Cerioni, Luca

The European Company Statute (SE) and the Statute for a European Cooperative Society (SCE): a comparison between the two new supranational vehicles

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designed to create conditions conducive to family unity in the host Member State, first by enabling family members to be with a migrant worker and then after some time by consolidating their position there by granting them the right to obtain employment in that State.  

42. Second, the same objective is pursued by Regulation No 1612/68 – which, as stated by the Court in paras 82 and 83 of its judgment Wählgruppe Gemeinsam, is intended to clarify the requirements of Article 48 of the EC Treaty (now, after amendment, Article 39 EC) – and, in particular, by Article 10(1) thereof.  

43. In Baumbast and R, para. 57, the Court held in that regard that the right of his spouse and their descendants who are under the age of 21 years or are dependants to install themselves with the migrant worker under that provision of Regulation No 1612/68 concerns both the descendants of that worker and those of his spouse.  

44. Since Bozkurt, paras 14, 19 and 20, the Court has consistently inferred from the wording of Article 12 of the Association Agreement and Article 36 of the Additional Protocol, as well as from the objective of Decision No 1/80, which is progressively to secure freedom of movement for workers, guided by Article 48 of the Treaty, Article 49 of the EC Treaty (now, after amendment, Article 40 EC) and Article 50 of the EC Treaty (now Article 41 EC), that the principles laid down in those articles must be extended, so far as possible, to Turkish nationals who enjoy the rights conferred by that decision.  

45. It follows that, in the determination of the scope of “member of the family” for the purposes of the first paragraph of Article 7 of Decision No 1/80, reference should be made to the interpretation given to that concept in the field of freedom of movement for workers who are nationals of the Member States of the Community and, more specifically, to the scope given to Article 10(1) of Regulation No 1612/68.  

46. Moreover, there is nothing in the first paragraph of Article 7 of Decision No 1/80 which might give the impression that the scope of the concept of “member of the family” is limited to the worker’s blood relations.  

47. The foregoing interpretation is, moreover, supported by Mesbah, in which the Court ruled that the term “member of the family” of a Moroccan migrant worker, within the meaning of Article 41(1) of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, signed in Rabat on 27 April 1976 and approved on behalf of the Community by Council Regulation No 2211/78, extends to relatives in the ascending line of that worker and of his spouse who live with him in the host Member State. That interpretation, given in respect of a cooperation agreement, must apply a fortiori with respect to an association agreement, which pursues a more ambitious objective.  

48. In the light of all the foregoing considerations, the answer to the question referred must be that the first paragraph of Article 7 of Decision No 1/80 is to be interpreted as meaning that a stepson who is under the age of 21 years or is a dependant of a Turkish worker duly registered as belonging to the labour force of a Member State is a member of the family of that worker, for the purposes of that provision, and enjoys the rights conferred on him by that decision, provided that he has been duly authorised to join that worker in the host Member State. (...)”

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**INTERNATIONAL AND EUROPEAN COMMERCIAL AND COMPANY LAW**

**The European Company Statute (SE) and the Statute for a European Cooperative Society (SCE): a comparison between the two new supranational vehicles**

*Luca Cerioni*

**Introduction**

of Regulation 1435/2003 on the Statute for a European Cooperative Society (hereinafter: SCE Regulation), completed by Directive 2003/72 regulating the involvement of employees in the European Cooperative Society (hereinafter: SCE), which is deemed to enter into force on 18 August 2006, EC company law has created two new company law vehicles.

The SE and the SCE, both introduced after decades of efforts by the Community to harmonise national company laws by means of Directives based on Article 44(2) lit. g of the Treaty, have a common objective: to meet the demand for supra-nationality – i.e., for genuine European law governing businesses organization and activity – expressed by all types of business enterprises operating in more than one Member State. A set of rules, as uniform as possible, from one Member State to another can minimize the uncertainty created by different national provisions and the costs of complying with the diverse requirements of the various jurisdictions and enables enterprises which do not limit themselves to satisfying purely local needs, to plan and carry out the reorganization of their business on a Community scale. This would imply the achievement of a goal which could not be fully reached by means of Directives aimed at approximating national law, that of creating a level playing field within the EC for all types of multinational enterprises, by adapting the legal framework, within which business must be carried out in the Community, to the economic framework within which it should develop.

Such purposes are clearly stated in the Preambles of both the SE and the SCE Regulation and suggest a comparative analysis of the two supranational company law instruments to assess whether they can equally reach their goals for the category of enterprises to whom they are addressed.

1. The SE and the SCE: essential aspects

The SE is a European form of public limited company. It must have a minimum share capital of 120.000,00 EUR. It can be created in four ways by already existing companies which are formed under the laws of Member States: merger between public limited companies, which may take the form of a merger by creation of a new company or of a merger by acquisition; creation of a holding SE by public and private limited companies; setting up of a joint-subsidiary on behalf of all undertakings; creation of a holding SE by public and private limited companies which may take the form of a merger by creation of a new company or of a merger by acquisition; creation of a holding SE by public and private limited companies; setting up of a joint-subsidiary on behalf of all undertakings; creation of a holding SE by public and private limited companies which may take the form of a merger by creation of a new company or of a merger by acquisition;


3. See infra chapter 2 ("The similarities between the SE and the SCE regulations ...") about the list of issued Directives.

4. Preamble of Regulation, supra note 1, Recitals (1), (4), (6) and (7); Preamble of Regulation, supra note 2, Recitals (2), (3), (4) and (6), which state the same objectives and justify the introduction of the SCE on the grounds that neither the SE nor the EEIG (European Economic Interest Grouping) (provided for in Regulation No. 2137/85, OJ 1985, L 199, at 1) are suited to the specific features and requirements of cooperatives.

5. Which include all profit-making entities (Article 48(2) EC).
dent in at least 2 Member States; by 5 or more natural persons and companies or firms within the meaning of Article 48 of the Treaty resident or, in general, governed by the law of different Member States; by companies and firms governed under the meaning of Article 48 of the Treaty and other legal bodies governed by public and private law governed by the law of different Member States; by merger of at least two cooperative enterprises governed by the law of different Member States; by conversion of a cooperative governed by the law of a Member State which has had a subsidiary or establishment in another Member State for at least 2 years. Finally, a form of employee involvement in the decision-making processes must be established similarly to the SE, before the SCE can be registered, in compliance with Directive 2003/72. The comparison between the SE and the SCE shows similarities as regards the legal framework, but also important differences in the ability of each of the two legal tools of reaching its objectives.

2. The similarities between the SE and the SCE regulations...

The similarities which can be found relate to the role of different legal sources as laid down in the two Regulations and in the choices made in the two accompanying Directives on employee involvement.

As regards the first aspect, both the SE and the SCE are not governed by one set of legal rules, but by one combination between different sets of rules. Article 9 of the SE Regulation, and Article 8 of the SCE Regulation, lay down a pyramid of legal sources, in which the Regulation – the first source – is integrated, in addition to the provisions of the statutes where expressly authorized by the Regulation itself, by national provisions of the Member State in which the SE or the SCE has its registered office. In the case of the SE, the national legislation referred to by the Regulation is that applying to public limited companies; in the case of the SCE, it is first that one applying to cooperatives and – as concerns procedural aspects, or issues where no national provisions concerning cooperatives can apply – that one concerning public limited companies as a subsidiary source, which is regarded as applicable by analogy.

The Community has issued several directives for approximating national company laws prior to the introduction of the SE and of the SCE: a First Directive concerning the disclosure of documents and particulars relating to the constitution of the company, to the validity of obligations entered into by a company and the nullity of a company⁶; a Second Directive dealing with the formation, the maintenance and alterations of the share capital; a Third Directive governing mergers between companies of the same Member State⁷; a Fourth Directive on annual accounts⁸; a Sixth Directive on divisions of companies of the same Member State⁹; a Seventh Directive on consolidated accounts¹⁰; an Eight Directive on the approval of experts responsible for carrying out the statutory audits of accounting documents¹¹; an Eleventh Directive on disclosure requirements in respect of branches opened in one Member State by companies of another State¹²; a Twelfth Directive on single member private limited companies¹³. Except the Twelfth, all Directives cover public limited companies.

As a result, the SE Regulation, when referring to national legislations, relies on all these directives and states that there are points where uniform Community law rules are not needed due to the progress achieved by in the approximation of national laws;¹⁴ on the other hand, the SCE Regulation only considers as applicable by analogy those national provisions governing public limited companies resulting from the implementation of the First, the Fourth, the Seventh, the Eight and the Eleventh Company Law Directives.¹⁵ Despite the different extent to which the company law directives are relied upon, the Regulation provisions and the national rules play the same role in both the two cases.

The Regulation indicates the essential elements which distinguish the SE or the SCE form as regards its basic identity, deals with the formation procedure, the management structure, the transfer of the registered office and the conversion into a company or a cooperative governed by the laws of Member States;¹⁶ in the case of the SCE, consistently with the very nature of the cooperative enterprise, it also contains specific provisions for the acquisition and the loss of membership and the financial entitlement of members in the case of resignation and expulsion.¹⁷ In both cases, it grants a large number of options to national legislators, so that national provisions of Member States have a twofold task: 1) making use of all such options; 2) filling gaps left by Regulation in the areas which are not governed at all by the provisions of this Regulation. In implementing the options granted by the Regulation, national provisions directly affect the range of constraints imposed and of possibilities allowed in the establishment and the

### Notes

⁶ See, e.g., Article 12 and Article 32 of the SCE Regulation.
⁷ See, e.g., Article 20 and Article 35(1) of the SCE Regulation.
¹⁷ Preamble of the SE Regulation; Recital 9.
¹⁸ Preamble of the SCE Regulation; Recital 18.
¹⁹ Articles 1 to 4 of the SE Regulation; Articles 1 to 5 of the SCE Regulation.
²⁰ Title II of the SE Regulation; Articles 15 to 37; Chapter II of the SCE Regulation; Articles 17 to 35.
²¹ Title III of the SE Regulation; Articles 38 to 60; Chapter III of the SCE Regulation; Articles 36 to 63.
²² Article 8 of the SE Regulation; Articles 7 of the SCE Regulation.
²³ Article 66 of the SE Regulation; Article 76 of the SCE Regulation.
²⁴ Article 14 to 16 SCE Regulation.
functioning of the company, and can make them widely different from one State to another.

As regards the formation, the seat transfer and the organs of the SE or of the SCE, some options for Member States are particularly significant. National legislators can in fact, *inter alia*: impose that the registered office and the head office be located in the same place; allow a company or legal body the head office of which is not in the Community to participate in the formation of an SE or of an SCE; introduce provisions designed to protect minority shareholders opposing the operation in the cases of formation by merger and of transfer of the registered office to another Member State; provide that a national authority may oppose, on grounds of public interest, the seat transfer to another Member State and the participation of a company or of a cooperative to the formation of a SE or of an SCE; provide that a managing director shall be responsible for the current management under the same conditions as for public limited companies or cooperatives that have the registered offices within the territory of the Member State concerned; adopt appropriate measures, in relation to SEs and SCEs, with respect to the two-tier system or to the one-tier system when no provision is made in its national law for domestic public limited companies and domestic cooperatives.

The other role for national legislations – to fill gaps left by the Regulation – can be seen where the national law of the Member State of registration is the only legal source by virtue of a choice made by the drafters of the Regulation. In the SE Regulation, this is the case for: maintenance and alterations of the share capital, shares, bonds and other similar securities (Article 5), organization and conduct of the general meeting, as well as voting procedure (Article 53), annual accounts and audits (Article 61), winding up, liquidation, insolvency and similar procedures (Article 63). Just part of these areas have been the object of the company law harmonization directives: the maintenance and alterations of the share capital, together with some aspects concerning the issue of shares (Second Company Law Directive); the annual accounts and the consolidated accounts (Fourth and Seventh Directives); audits (the Eight Directive). To that extent, the reliance on national law can be justified by the claim, stated in the Regulation Preamble, that uniform rules on the functioning of the SE are not needed due to the progress made by the approximation of national laws by means of directives.

However, this does not apply to the remaining areas, where no harmonization directive has been enacted: all other aspects concerning shares (e.g., how many classes of shares can be created, what can be the attached rights), bonds and similar securities; conduct of the general meeting; winding up, liquidation, insolvency, cessation of payments and similar procedures, where the not yet harmonized national laws are only source which govern the SE. Equally, in the SCE Regulation, national laws are the only source in two important fields: annual accounts and audits (Article 61); and winding up, liquidation, insolvency and similar procedures (Article 63). Only annual accounts, however, have been the object of an approximation Directive (again, the Forth Directive).

As a result of the extensive reliance on national laws, the outcomes of the SE Regulation and of the SCE Regulation are two vehicles which, on the whole – while keeping the basic identity – have in several important respects different working rules from one Member State to another. A second consequence concerns the direct effect of the Regulation, i.e. its conferring on businesses, choosing the SE form or on cooperatives wishing to opt for the SCE form rights which are directly enforceable before national courts even against national authorities.

In this regard, in addition to conferring the right to create companies characterized by a common, basic identity – which corresponds to the aspects directly governed by its provisions – the Regulation may generate different legal implications in relation to the aspects left to national laws. In the areas where the Regulation relies upon harmonized company laws, its direct effect will depend on the direct effect of the Directives which it recalls. On the contrary, in the areas where national legislation fills gaps left by the Regulation or in the cases where it implements options left by the Regulation on issues not dealt with by the Directives, the situation seems quite different. As the Preamble of the SE Regulation and the SCE Regulation both lay down the principle of non-discrimination of the SE and of the SCE compared with domestic public limited companies and cooperatives, it may be deduced that, in implementing options left by the Regulation, Member States’ discretion finds a general limit in a right, recognized by the parties who might be interested in creating an SE or an SCE, to choose these forms while incurring neither discrimination in comparison with those choosing the forms of public limited company or cooperatives governed by national law nor restrictions which are disproportionate to a specific “public interest” to be protected.

The second case will apply where restrictions can in principle be admitted, such as in the participation of a domestic company or cooperative in the formation of an SE or SCE or in the transfer of the registered office of the SE or of the SCE. Whether this right can cause national provisions implementing specific options to be successfully challenged (before the national courts and the ECJ) will have to be verified on a case-by-case basis, rather than assumed ex ante on the basis of directly effective provisions of EC Directives. Equally, in the areas where national legislation fills gaps left by the Regulation and where no harmonizing directive has been issued, no direct effect can be assumed from the Regulation other than a general obligation on national legislators to equate the treatment of SEs and of SCEs to that of domestic

**Notes**

25 Article 7 of the SE Regulation; Article 6 of the SCE Regulation.
26 Article 2 of the SE Regulation; Article 2 of the SCE Regulation.
27 Article 24 of the SE Regulation, and also Article 34 for the establishment of a holding SE; Article 28 of the SCE Regulation.
28 Article 8 of the SE Regulation; Article 7 of the SCE Regulation.
29 Ibid supra note 25.
30 Article 19 of the SE Regulation; Article 21 of the SCE Regulation.
31 Article 39 of the SE Regulation; Article 37 of the SCE Regulation.
32 Ibid supra note 28.
33 Article 43 of the SE Regulation; Article 42 of the SCE Regulation.
34 See Preamble of the SE Regulation, Recital 5, and SCE Regulation, Article 9.
35 Where Member States can provide that national authorities can make opposition on grounds of public interest: *supra*, in the text among the options left to national legislators.
companies or cooperatives. An important area where neither the SE Regulation nor the SCE Regulation contains provisions is that of the tax treatment of these new legal forms: the European Commission’s approach simply aims at including both the SE and the SCE within the scope of the tax legislation issued at EC level.

The second similarity between the SE Statute and the Statute of the SCE lies in the two supplementing Directives on employees’ involvement. They define the concept of involvement as including information, consultation and participation of employees, which latter consists in the right to appoint or oppose the appointment of some of the members of the company’s supervisory or administrative organ. Whereas information and consultation are to be ensured in all cases of creation of an SE or of an SCE, participation rights can be avoided if they exist in none of the companies or entities establishing an SE or an SCE. Both of the Directives state that the concrete modality of employees’ involvement in each SE or SCE must be negotiated and should be decided primarily by means of agreement between the management and administrative organs of the companies involved and the representatives of employees. Only in the absence of agreement, employee involvement is governed through the application of “standard rules” on information, consultation and, where applicable, participation, to be laid down by Member States according to detailed provisions contained in the Annex of each of the two Directives.

This common negotiation-based approach (Articles 3 to 7 of Directive 2003/72 as compared with Articles 3 to 7 of Directive 2001/86) finds an exception only in the case of an SCE established exclusively by natural persons or by a single legal entity and natural persons employing together less than 50 employees in at least 2 Member State: in this case, employee involvement shall simply be governed by national provisions applicable in the States of the registered office of the SCE and of its subsidiaries and establishments (Article 9 of Directive 2003/72). Employee participation – supported by some Member States (e.g., Germany) and opposed by others (e.g., the UK) – had blocked, for thirty years, the adoption of the SE Statute: the final solution adopted by the Directive on employee involvement in the SE has thus reached a compromise aimed at tailoring the form of involvement of employees to the needs of each SE by means of negotiation or, failing this, to the practice of each Member State, and the same approach has been adopted by the Directive on employee involvement in the SCE.

3. ... and the differences

A first, immediate difference relating to the ability of the two legal forms to achieve the stated goals arises from the circumstance that due to the possibility of direct creation by natural persons the SCE, unlike the SE, can be considered, from the beginning of the business activity, as an alternative to the choice of one of the cooperative forms governed by national laws. This implies that, whilst the SE can only be an instrument for reorganization and restructuring of already existing companies, the SCE Regulation goes further and manages to a greater extent than the SE Statute to create – as it is expressly stated only by the Preamble of this latter – companies (i.e., in its case, cooperatives) formed and carrying on business under the law created by a Community Regulation “side by side with companies governed by a particular national law”.

From the viewpoint of 5 or more natural persons resident at least in 2 Member States who, by assumption, be attracted by the SE form, they would be forced in any case to have recourse to the prior creation of companies under a national legal form, whereas this would be unnecessary if they were interested in setting up an SCE. Only this latter can thus have a truly parallel existence to that of national forms of cooperatives.

A second, important difference emerges from a thorough comparison. Despite a similar structure as regards the ways in which the provisions of the Regulations are integrated by the provisions of national laws, the SCE Regulation deals with more aspects relating to the structure and working of the SCE than the SE Regulation does for the SE, and it offers the founders of the SCE more freedom to tailor the statutes to their specific needs than the SE Regulation.

This difference can be noted by comparing numerous provisions dealing with the share capital and the functioning of the SCE with the corresponding provisions of the SE Statute, which makes it possible to find several significant examples in this regard. First, whereas the SE is governed by the national provisions applicable to public limited companies with regard to shares, bonds and similar securities (Article 5 SE Regulation), so that the possibility of issuing two or more classes of shares (as well as the kinds of shares) and/or of other securities entirely depends on each applicable national legislation, this does not apply to the SCE. In fact, Article 4 of the SCE Regulation directly specifies that more than one class of shares may be issued, and leaves the statutes free to establish the different entitlements concerning the distribution of surpluses. Consistently with this possibility, Article 64 enables the statutes to provide for the issue of securities other than shares and debentures conferring special advantages, to determine these special advantages, to fix the total nominal value of such shares or debentures and to provide for special meetings of holders of these securities or debentures.

Second, the SCE Regulation allows the statutes to govern other important aspects: under Article 1, by way of exception from the general rule, the statutes may extend the activities of the SCE to non-members or allow them to participate in the businesses; under Article 14, they may restrict the acquisition of membership; under Article 38, in a two-tier system SCE, they may regulate the election of a chairman of the management organ and the calling of meetings of this organ. Moreover, Articles 55 to 63 deal with the organization and working of the general meeting of the SCE cooperative. In so doing, these provisions cover aspects of the internal organization which are not dealt with by the SE Regulation, and they leave to the statutes other aspects concerning the internal decision-making procedure within the SCE, such as the appointment of

57 After the first proposal submitted by the Commission, which dates back to 1970.
58 Preamble of the SE Regulation, Recital (6); emphasis added.
a proxy by a person entitled to vote and the maximum number of persons for whom a proxy may act (Article 58).

Although some of these choices (such as that allowed by Articles 1 and 14) left to an SCE statutes derive from the very nature of a cooperative enterprise, margins of discretion having the same importance in the functioning of the company are not offered to the SE statutes in the SE Regulation, which mostly relies on national laws on the corresponding aspects (e.g., the organization and conduct of the general meeting of the company). Such examples indicate that, in comparison with the SE, the different working rules which may be found from one SCE to another can derive, to a greater extent, from options made by the drafters of the SCE statutes within a uniform range of possibilities allowed by the SCE Regulation, outside the different choices made by national legislators in implementing the options granted to them. In other words, the choices made by national legislators are bound to occupy a greater area in shaping the overall aspects of a SE than of a SCE, whereas, in the latter, margins of discretion unrelated to national laws are more extended and the drafters of the statutes are delegated more power.

As a result, the SCE Regulation offers a better match of supra-nationality (intended as the area of genuine EC law, which transcends national laws) and flexibility (possibility of adapting the choices left to the specific needs) than the SE Regulation. The important consequence is that the founders of a SCE enjoy an enforceable right – to set different statutory clauses from those allowed by national laws for domestic cooperatives – whose ambit of application is wider than that available to the drafters of an SE statutes.

It has been argued, in relation to the SE, that “the very non-uniform set of rules will complicate the exercise of the right of establishment of the enterprises throughout the Community. These legal uncertainties might involve difficulties in the determination of the competent jurisdiction (e.g., National Supreme Court or European Court of Justice)”.39 Given the above indicated principle of non discrimination in comparison with national legal forms,40 it may be added that, once the implementation of an option left to Member States equates SEs and national companies, it can be unclear whether and to what extent either the ECJ or the national courts will be able to assess whether the content of the implementing provision at issue is, e.g., too restrictive in relation to the stated objectives of the SE, if the interested parties put forward this ground for litigation. The minor area of options for national legislators in the SCE Regulation makes this kind of difficulty appear less relevant in the case of the SCE.

A third difference relates to a general interpretation problem, which seems to characterize the pyramid of legal sources of the SE but not that of the SCE, and which can generate important implications on the degree of uniformity of the overall functioning SE vehicles from one Member State to another. Both Article 9 of the SE Regulation and Article 8 of the SCE Regulation, after listing the Regulation and, where expressly authorized by it, the statutes as first legal sources, state that in case of matters not covered by the Regulation or, where matters are partly covered, for those aspects not covered, the provisions of laws adopted by Member States in implementation of Community measures relating specifically to SEs or to SCEs shall apply before the national provisions applicable to a public limited company or a cooperative. However, only the SE Regulation adds that “the provisions of laws adopted by Member States specifically for the SE must be in accordance with Directives applicable to public limited companies”. At first reading, the latter sentence may be seen as a reference to the issued Directives, and may appear consistent with the circumstance that – as seen above – the SE Regulation relies to a greater extent than the SCE Regulation on these Directives on aspects which it does not directly govern.

However, this interpretation gives rise to doubts: these provisions cannot be in accordance with the Directives where, e.g., they implement options in areas which have not been the object of the Directives; moreover, even without this sentence, the national provisions applicable to the SE – those concerning public limited companies – would need in any case, by definition, to be in accordance with Directives, to the extent that they result in several areas from their implementation. Consequently, the sentence could perhaps be read with reference to any future Directive applicable to public limited companies too, and/or to any future Community measures relating specifically to the SE: if this were the most appropriate interpretation, future EC measures relating to the SE should rely on Directives concerning public limited companies.

As a result, the greater the number of options left by these Directives to Member States, the greater the possible differences in the functioning of the SE from one country to another. In this regard, it can be noted that most of the already issued Directives have left important differences in the company laws of Member States due to the options allowed,41 and that they inevitably apply to the SE in the way in which they have been implemented in each Member State: therefore, if the future EC measures specifically relating to the SE will consist of other Directives and if these latter will adopt the approach – typical of some of the Directives issued to-date – of granting several options for Member States, the national implementation of these Directives would further risk compromising the SE potential of offering an effective alternative to national company law forms. On the contrary, by avoiding a general reference to Directives concerning public companies, the pyramid of legal sources laid down by the SCE Regulation does not entail this risk.

Finally it must be recalled that both Article 69 of the SE Regulation and Article 79 of the SCE Regulation contain a “best endeavour” clause, i.e. a provision allowing the Commission, 5 years at the latest after the entry into force, to pro-

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40 See supra, chapter 2 (“The similarities between the SE and the SCE regulations ...”).
42 Such as the Fourth and the Seventh Directives.
pose amendments to the two Regulations. These concern, first, a particular constraint which is imposed by their current versions: the obligation on the SE and the SCE to maintain the registered office and the head office in the same Member State, which implies that the transfer of the registered office – through the rigidly scheduled procedure above indicated – needs to take place together with that of the head office. As the ECJ rulings in Überseering and, apparently, in the Lasteyrie du Saillant cases allow companies (entirely) governed by national laws to move the head office without transferring the registered office, this current constraint set by the SE and the SCE Regulations would also need to be removed.

The “best endeavour clause” enables the Commission to propose this amendment, which would be coherent, in the case of both the SE and the SCE, with the stated need to avoid that these vehicles be subject to discriminations in comparison with the national ones. A further amendment based on the clause at stake could be that of authorising Member States to allow provisions, in the statutes of an SE or of an SCE, which deviate from or complement the national legislation introduced pursuant to the Regulation, even when those provisions would not be allowed in the statutes of a public limited company or of a cooperative having the registered office in the Member State concerned: in the case of the SCE Regulation, this possibility could be seen as consistent with the degree of flexibility already allowed to the statutes, whereas, in the case of the SE Regulation, it could become the necessary element for preventing the SE from duplicating, in too many aspects, the public company forms already existing in each Member State.

4. Concluding remarks

Although it was assumed by the Commissioner for Internal Market that the introduction of the SE would bring businesses that are active throughout the Community decisive advantages in terms of the possibility of operating within one set of legal rules and of the transfer of the place of business from one Member State to another, commentators however have come to different conclusions, in the light of the features of the SE Statute. They have argued that these advantages are only relative, that the term “European Company” complies only contingently with the principles of clarity and truth of the legal form and that the SE would, as a company form, be genuinely able to acquire supranational status only if the possibilities inherent in the “best endeavour clause” of Article 69 were exploited. The above comparison confirms these claims, and suggests that they can apply both to the SE and to the SCE since none of the two new instruments – in the current versions of the SE Regulation and of the SCE Regulation – can fully reach its declared goals. However, it also shows that, from the company law viewpoint, the SCE seems to be able to offer a greater contribution towards the achievement of a level playing field for the cooperative enterprise within the Community than the SE seems to be able to do for all other businesses: this outcome may appear surprising and, probably, was not pursued by the drafters of the two Regulations. Whether such a result depends on the limits of the EC company law harmonization process in approximating national laws – given that, as seen, the SE Statute relies on a greater extent on national laws than the SCE Statute – and which features any future EC law measures relating to the SE should have to “correct” it, could be and would deserve to be the object of discussion.

43 See supra, chapter 1 (“The SE and the SCE: essential aspects”).
44 The position of the SE or of the SCE would otherwise become irregular, leading to mandatory liquidation in the event of failure to regularise; see Article 64 of the SE Regulation and Article 72 of the SCE Regulation.
45 ECJ 5 November 2002 – C-208/00 – Überseering [2002] ECR 1-9919; see ECJ 5 November 2002 – Überseering BV v Nordic Construction Company Beamangement GmbH (NCC) – Articles 43 and 48 – Company deemed to have transferred its actual centre of administration – Non recognition by the host Member State of legal capacity, in [2002] EuL (E) 331-338; also, for a reference to this ruling in the context of a discussion of the later Inspire Art ruling, see, Rehberg, Inspire Art – Freedom of establishment for companies in Europe between “abuse” and national regulatory concern, in [2004] EuL (E) 1-8, at 1 and 5; ECJ-30 September 2003 – C-167/01 – Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd – Articles 43 EC, 46 EC, and 48 EC – Company formed in one Member State and carrying on its activities in another Member State (Rainer Deininger, L.L.M.), also in [2004] EuL (E) 8-19, at 17.
47 See supra, chapter 3 (“... and the differences”), Recital 5 of the SE Regulation Preamble and Article 5 of the SCE Regulation.

49 Gammie, EU Taxation and the Societas Europaea – Harmless Creature or Trojan Horse? in 44 European Taxation n. 1 (2004), at 33-45, see at 36.
50 Ebert, ibid note 37.
52 See supra, Introduction.
53 In the light of the objectives stated in the Preambles of both Regulations: supra Introduction, supra note 3.

ECJ 5 October 2004 – C-442/02 – Caixa-Bank France v Ministère de l’Économie, des Finances et de l’Industrie Article 43 EC, read in conjunction with Article 48 EC – Directive 2000/12 – Freedom of establishment – Credit institutions – National legislation prohibiting the payment of remuneration on sight accounts

Article 43 EC precludes legislation of a Member State which prohibits a credit institution which is a subsidiary of a company from another Member State from remunerating sight accounts in euros opened by residents of the former Member State.