the people who buy their goods or use their services. They can incorporate in various legal forms- as companies limited by guarantee, limited liability partnerships or more commonly in the United Kingdom as an Industrial and Provident Society (IPS).

1.3 Industrial and Provident Societies are non-financial mutual organisations, providing an alternative legal form to companies. They are registered and regulated under the Industrial and Provident Societies Act 1965¹ (“IPS Act 1965”) and associated legislation, including the Co-operatives and Community Benefit Societies Act 2003.

1.4 The Government welcomes the contribution of the IPS sector to the wider economy. It seeks to ensure a level playing field where appropriate between societies and companies, to harness the distinct features of cooperatives in enhancing community participation, financial inclusion as well as meeting government objectives. The Government is giving effect to the EC Regulation and implementing the Directive to strengthen the ability of cooperative enterprises to trade effectively across the single European market similar to that which was adopted for the European Company in 2004 and to comply with the UK’s obligations under the EC Treaty.

1.5 The consultation document on the SCE covering Great Britain (GB) was published on 16 March 2006 and responses were invited by 8 June 2006. The Department of Enterprise, Trade and Investment conducted a parallel consultation in Northern Ireland.

¹ The corresponding Act in Northern Ireland is the Industrial and Provident Societies Act 1969.

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SUMMARY OF RESPONSES

2.1 There were 7 responses to the consultation of GB stakeholders, which closed on 8 June 2006. Responses were received from a diverse group including an umbrella group for cooperatives representing some 455 organisations, two government [executive] agencies, two co-operative societies, a credit union association, and a law firm.

2.2 Over 500 copies of the consultation document were mailed out to GB stakeholders and copies posted on the HM Treasury public website. A full list of the consultation respondents is provided at Annex A.

2.3 The respondents were unanimous in welcoming the Council proposal to enable SCEs to operate in the United Kingdom. The choice of the Financial Services Authority as the Competent Authority to register and to regulate SCEs where appropriate was also deemed to be logical and was widely welcomed. It was also considered important that a consistent approach was maintained between the SCE and the European Company (SE) so far as possible.

2.4 Respondents raised a number of cautionary points.

- The Treasury should take into account the recent publication by the FSA of its intention to outsource the administration of the registry function for Industrial and Provident Societies and the possible impact on SCEs.
- Concern was also raised as to whether the FSA was sufficiently resourced, with the appropriate level of skill and expertise within the existing staff group, bearing in mind that society and cooperative registration is not the FSA's mainstream function.
- There was one response to the consultation of Northern Irish stakeholders. That response supported the role of the Industrial Court of Northern Ireland in relation to employee involvement in SCEs.

Government Response

2.5 The Government welcomes the unanimous support given by respondents to the idea of the SCE in UK but notes that most cooperatives did not respond to this consultation. This could either indicate that the stakeholders considered the Government's proposals acceptable or did not find the SCE idea of much interest. It is still not clear what the likely take-up of this new form of cooperative will be but the Government considers that the benefits from this will outweigh the costs. The Government will keep the SCE legislation under review and aim to conduct a post-implementation review in the near future.

Implementation

2.6 HM Treasury and the DTI propose to give effect to the EC Regulation and EC Directive using secondary legislation made under section 2(2) of the European Communities Act 1972. The secondary legislation will come into force on 18 August 2006.

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SPECIFIC COMMENTS

QUESTIONS RELATING TO THE EC REGULATION

QUESTION 1

Do you agree that the Financial services Authority (“FSA”) should be designated as the Competent Authority? If not, please specify your alternative choice and explain how that alternative would fulfil those functions.

3.1 All the respondents were of the view that FSA was the logical choice and would be best suited for this role given their role as registrar of IPSs.

The Government Response

3.2 The Government considers that the FSA’s current role as registrar of IPSs makes it the ideal body to fulfil this role. The FSA has the expertise, and knowledge of this sector to ensure a smooth implementation. The Government hopes that stakeholders will be consulted and fully appraised if there is to be any change to the FSA’s function as registrar of IPSs.

QUESTION 2

Do you agree that the FSA should be required to establish and maintain the designated Register? If not, please specify your alternative choice and explain how that alternative would fulfil those functions.

3.3 All respondents agreed that it would be sensible to require the FSA to establish and maintain the designated register for SCE. Two of the respondents also considered that this represented an ideal opportunity to update and modernise the FSA function as registrar, particularly in regard to the electronic submission of documents and access to the public register on line

The Government Response

3.4 The Government considers that the establishment and maintenance of such a register is essential to the efficient administration of SCE records. The FSA will no doubt seek to provide electronic facilities where necessary and if it is deemed to offer a more efficient service.

QUESTION 3

Are you content with the registration procedure (as set out in regulations 9 and 10 of the draft Statutory Instrument) for SCEs that wish to register in Great Britain?

3.5 Respondents suggest that in order for societies not to be disadvantaged, they should have the same opportunities to be able to register on line as is being offered in the Company Law Reform Bill.

3.6 It was also suggested that the registration procedure should also mirror the Company Law Reform Bill and allow for the use of a service address for all company officers, whilst retaining a separate register of residential addresses for regulatory and compliance purposes.

The Government Response

3.7 The Government considers the ability of societies to conduct certain administrative functions online as a necessity for modern business and are confident the FSA will review this. Furthermore the Government has noted respondents' views that it would be desirable that a dual register of addresses be kept by the FSA in order to protect named officers from harassment and retain their privacy but still enable the FSA to maintain regulatory compliance. The Government will consider that proposal as part of a review of the draft Statutory Instrument once it has come into force in light of practice and following the adoption of the Company Law Reform Bill.

QUESTION 4

Are you content for the FSA to be given a power to charge fees to recoup the costs of carrying out their functions as Competent Authority and Registrar?

3.8 Respondents were of the unanimous view that the FSA should be allowed to charge fees to pay for such costs. It was suggested however that it would be helpful if the costs were calculated on a long-term basis otherwise those societies wishing to form an SCE in the early days could face disproportionately high fees.

3.9 Respondents also stressed that fees charges should not act as a deterrent to registration and ask the FSA to consider some subsidy to ensure parity between societies and companies in this regard.

The Government Response

3.10 The FSA is obliged to charge fees to recoup costs incurred in their SCE work. They are not permitted to cross-subsidise income between their SCE-related work and other functions. The fees structure will therefore be based on the commercial realities of carrying out these functions.

QUESTION 5

Do you agree that Article 73 of the EC Regulation, regulations 12 and 13 and Part 5 of the draft Statutory Instrument appropriately and adequately enforce the requirements that are imposed on SCEs that register in GB? Please identify any enforcement that you consider is inappropriate and any additional enforcement that you would choose to adopt.

3.11 Respondents took the view that the regulations over-all were sufficient to enforce the additional requirements. However one respondent cited a lacuna in the legislation relating to instances where a society's registration is cancelled or suspended. They recommended a holding position whereby the Registrar could appoint a competent person to manage the society in the interim to allow it to function and to meet its duty of care to its employees and other stakeholders.

The Government Response

3.12 The Government aims to ensure that the legislation appropriately and adequately enforces requirements on SCEs that register in the UK and will consider introducing additional enforcement if necessary. The Government has noted respondents concerns about societies whose registrations are cancelled or suspended. Government will seek stakeholders' views as part of the planned consultation exercise on the implementation of section 255 of the Enterprise Act 2000 on IPSs and Friendly Societies.

QUESTION 6

Do you agree with HM Treasury's proposals in respect of various other options that are set out in the EC Regulation? If not, please specify the proposal with which you disagree and your alternative proposal.

3.13 Respondents overwhelmingly agreed with HM Treasury's proposals in respect of the various options set out and the underlying reasoning. Attention has however been drawn to Article 75 of the EC Regulation which relates to distribution of assets on a winding up and provides that an SCE's net assets shall be distributed in accordance with the principles of disinterested distribution or alternative arrangements as set in the SCE's statutes if permitted at the Member State's option.

3.14 HM Treasury decided not to permit an SCE's statutes to provide for alternative arrangements for distributing net assets on winding up because of the principle of disinterested distribution. A respondent commented that although this may be appropriate for some cooperatives it was certainly not the case for all. It was suggested that of many cooperatives which operate for the benefit for their member's trade it would be perverse if any underlying value in the cooperative were not available to its members should the SCE wind up. The respondent further suggested that this could impose a bar on cross border activity.

The Government Response

3.15 The Government remains of the view that the principle of disinterested distribution on winding up of an IPS is a fundamental feature that distinguishes it from other corporate forms. It is necessary for the protection of the IPS's assets from persons who join in the society to force a vote on demutualization in order to benefit from a share of the assets. The Government earlier this year introduced legislation to protect the net assets of companies who operate for the benefit of communities in certain instances- the so-called "asset lock" and does not consider that such action will inhibit genuine cross-border activity.

There were no responses to the equivalent questions that were posed to NI Stakeholders in relation to the EC Regulation.

QUESTIONS RELATING TO THE EC DIRECTIVE

QUESTION 1

Do you consider that the regulation 4 of the employee involvement statutory instrument (EISI) makes it sufficiently clear which provisions apply in Great Britain (GB) and which apply in other Member States?

3.16 No comments were received in respect of this provision.

The Government Response

3.17 The Government is content that Regulation 4 of the EISI is sufficiently clear and does not propose to amend the provision save to reflect the fact that the Regulations will now extend to Northern Ireland.

Question 2

Do you consider that regulations 5 and 6 and Schedule 1 of the EISI makes it sufficiently clear when the small cooperatives exemption can be applied?

3.18 Respondents were of the view that it was clear at incorporation when a body would qualify for exemption. However what they were not very clear about was how continuing eligibility would be monitored.

The Government Response

3.19 The Government does not propose to add in a continuing duty on a body to monitor its eligibility as this could be seen as gold-plating the requirements of the Directive. However, if an employee were to make a complaint under Regulation 11, it is envisaged that this would be one of the factors that would necessarily have to be considered by the CAC in establishing whether or not it had jurisdiction to deal with the complaint.

Question 3

Do you consider that the proposed method (in regulation 14) for appointing UK SNB members from “consultative committees” makes effective use of existing information and consultation structures found in cooperatives?

3.20 Respondents pointed out that in the UK co-operative committees were elected by ballot and that for reasons of good governance and to take into account skills shortages there should be a limited number of places through appointment. It was also suggested that these places should be in the minority and that the majority of places should still be by democratic election.

The Government Response

3.21 The government is satisfied that its current mixed approach of a combination of election by ballot of employees and appointment by an existing representative body where such a body exists. The Government feels that this strikes the right balance between allowing current consultative arrangements to continue whilst allowing sufficient flexibility through the ballot process.

Question 4

We would welcome views on the likelihood of SCEs with no employees registering within GB.

3.22 Respondents considered that it was likely in some instances that an SCE without employees would be formed in GB. Two possible scenarios where this would happen were cited:

- Secondary co-operatives either of businesses domiciled in the UK or of co-operatives from several Member States whose operations are carried out by staff of the member States in return for fees.
- Housing co-operatives holding property in the UK and in one or more other Member States.

The Government Response

3.23 The Government remains of the view that in such situations it would be impractical to require SCEs that have no employees to conclude the employee involvement arrangements before registering in the UK. In this situation the Regulations would not be applicable.

Question 5

We would welcome views on whether “employee participation” (as defined by Article 2(k) of the EC Directive) is commonplace in practice in General Meetings of GB cooperatives.

3.24 Respondents point out that employee participation in General Meetings by virtue of membership is variable in the UK co-operatives. Such participation is essential in worker co-operatives however rare in other forms of co-operatives unless in instances where employees qualify as members as consumers in a consumer co-operative.

The Government Response

3.25 The Government considers that there is no mechanism in UK law that *specifically provides* for employee participation in General Meetings, although there is nothing to prevent employees participating in general meetings where they are also members.

Question 6

Do you have any general comments on, or concerns about the provisions of the EISI or employee involvement practices within cooperatives in general?

3.26 No comments were received in respect of this provision.

The Government Response

3.27 As no comments were received on this point, it would suggest that consultees were content with the general provisions set out in the EISI.

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LIST OF CONSULTATION RESPONDENTS

Co-operative & Mutual Solutions
Association of British Credit Unions
Co-operatives UK
Companies House
Midcounties Co-operative Limited
The Financial Services Authority