

Company & Commercial - Luxembourg

Luxembourg implements law on European cooperative societies

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Introduction

The legal form known as the European cooperative society (SCE) was introduced by the EU SCE Regulation (1435/2003) and EU Directive 2003/72/EC (which supplements the regulation with regard to employee involvement) in order to provide a structure through which cooperatives in the European Union – at that time numbering approximately 130,000(1) – could more easily carry out cross-border activities in other EU member states.

The regulation has been binding and directly applicable in all member states since August 18 2006. Although EU regulations do not require national implementing legislation, Luxembourg recently passed a law exercising a number of options provided for in the regulation: the law of March 10 2014 (known as the 'SCE Law'). Pursuant to the SCE Law, Articles 137-11 to 137-62 were added to the rules on cooperatives set out in Section VI(2) of the law of August 10 1915 on commercial companies (known as the 'Companies Law').

In order to determine the rules applicable to a Luxembourg SCE, the regulation (and the directive) must be read together with the Companies Law.

Incorporation in Luxembourg

The regulation provides for five different ways to incorporate an SCE;(3) three are *ex novo* while the other two are similar to those applicable to European companies (SEs).(4)

An SCE can be formed *ex novo* by:

- five or more natural persons resident in at least two EU member states;
- five or more natural persons and companies and firms(5) or other legal bodies governed by public or private law, formed under the law of an EU member state and resident in (or governed by the law of) at least two different EU member states; or
- companies and firms(6) or other legal bodies governed by public or private law, formed under the law of an EU member state and governed by the law of at least two different EU member states.

An SCE can also be formed by:

- a merger between cooperatives formed under the law of an EU member state with registered offices and head offices in the European Union, provided that at least two of the cooperatives are governed by the laws of different EU member states; or
- conversion of a cooperative that was formed under the law of an EU member state and has a registered office and head office in the European Union, provided that it has had an establishment or subsidiary governed by the law of another EU member state for at least two years.

Once incorporated, SCEs acquire legal personality.(7)

Registered office

Pursuant to the regulation, an SCE's registered office must be located in the same EU member state as its head office.(8) Like an SE, the main feature of an SCE is that its registered office may be transferred to another EU member state without winding up the SCE or creating a new legal person.

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(9) The reasons for the transfer and its consequences for the SCE's shareholders, employees and creditors must be set forth in a report to be issued by the SCE's management body, on the basis of which the SCE's shareholders will decide on the proposed transfer.(10)

A transfer from another EU member state to Luxembourg requires, among other things, passage of a shareholders' resolution before a Luxembourg notary, who will need a certificate certifying that the relevant formalities of the other member state have been completed before the transfer. This certificate will be issued by the relevant authority of the original member state. The laws of the member state from which the registered office is being transferred must also be complied with.(11)

Share capital

The minimum subscribed share capital of an SCE is €30,000,(12) which is less than the minimum share capital required for an SE (€120,000). As SCEs have variable capital,(13) a capital increase or decrease does not require amendment of the articles of association or publication(14) and the rules on entry and exit of shareholders are considered rather flexible. The liability of each shareholder is limited to the amount which that shareholder has subscribed.(15)

An SCE's subscribed share capital may be paid in cash or in kind. Contributions in kind are subject to Articles 26-1 to 26-3 of the Companies Law, which apply to public limited liability companies.(16) An SCE may not subscribe, purchase or otherwise accept its own shares as security, either directly or through a person acting in its own name but on behalf of the SCE.(17) However, an SCE's shares may be accepted as security in ordinary transactions of SCE credit institutions.(18)

Management

Like Luxembourg public limited liability companies, SCEs may choose between a one-tier management structure (ie, a single administrative body) or a two-tier structure (ie, a supervisory body and a management body).(19)

Employee involvement

The rules on employee involvement in an SCE as set out in the directive are based on those applicable to SEs.(20) Their main purpose is to ensure that where an SCE is incorporated by existing entities, its creation does not eliminate or reduce employee involvement within those entities.(21)

As soon as possible after drawing up plans to establish an SCE, the management or administrative bodies of the participating legal entities should begin negotiations with the representatives of the legal entities' employees on arrangements for the involvement of employees in the SCE.(22) If an agreement is not reached within six months of registration of the SCE in a member state,(23) the standard rules provided for in that member state's national legislation will apply, subject to further conditions set forth in the directive.(24) However, national laws and/or practice on employee participation other than those implementing the directive do not apply to SCEs, so as to privilege the directive's employee participation rules.(25)

Employee involvement in an SCE can take several forms:

- a requirement that the employees' representative body, elected by a method determined by each member state,(26) be informed and consulted by the competent organ of the SCE as to the progress of the SCE's business and prospects;(27)
- a right of the employees' representative body to elect or appoint some members of the legal entity's supervisory or administrative organ, or a right to recommend and/or oppose the appointment of some or all of the members of that organ;(28) or
- any mechanism through which employees' representatives may exercise influence over decisions to be taken within the undertaking.(29)

Shareholders

The number of shareholders of an SCE varies.(30) Unless the SCE's articles provide otherwise, the shareholder's capacity in the SCE may be acquired by natural persons or legal bodies.(31)

The shareholders of an SCE are divided into two categories:

- those that use or produce the SCE's goods and services; and
- non-users that – pursuant to Luxembourg law and to the extent that the SCE's articles provide as such – are accepted as investors. Investors may become shareholders of the SCE to the extent that they hold no more than 25% of the voting rights in the SCE,(32) subject to the approval of the general meeting or any other corporate body given this power pursuant to the general meeting or the articles.(33)

Report on application of SCE Regulation

Pursuant to Article 79 of the regulation, on February 23 2012 the European Commission issued a report to the European Parliament, the EU Council, the European Economic and Social Committee and the Committee of the Regions concerning the application of the regulation, in which it noted that the most important benefit of setting up an SCE is the European image that it provides.

The main features of the SCE form – its supranational character and the possibility of transferring its registered office to another member state – do not seem to be of particular interest to cooperative companies and professional organisations in this sector. The explanation offered is that firms which choose to operate as a cooperative tend to be well anchored in their local territory.

The report notes that it would be beneficial to:

- reduce the complexity of the regulation (with its multiple references to national legislation);
- integrate taxation rules for SCEs; and
- amend the rules on employee involvement, which are disproportionate and deter firms where only a few employees are involved.

The report essentially concludes that the regulation should be simplified in a way that limits cross-references to national laws.⁽³⁴⁾

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Endnotes

- (1) European Parliament [joint debate](#) on the regulation and the directive, May 13 2003.
- (2) See Section VI(3) of the Companies Law.
- (3) Article 2(1) of the regulation.
- (4) EU SE Regulation (2157/2001).
- (5) 'Companies and firms' within the meaning of Article 54(2) of the Treaty on the Functioning of the European Union.
- (6) *Id.*
- (7) Article 18(1) of the regulation.
- (8) Article 6 of the regulation and Article 137-13 of the Companies Law.
- (9) Article 7(1) of the regulation.
- (10) Article 7(3) of the regulation.
- (11) Article 7(9) of the regulation in relation to Article 7(8) of the regulation and Article 137-51 of the Companies Law.
- (12) Article 3(2) of the regulation.
- (13) Article 1(2) of the regulation.
- (14) Article 3(5) of the regulation.
- (15) Article 1(2) of the regulation.
- (16) Article 4(6) of the regulation and Article 137-12(2) of the Companies Law.
- (17) Article 4(12) of the regulation.
- (18) Article 4(12) of the regulation.
- (19) Article 36 of the regulation.
- (20) EU Directive 2001/86/EC supplementing the SE Regulation with regard to the involvement of employees.
- (21) Recitals (3) and (7) of the directive.
- (22) Article 3(1) of the directive.
- (23) Articles 7(1)b and 5(1) of the directive.
- (24) Article 7(1)b of the directive.
- (25) Article 15(2) of the directive.
- (26) Article 3(2)b of the directive.
- (27) Annex, Part 2, referred to in Articles 7 and 8 of the directive.
- (28) Article 2k of the directive.

(29) Article 2h of the directive.

(30) Article 36(1) of the regulation.

(31) Article 14(1) of the regulation.

(32) Articles 14(1) and 59(3) of the regulation and Articles 137-14 and 137-45(2) of the Companies Law.

(33) Article 14(1) of the regulation.

(34) Report from the European Commission to the European Parliament, EU Council, European Economic and Social Committee and Committee of the Regions, February 23 2012.

Meryl Herat assisted in the preparation of this update.

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