

CONSULTATION ON THE RESULTS OF THE STUDY ON THE CURRENT SITUATION AND PROSPECTS OF MUTUALS IN EUROPE

PRELIMINARY REMARK

The following text has been drafted by the Services of the Directorate General “Enterprise and Industry” of the European Commission in order to consult stakeholders (individual mutual societies and associations of mutual insurances, organisations representing mutual societies, entities providing statutory social security, citizens members of mutual societies, the legal profession, Governments, supervisors, and any other interested party) on the results and recommendations of an external study on the current situation and prospects of mutual societies in Europe including inter alia examination of the possible advantages of a proposal for a Regulation establishing the legal statute for European Mutual Society. The study does not reflect the views of the European Commission and will not prejudice its future decisions, if any, on further measures concerning the promotion of the mutual business form in Europe.

The answers to the questionnaire should be sent to DG Enterprise and Industry, Unit D1, European Commission, B-1049 Brussels no later than 14/06/2013. Responses may also be sent by e-mail to: ENTR-CONSULTATION-MUTUALS@ec.europa.eu . Unless an explicit request is made for confidential treatment, contributions will be treated as documents that the Commission can make public. The results of the consultation will be published at:

http://ec.europa.eu/enterprise/policies/sme/promoting-entrepreneurship/social-economy/mutuals/public-consultation/index_en.htm

It is not mandatory to reply to all the questions. Anonymous replies will not be taken into consideration. You can download the Word text and reply directly to the questions or you can create a new document and reply to the questions you wish by mentioning the number of the question.

Please read carefully the introduction before proceeding.

INTRODUCTION

1. **Background.** In its Communication for a Single Market Act – Twelve levers to boost growth and strengthen confidence – “Working together to create new growth”¹ and in the following up Communication for a Social Business Initiative², the European Commission announced that it would finance a study in order to be able to assess the current situation and prospects of mutuals, since many offer social services. In addition the European Parliament (2010) had financed a study that covered only partially the

¹ COM(2011)206 of 13 April 2011

² COM(2011)682 of 25 October 2011

activities of mutual societies. The Commission's study (see para 4) was published in November 2012 on the website of the Directorate General Enterprise and Industry³.

2. **Definition:** According to the study, a large variety in legal types of mutual societies exists, both with regard to their structure governance and to their fields of activities. The study covered those mutual-type entities that are enterprises in the sense of the Treaty on Functioning of EU (and case law⁴), and are therefore subject to all aspects of European law (free competition, State aid, taxation, insurance, accounting, company law, etc.). In total, the study identified approximately 40 types of mutual-like organisations in Europe. They can be grouped in the following categories:

- a) mutual benefit or health provident societies providing a variety of services supplementary or complementary to statutory social security systems, and other services of social nature;
- b) mutual insurance societies/associations, covering all types of life and non-life (re-) insurance;
- c) mutual societies that in some Member States offer services in fields such as credit or housing etc; and
- d) entities, also called "mutuals", that in a number of Member States are the vehicles providing statutory (obligatory) welfare coverage, which implies that these entities are not subject to EU law (and are therefore outside the scope of this questionnaire).

3. **Common characteristics.** As the study indicates the mutual landscape is very diverse and there is no clear all-encompassing legal concept of what defines a mutual organisation. Despite the diversity described above there are many distinctive elements that allow easily identifying a mutual-type society:

- a) the entity is a grouping of persons, with the legal personality, acting as a separate independent organisation, neither controlled by Government nor funded by public subsidies, acting in areas as above, and subject to free competition.
- b) every mutual society is characterised by its democratic governance, i.e. each member has one vote.
- c) it embraces the principles of solidarity and mutuality among members and allows free entry and exit of everyone who fulfils the conditions laid down in the articles of association.
- d) the members are also the owners of the organisation; the entity is not a capital-based company, members -in principle- do not have shares and profits (surpluses) are not used to distribute dividends, but serve to better benefit all members (lower premiums, better services) or are allocated to indivisible reserves, so as to serve members in the future.

4. **The study** contains a number of chapters on the characteristics of the different mutual-type organisations in all European countries, their legal frameworks, their corporate governance, their economic importance, as well as sections about the barriers that these

³http://ec.europa.eu/enterprise/policies/sme/files/mutuals/prospects_mutuals_fin_en.pdf
http://ec.europa.eu/enterprise/policies/sme/files/mutuals/prospects_mutuals_annex_en.pdf

⁴ Joined cases C-159/91 and C-160/91 Poucet and Pistre. Also INAIL Case C-218/00 and others. The concept of an undertaking, within the meaning of Articles on competition of the Treaty, encompasses all entities engaged in an economic activity. It does not include, therefore, organizations involved in the management of the public social security system, which fulfil an exclusively social function and perform an activity based on the principle of national solidarity which is entirely non-profit-making
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61991J0159:EN:HTML>; http://eur-lex.europa.eu/Result.do?arg0=C-159%2F91+&arg1=&arg2=&titre=titretexte&clang=en&RechType=RECH_mot&idRoot=4&refinecode=JUR*T1%3DV111%3BT2%3D%3BT3%3DV1&Submit=Search .

enterprises face in Europe, when they wish to engage in activities across borders or to create groups. It ends with recommendations on how these obstacles could be removed. Two large annexes to the study contain a table of the key legal issues per country as well as a more detailed description of the specific situation of mutuals in the 30 countries of the EU/EEA (national reports)

5. The question on the European Mutual Society: The study also examined whether one of the solutions to the problems of mutual-type organisations in Europe could be a proposal by the Commission (to be adopted by the European Council and agreed by the European Parliament) of a European Statute specifically related to mutual societies, along the lines of the Statutes for the European Economic Interest Group (1985), the European Company (2001 which is a public limited company with share capital), the European Cooperative Society (2003), the proposal on a Statute for a European Private Company (2009), and the proposal on a Statute for a European Foundation (2012).

6. History of the file: It should be recalled that the Commission showed two decades ago an interest in promoting mutual societies in Europe. In 1992⁵, a draft Regulation establishing a legal framework for the creation of a European Mutual Society, together with a draft for a European Association, had already been presented by the Commission following the submission of the European Company Statute. Both were however subsequently withdrawn in March 2006, due to the lack of progress in the Council Working Group on Company Law. It should also be reminded that the statutes for European-type enterprises are Council Regulations, are in principle based on article 352 of the Treaty on the Functioning of the European Union, and according to the case law⁶ they need to be adopted by unanimity of the (currently 27) Member States.

7. Action of the European Parliament: In 2012/2013, an own-initiative report was proposed in the European Parliament's JURI Committee by Mr Luigi Berlinguer MEP⁷ that (following a large number of previous similar EP reports and the adoption of a written declaration of 2011 on establishing European statutes for mutual societies, associations and foundations) also examines the legal aspects of the structures of mutual societies, enumerates the main advantages of a European Mutual Society Statute of which the EU could benefit, and calls on the Commission to present a proposal of which it recommends the basic features.

THE QUESTIONNAIRE

Question 1: Information about the respondent

Q.1.1. Name of the person/ organisation/service/mutual society /company/ association etc., the legal form, field of activity and country of origin, address and your function, as

⁵ They were tabled together with the European Cooperative Statute, in the context of the Commission's policy on the promotion of social economy in Europe.

⁶ Case C-436/03 of 2 May 2006 European Parliament v Council of the European Union; see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003CJ0436:EN:HTML>

⁷ The report is scheduled to be adopted by the EP Plenary on 14/3/ 2013; the report is accompanied by a Study by the General Secretariat of the European Parliament, on the subject see:

<http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=83593>

well as -in the case of a person or entity registered in the European Transparency Register (TR)⁸, your Transparency Register ID number.

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Q 1.2. If you answer as an individual: Are you a member of a mutual-type organisation and of what type?

Q 1.3. If you are answering for a mutual society:

Q 1.3.1. Please indicate the field of activity (health services, complementary social security, mandatory social security, life and non-life insurance, credit or building society or other) of your mutual, your business volume, and the approximate number of members.

Q 1.3.2. Does your mutual society conduct cross-border activities within the single market and if yes, under which legal form (e.g. subsidiary, joint venture, agency, branch, cross-border provision of services, cooperation with a local enterprise in the host country, other)?

Q 1.3.3. Does your mutual society plan to expand its activities to other EU/EEA area Member State(s) in the foreseeable future? If yes, under which legal form? Please indicate to which Member State(s).

Question 2: Barriers to cross-border activities/establishment of mutual society

The study identifies a number of barriers/difficulties proper to the mutual societies in the EU which affect their possibilities to engage in cross-borders activities:

- a. mutual-type organisations are not allowed to operate in all Member States or they are not allowed to start or conduct some activities, while the other legal forms of companies operating in the same field -like cooperatives or public limited-companies are permitted or are not restricted;
- b. the lack of possibilities, or the existence of very limited possibilities to form horizontal cross-border groups that are not based on vertical ownership structures, while other legal forms of companies in the same field can do so; (for groups see question 4)
- c. the general lack of understanding and awareness about mutual-type organisations in many Member States; (see question 5)
- d. high capital requirements for starting up a mutual⁹;

⁸ The Commission asks organisations that wish to submit comments in the context of public consultations to provide the Commission and the public at large with information about whom and what they represent. If an organisation decides not to provide this information, it is the Commission's stated policy to list the contribution as part of the individual contributions
<http://europa.eu/transparency-register/>

⁹ In examining this "obstacle" it must be considered that a number of pieces of EU legislation, regulating activities mostly in the financial sector e.g. in prudential insurance legislation (Solvency I and II), require a minimum capital as a guarantee for the public.

Q 2.1. Do you agree with these findings? Which of these barriers is the most important one for you?

Q 2.2. Do you see other barriers/difficulties? Please specify.

Q 2.1-2.2

Wij zijn niet bekend met dergelijke of andere hindernissen voor het opereren van onderlinge waarborgmaatschappijen. De Nederlandse onderlinge waarborgmaatschappij is een bij notariële akte als onderlinge waarborgmaatschappij opgerichte vereniging. Zij moet zich blijkens de statuten ten doel stellen met haar leden verzekeringsovereenkomsten te sluiten, een en ander in het verzekeringsbedrijf dat zij te dien einde ten behoeve van haar leden uitoefent (artikel 2:53 lid 2 van het Burgerlijk Wetboek). Wanneer men zich op andere activiteiten dan het verzekeringsbedrijf wil richten, kan men kiezen voor een andere rechtsvorm zoals de coöperatie.

Wanneer onderlinge waarborgmaatschappijen onder het toepassingsbereik van de Europese verzekeringsrichtlijnen vallen, moeten zij aan de kapitaalvereisten van die richtlijnen voldoen. De kleinere onderlinge waarborgmaatschappijen die niet onder de richtlijn vallen, zijn onderworpen aan een nationaal regime, waarbij minder zware eisen gelden.

Q 2.4. If you are answering for a mutual society:

Q 2.4.1. Can you give concrete examples of the barriers and/or difficulties you have encountered when trying to start activities in another Member State, either by setting up a mutual society there, by establishing a subsidiary, branch or agency, or by offering your services across borders? How did you deal with these barriers/difficulties? Have they influenced your plans to conduct cross-border activities or to develop the business scope or geographical scope of your mutual-type organisation? (For groups see question 4)

Q 2.4.3. Have you ever tried to merge with another mutual-type organisation registered in your country or another Member State? If yes, what kind of difficulties have you encountered with your partners or with the supervisory authorities?

Q 2.4.7. Are you interested in the transfer of your head-office or registered seat to another Member State? Can you specify your reasons why your organisation may want to transfer the seat and the problems experienced or expected, if any?

Q. 2.4.1-2.4.7

n.v.t.

Question 3: Content and form of a possible statute for a European Mutual Society

The study recognises that a European Mutual Statute could help mutual societies to gain recognition, to increase the understanding concerning the benefits one can get from them, and to better respect their interests at the EU level by offering more level playing field. It will help them to be introduced in Member States where until today this type of enterprises (in the complementary social security services or in insurance etc.) does not exist or is, to a certain extent, restricted and also to create groups.

It is evident that if a European Mutual Society were proposed by the Commission the text should not affect obligatory and or social security schemes managed in certain Member states by mutual societies, nor the freedom of Member States to decide whether or not, and under what conditions, to entrust the management of such schemes to mutual societies (see Berlinguer report, Recommendation 3). Furthermore the draft should in principle take on board the particular operating rules of mutual societies and their common characteristics as described in point 3 of the Introduction.

Q 3.1. Do you believe that the Statute should be a uniform piece of legislation applying the same way without derogations in all Member States?

Q 3.2. Should the Statute achieve autonomy from the national legislation, (in case there is one), in the sense that it does not afford any flexibility to Member States, in the sense that it should not contain references to national law regulating mutual societies (or similar entities)? In other words do you think that the Statute may deviate from these rules, values and principles that are nevertheless applicable to every other national mutual society in the Member State concerned e.g. allowing a European mutual society to foresee for multiple voting rights, or for a selection of risk, or for admitting non-members as clients/users, or non-member investors etc., in order to open up additional financing options, copying methods that are open to joint stock companies?

Q 3.3. What is your opinion as the necessity or consequences of an introduction of such options as above, in any future European Mutual Society?

Q. 3.1-3.3

Het is niet duidelijk welk probleem met een "European Mutual Statute" wordt opgelost. Er zijn ons geen grensoverschrijdende problemen bekend die de introductie van een dergelijk statuut rechtvaardigen, noch als substituut voor bestaande "mutual-like organisations", noch als aanvulling hierop. Zoals uit de studie blijkt, bestaat er een grote variëteit aan "mutual-like organisations" in Europa. Zij worden voor verschillende doeleinden gebruikt. Nationale overheden kunnen met hun regelgeving rekening houden met de specifieke activiteiten van deze rechtsvorm. Het Nederlandse stelsel voor de onderlinge waarborgmaatschappij functioneert naar behoren. Gezien de diversiteit aan nationale regelingen (of het ontbreken van een regeling) is het de vraag of er een "European Mutual" kan worden gevormd die aan alle nationale wensen voldoet en nog steeds kwalitatief toegevoegde waarde heeft.

Q 3.4. According to the study, the effect of the Solvency II Directive¹⁰ on the corporate governance of mutual-type organisations should be closely monitored. Issues raised include:

- a) the required ‘fitness’ of the persons managing effectively the undertaking;
- b) the principle of proportionality;
- c) the possibility or not to create mutual group structures as a reply to the requirements of the directive.

Do you believe that the statute of a European Mutual Society could help to find an answer to these concerns? What kind of other problems do you believe that such a Statute could solve? Please justify your reply.

Indien er problemen zijn bij de uitvoering van de Solvency II richtlijn, zouden die door aanpassing van die richtlijn moeten worden opgelost.

Q 3.5. Do you believe that an adaptation/amendment of existing European legislation (e.g. the statute for the European Cooperative Society or the Directive on Cross-border Mergers that regulates only cross border mergers of limited liability companies – n°2005/56/EC) could be an alternative solution? Could such amendments provide sufficient legal possibilities for mutual-type organisations to expand across borders and/or to create horizontal groups of mutual societies? Please justify your reply.

Aangezien wij niet bekend zijn met problemen met betrekking tot het grensoverschrijdend opereren van onderlinge waarborgmaatschappijen, is er onzes inziens geen behoefte aan aanpassing van het toepassingsbereik van bestaande richtlijnen of verordeningen.

Question 4. The need to create groups?

As it is mentioned in the introduction of Question 3, one of the problems of mutual is the lack of possibilities, or the existence of very limited possibilities to form horizontal cross-border groups that are not based on vertical ownership structures, while other legal forms of companies in the same field can do so. Groups seem to be a solution to the question of how to increase the solvability of mutual societies.

Q 4.1. In your country, is it possible to create a horizontal group of mutual societies?

Het is niet duidelijk wat wordt bedoeld met het vormen van een horizontale groep. Er zijn geen wettelijke beperkingen voor het samenwerken van onderlinge waarborgmaatschappijen. Het Nederlandse stelsel biedt genoeg mogelijkheden voor een goede uitvoering van samenwerking van onderlinge waarborgmaatschappijen. Een onderlinge waarborgmaatschappij kan een groep vormen door personele unies of door afspraken te maken, waardoor er een centrale leiding ontstaat.

¹⁰ When responding to this question with respect to insurance mutuals, please take into regard the provisions of Art. 212(1)(c)(ii) of the Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)

Q 4.2. Have you ever tried to create a horizontal group with other mutual-type organisations within your country or with other mutual-type partners from other Member States? If yes, what kind of difficulties have you encountered with your partners or with the supervisory authorities? What has been the result?

n.v.t.

Q 4.3. As a substitute or complement to forming horizontal groups of mutual societies, the study proposed some other options for mutual-type organisations, allowing them to overcome their (cross-border or internal) barriers for growth

- to find possibilities for the exchange of guarantee capital (e.g. as a kind of subordinated loan), through which mutual-type organisations can establish financial ties;
- To improve any existing national legislation on the conditions for the creation of horizontal groups of mutual societies so as to better respond to the existing legal requirements.

Do you believe that these options can provide a practical solution? Do you have any other proposals?

Wij zijn niet bekend met problemen omtrent het aangaan van financiële banden of het samenwerken van onderlinge waarborgmaatschappijen die een oplossing op EU-niveau behoeven. Garantie capital zal in de toekomst wel moeten voldoen aan de eisen van de Solvency II richtlijn.

Question 5 – What solutions would be most appropriate?

The study provides proposals for (political) action by which "behavioural" barriers of Member States where currently no legal possibilities are available in order to create a mutual-type organisation could be removed. It proposes that the values of mutual societies and the benefits for having a diversified market with a variety of legal entities should be better communicated to the responsible policymakers and to national supervisory/regulatory authorities.

Q 5.1. Do you believe that mutual societies suffer from insufficient public recognition, even in Member States where this type of enterprises exists in one or other form? Can you give examples?

Q 5.2. If you believe that the mutualistic idea should be promoted (because as of today the capacity of the mutual business model is not fully exploited), what kind of actions do you think are needed at national and/or European level in order to promote a better understanding of the mutual-type organisations' role and importance?

Q 5.3. What arguments can one use as to the need for allowing mutual-type organisations in all countries?

Q 5.1-5.3

Wij zijn niet bekend met problemen omtrent de bekendheid met de rechtsvorm onderlinge waarborgmaatschappij. De rechtsvorm wordt in Nederland regelmatig gebruikt en is

herkenbaar. Het is aan een lidstaat zelf om te bepalen of en hoe hij een rechtsvorm voor een “mutual-like organisation” wil invoeren.

Q 5.4. Did you ever contact local authorities, policy makers and/or supervisors on this subject?

n.v.t.

Q 5.5. The study observes that in many Member States, mutual societies are not allowed to operate or are restricted to conducting certain activities. Apart from a Statute for a European Mutual Society, the supporters of the need to promote the idea of "mutualism" in Europe (see Berlinguer report) request the Commission to submit¹¹ one or more proposals allowing mutual societies to act on a European and cross-border scale.

Q 5.5.1. What kind of actions for the approximation of laws do you believe can give a solution to the problem of promoting legislation on mutual-type organisations in these countries?

Q 5.5.2. Do you believe that the difficulties to act cross-border can be addressed by re-examining issues relevant to the application of rules referring to the freedom of establishment or the right to provide services etc., in order to create a more level playing field for mutual societies when competing in the same markets with joint-stock companies? Please give some examples.

Wij zijn niet bekend met problemen die een oplossing op EU-niveau behoeven. In Nederland worden de activiteiten van de onderlinge waarborgmaatschappij beperkt tot de uitoefening van het verzekeringsbedrijf. Andere activiteiten kunnen worden uitgeoefend onder een andere rechtsvorm, bijvoorbeeld een coöperatie. Harmonisatie van voorschriften lijkt ons, mede gelet op het diverse gebruik, onnodig.

Question 6: Asset protection systems

The study analyses the issue of the legal regimes for the protection of the assets of a mutual society. Such regimes foresee that in the event of the liquidation of a mutual society and/or its conversion to a capital-type company (like a plc), the remaining assets, mostly those which are allocated to the indivisible reserves, are transferred to a similar or other not-for-profit organisations and are not distributed to members. Where they apply, such asset-protection schemes (sometimes called “asset locks”) are deemed to protect mutual societies from demutualisation, because they do not provide any incentive for the mutual society’s members to vote for liquidation or demutualisation (conversion) because they would not benefit from it. The study stated that while asset protection systems discourage de-mutualisation, no evidence was found that the existence of asset protection systems is necessary to prevent demutualisation from happening.

¹¹ On the basis of, possibly, Article 114 of the TFEU on approximation of laws, that foresees for the adoption of a measure the ordinary legislative procedure that gives the same weight to the European Parliament and the Council of the European Union on a wide range of areas, while no unanimity by the Council is required as in the case of article 352 TFEU; see <http://www.europarl.europa.eu/aboutparliament/en/0080a6d3d8/Ordinary-legislative-procedure.html>

Q 6.1 Do you consider asset protection systems as an indispensable element of the nature of the mutual societies? Do you have comments on the necessity of asset protection systems? Do you believe that there are other ways to avoid de-mutualisation?

De statuten bepalen de bestemming van het batig saldo van de onderlinge waarborgmaatschappij wanneer deze wordt ontbonden, of de wijze waarop de bestemming zal worden vastgesteld. Voor alle rechtspersonen geldt dat de vereffenaar hetgeen na de voldoening der schuldeisers van het vermogen van de ontbonden rechtspersoon is overgebleven, in verhouding tot ieders recht overdraagt aan hen die krachtens de statuten daartoe zijn gerechtigd, of anders aan de leden of aandeelhouders. Er zijn geen wettelijke bepalingen over “asset locks” die beogen “demutualisation” te ontmoedigen.

Q 6.2. Do you consider that mutual societies should be not allowed to convert to another legal company form?

Nee. Op grond van het Nederlandse recht kunnen onderlinge waarborgmaatschappijen zich omzetten in andere rechtsvormen.

Question 7: National report on your Member State (Part III)

Q 7.1 Do you have any comments on the national report of your Member State (Part III)?

n.v.t.

Question 8: Any other comments?

n.v.t.