

# Merger as a Formula to Establish European Cooperative Societies

by  
Elena Meliá Martí\*  
and  
M<sup>a</sup> Del Mar Marín Sánchez

## Abstract

Council Regulation (EC) No 1.435/2003, of 22 July 2003, concerning the European Co-operative Statute (ECS), constitutes the legal basis for the creation of European cooperatives, facilitating the development of their cross-border activities and contributing to their economic development. So, the aim of this regulation is to enable the creation of European cooperatives by physical persons or legal entities resident or established under the laws of different Member States, but it also makes possible the establishment of European cooperatives by merger or transformation of existing cooperatives from different Member States. The aim of this paper is to show the specific features of formation of crossborder cooperatives by merger, covered by the ECS, with special attention to those aspects that distance them from the internal formation by merger, within the Spanish legal framework. For the purpose of comparison, Spain will be considered as regards the regulations governing mergers, depending on whether the ECS or the Spanish Cooperative Law is taken into consideration.

**Key Words:** Statute for a European Cooperative Society, Spanish cooperative regulation, cooperative mergers, crossborder activity.

\* Corresponding author. Address: Dpto. Economía y Ciencias Sociales, Universidad Politécnica de Valencia, Camino de Vera s/n, 46071 - Valencia, Spain. Email: [emeliam@esp.upv.es](mailto:emeliam@esp.upv.es). The authors would like to thank the Foreign Language Coordination Office at the Polytechnic University of Valencia for their help in translating this paper.

## Introduction

Globalization and the increasing convergence of the economy of the different countries is favoured by several factors: economic (achieving economies of scale, different costs in different countries, convergence in national financial markets towards their internationalization, etc) market (multinational consumers, approach of the needs in local markets, possibility of accomplishment of global marketing campaigns, etc.), technological (new technologies encourage international communications), etc. (Llaudet and Sabé, 2004).

In this highly competitive context companies have to approach strategic solutions to keep and increase their presence in the market. Among the options for companies facing this situation to achieve a larger business size are mergers, acquisitions, alliances, etc.

It is not surprising that business mergers have been carried out in Europe at an unprecedented rate during the last decade, especially during 1999 and 2000, as a consequence of the establishment of the Euro and the peak of stock markets.

However, there are still several cultural and social barriers in the European Union (EU), where national borders are very present, which undoubtedly makes it difficult to achieve higher business integration. In fact, as shown in table 1, mergers in the EU still take place mostly between companies of the same country (domestic); in the second place those carried out between European companies and non-European companies, and thirdly, those carried out between companies from different EU Member States.

**Table 1. Percentage of mergers and acquisitions carried out between EU companies**

	<b>Domestic</b>	<b>Between EU companies</b>	<b>International</b>	<b>Not known</b>
1991	54.3	11.9	14.5	19.3
1992	58.1	11.6	14.2	16.1
1993	57.4	11.7	18.8	12.1
1994	58.7	12.9	20.5	7.9
1995	57.4	12.9	22.8	6.9
1996	54.8	12.6	26	6.6
1997	56	14	26	4
1998	52.5	14.1	28.4	5
1999	55.7	14.2	26.4	3.7
2000	54.7	15.2	25.4	4.7
2001	54.1	14.9	24.1	6.9

Source: European Commission. European Economy. Supplement A. Mergers and acquisitions. December 2001.

Among other factors, this is because the legal framework applicable to the EU economic activity is still based, to a large extent, on the national laws, which leads to many difficulties when approaching merger operations between companies located in different Member States.

Undoubtedly, it was necessary to adopt rules concerning the demands of those companies whose activity exceeded only one Member State, allowing them to reorganize and restructure their activities on a Community scale, by means of the creation of societies with participation of companies from different Member States. In order to fulfill that need in 2001 it was established Council Regulation (EC) No 2157/2001 of 8 October 2001, adopting the Statute of the European Company, from now on, SECO.

However, this Regulation is not applicable to many other types of businesses in the EU, such as cooperatives, which have to face similar strategies. Cooperative societies are active in almost all business sectors of the European Union (EU), operating with considerable success in sectors like banking, agriculture, health care, education, housing, etc., which confers them an outstanding role in the European economy

For example, cooperative banking reached in 1995 market shares of 37% in France, 35% in Finland, 31% in Austria and 19.5% in Germany (ICA, 1,998). In the agricultural sector, these forms of association exceed market shares of 70%, such as the case of fruits and vegetables in Belgium and Holland, or 80%, as it happens with dairy products in Austria, Denmark, Finland, Holland, Ireland, Luxemburg, Portugal or Sweden (COGECA, 2000). Other representative sectors are health care or housing. Thus, in the first case we can highlight Spanish or Belgian cooperatives, with market shares of 21% and 18%, respectively, and 45% in housing cooperatives in the Czech Republic (ICA, 1998).

In the cooperative context the need to increase business size has a critical importance, in order to compete with the same opportunities as the rest of companies. Not in vain, the different legislations that regulate cooperative societies have in the EU reflect this need, and have taken into consideration different integration formulas in their articles, among which merger plays an important role, given the synergies in different business areas, or the reduction of costs promoted.

In fact, competition, concentration and business growth are among the tendencies and structural changes in the evolution of cooperatives included in the consultative document "Co-operatives in Enterprise Europe", presented by the European Commission in 2001, which is a clear example of the recognition of this lack. This document highlights that there are already multiple mergers that have materialized among cooperatives from different Member States, as well as between these and those from candidate countries or third countries, which found difficulties in many cases, given the current diversity of legislations and the

consequent legal conflicts that have appeared on many occasions, hindering the processes.

All this has resulted in the enactment of Council Regulation (EC) No 1.435/2003, of 22 July 2003, concerning the European Co-operative Statute (ECS), to be applied from August 18, 2006 and that responds to such demands, making available to cooperatives the necessary legal instruments for the development of cross-border activities, which, on the other hand, are more and more frequent and necessary

In this sense, the ECS constitutes the legal basis to establish transnational cooperatives from (whereas 13, ECS):

- the constitution of cooperative societies by physical persons and/or companies located in different Member States, and therefore subject to different cooperative laws
- the formation of these societies from the merger of cooperatives from different Member States,
- the transformation into of cooperatives.

However, this paper focuses exclusively on one of the methods of creation of European Cooperative Societies of the ECS, concretely in the second option, mergers, and analyzes the potential situation of its application, since after the approval of the ECS there will be a double regulation for the processes of cooperative mergers:

- one for mergers between cooperatives **located in only one Member State**, or internal, determined by the regulations of the different national laws concerning cooperatives
- another one established by the ECS, applicable to cross-border cooperative mergers or **between societies from different Member States**

## **Objectives**

This paper has a twofold objective:

In the first place, to describe from the ECS the characteristics of a cooperative merger process, that is materialized between cooperatives from different Member States.

Secondly, to emphasize the differences that are likely to arise between the processes of domestic merger (cooperatives from a Member State), and those of cross-border merger (regulated in the ECS). Thus, one Member State has been chosen, from whose internal regulation the comparison will be carried out. The chosen Member State is Spain, not by chance, but because of the special situation

of this country where as far as cooperative law is concerned, there are 13 regional cooperative laws and one national law coexisting.

However, for this analysis, the Spanish national cooperative law has been taken as reference -Law 27/1999, of 16 July, (hereinafter Law 27/1999)-, although regional laws will be referred to in those aspects of application, by reference of the ECS itself.

## **Merger as a Formula to Establish European Cooperative Societies**

The ECS considers several possibilities when creating a European Cooperative Society (SCE) (art. 2 ECS). An SCE may be formed as follows:

- By natural persons resident in at least two Member States (with a minimum of 5),
- By natural persons (minimum 5) and societies or legal persons resident or regulated by the legislation of at least 2 Member States,
- By companies and other legal bodies, governed by the law of at least 2 different Member States,
- By a merger between cooperatives formed under the law of a Member State with registered offices and head offices within the Community, provided that at least two of them are governed by the law of at least 2 different Member States,
- By conversion of a cooperative with its registered office in a Member State if for at least two years has had an establishment or branch governed by the law of another Member State.

Regarding the formation by merger, the ECS provides two procedures (art. 19 ECS), the so-called merger by acquisition, in which one of the cooperatives implied in the merger (acquiring coop) acquires the assets and liabilities and hosts the members of the other cooperatives, and simultaneously taking the form of an SCE, and merger by formation, in which the cooperative to which the assets and liabilities and members transferred is newly formed, and is formed as an SCE, as shown in table 2.

The cooperative resulting from merger shall be subject to the provisions in the ECS, although in those aspects not covered by it (completely or partially) they shall be governed by the dispositions in force regarding cooperative mergers of the Member State to which they are subject, and, failing that, to the national dispositions for the internal mergers of public limited-liability companies (art. 20 ECS).

**Table 2. Effects of the merger**

	<b>By acquisition</b>	<b>By formation</b>
<b>Universal transfer of all the assets and liabilities of:</b>	each cooperative acquired to the acquiring cooperative	the merging cooperatives to the society formed.
<b>Members of the cooperatives acquired will become:</b>	members of the acquiring cooperative	members of the SCE formed
<b>Cooperative that disappear:</b>	acquired cooperatives	all the merging cooperatives
<b>Society resulting from the merger:</b>	the acquired cooperative will become an SCE.	SCE formed after the merger.

Source: Own elaboration from the ECS (art. 19 and 33)

Therefore, the Spanish cooperatives involved in these processes shall comply with the requirements of the ECS regarding the merger procedure, which differs in several aspects to the procedure in the national legislation (Law 27/1999 and Regional Laws), arising the question of which legislation is to be applied in substitution of the Statute, in the aspects not covered in this (totally or partially). In fact, the reference expressed in the 1993 text has disappeared, which considered the possible existence of regional laws, thus enforcing the autonomous legislation applicable (Fajardo, 2001).

According to Vicent (2004), regarding the references of the statute to the cooperative legislation of the Member State in which the cooperatives are registered, and especially the case of Spain, according to the Constitution and the Statutes of Autonomy, the autonomous Law corresponding to the registered office shall apply and not the 27/1999 Cooperative Law.

On the other hand, an element to highlight within the framework of mergers regulated by the ECS is the power conferred to the Member States to avoid the participation of a cooperative in a merger. Therefore, the laws of a Member State may provide that a cooperative may not take part in the formation of a SCE by merger if any of that Member state's competent authorities opposes it (art. 21 ECS).

In this sense, although it specifies that such opposition may be based only on grounds of public interest, and regulates the possibility of being reviewed by a judicial authority, the indefiniteness or ambiguity pointed out makes it difficult to imagine the powerful reasons that could lead a country to avoid a process with these characteristics. Some examples in this sense could be to ensure the supply of

energy products or other supplies of vital interest for the population, which do not seem usual in the case of cooperatives, just as Vicent (2004) points out.

## **Formation by Merger from the European Co-operative Statute**

To show the differences between domestic mergers (cooperatives from a Member State) and cross-border mergers (regulated in the ECS), we are going to describe the principal aspects of a merger process regulated by ECS and Spanish cooperative laws (Law 27/1999 and regional cooperative laws).

### ***The draft terms of merger***

The draft terms of merger is a document that the management or administrative organ of the cooperatives (Decision-making councils) involved in any merger have to prepare, which later on shall be adopted by the general meetings of all them (arts 22 and 27 ECS).

The preparation of this document also constitutes one of the guidelines in the procedures of formation by merger of EU public limited-liability companies, as stated in the Third Council Directive 78/855/CEE, of 9 October 1978, on the mergers of public limited-liability companies, (from now on Third Directive), to which the commercial dispositions of the different Member States had to adapt, as specified in article 1.

All the cooperative laws in the Spanish territory include also the obligation of preparing this document, although its contents differ in different aspects to what is established in the ECS.

In fact, the draft terms of merger defined by the ECS are much more similar to what is pointed out in the Third Directive and to that already covered by the mentioned Statute of the European Company (SECO), to that considered by the Spanish cooperative legislation.

Among the differences found in the detailed contents of the ECS and the Cooperative Law 27/1999 (Table 3), the following should be pointed out:

First, the ECS establishes the need to quantify the relationship of exchange of the shares and the amount of the compensation to be paid in cash. This clause is part of the terms of merger carried out by companies, as it comes from the Third Directive, not being included in the cooperative mergers governed by Law 27/1999, which only requires to identify the system by which the capital of the resulting cooperative will be ascribed to the members of each cooperative involved.

This seems logic, since Law 27/1999 does not mention that the capital can be divided in shares, and only indicates that it shall be formed by the members' contributions (art. 45 Law 27/1999).

In fact, although there are cooperatives with a registered office in Spain whose capital is divided into shares, in which an exchange "relationship" could be established to allot the capital between the members of the SCE resulting from a merger, we cannot overlook that in many of them there are not shares. Therefore the system used to assign the capital to each member in the resulting SCE will require a different procedure.

Nevertheless, we find that this requirement can be sometimes adequate, since in many cooperatives the willingness to attract new members has resulted, in the long run, in unfair imbalances regarding the investment in the cooperative by some of its members. In these cases, mergers can offer an excellent opportunity to clarify this situation, promoting the establishment of shares whose determination is usually recommended to be carried out depending on the unit of activity of the cooperative (surface unit in agricultural cooperatives, livestock in farming cooperatives, etc.), link between the members and the cooperative.

It should be noted that in both cases we refer to the assignment between the members of the reimbursable assets in case of winding-up of the resulting cooperative. We should keep in mind that cooperatives have another type of corporate assets, in many cases considerably higher, which cannot be distributed, composed of the non distributable reserves invested by the companies in compliance with the legislation in force. Therefore, and although not covered in the legislation, we understand that these corporate assets shall also be valued and the appropriate means should be established to balance possible imbalances between the cooperatives involved in the merger (Juliá, Server, Meliá, 2004).

The terms of the allotment of SCE's shares between members, the date from which these will entitle the holders to share in surplus, and any special conditions affecting that entitlement, are included in the draft terms of mergers regulated by the ECS, that are not included in the 27/1999 Law either. The reasons are similar to those presented in the previous case, as the 27/1999 Law does not recognizes shares.

Moreover, the draft terms of merger of Law 27/1999 do not adopt provisions designed to ensure appropriate protection of the creditors' rights of the cooperatives that merge. On that score, the ECS refers to the legal order in public limited-liability companies' mergers of the Member State in which each participating cooperative is registered, taking into account the crossborder nature of the merger (art. 28 ECS).



Therefore, there may be differences regarding the procedures of application and obtaining of credit collection guarantees, depending on the Member State in which the cooperative has a registered office.

**Table 3. Contents of the draft terms of the merger according to Council Regulation (EC) no 1435/2003 on the European Co-operative Society Statute, and the Spanish Cooperative Law 27/1999 .**

ECS	Spanish 27/1999 law
a) Name and registered office of each of the merging cooperatives together with those proposed by the SCE;	a) Name, class and type of the merging cooperatives, including the data that identify their registration in the corresponding Cooperative Register, and those of the new cooperative if applicable.
b) Share exchange ratio of the subscribed capital and the amount of any cash payment. If there are no shares, a precise division of the assets and its equivalent value in shares.	b) System followed to establish the amount of the resulting cooperative capital that each member of the merging cooperatives is going to subscribe. To calculate it, the the distributable reserves, when available, can be included.
-----	c) Rights and obligations recognized to members of disappeared cooperatives in the new or acquiring cooperative.
c) Terms of the allotment shares in the SCE.	-----
d) Dates from which the holding of shares will entitle the holders to share in surplus, as well as any special conditions affecting that entitlement.	-----
e) Date from which the operations carried out by the cooperatives that disappear can be considered for accounting purposes carried out by the new or acquiring cooperative.	-----
f) the special conditions or advantages attached to debentures or securities other than shares which do not confer the status of member.	-----
g) the rights conferred by the SCE on the holders of shares to which special rights are attached and on the holders of securities other than shares, or the measures proposed concerning them;	e) Rights that correspond to the holders of special shares, shares or securities similar to those of the disappearing cooperatives.
h) The forms of protection for the rights of creditors of merging cooperatives.	-----
i) any special advantage granted to the experts who examine the draft terms of merger or to members of the administrative, management, supervisory or controlling organs of the merging cooperatives;	-----
j) Statutes of the SCE.	-----
k) information on the procedures by which arrangements for employee involvement are determined pursuant to Directive 2003/ 72/ EC.	-----

Source: Own elaboration from the ECS and Law 27/1999.

Another clause included in the draft terms of merger of ECS not covered in the Spanish cooperative legislation encourages to specify the particular advantages attributed to the experts that study the draft terms of merger, as well as to the members of the administration organs, management, supervision or control of the merging cooperatives. This clause seems to respond to the possibility to confer advantages, usually financial, to the experts appointed or to the administrators, to be paid by the society resulting from the merger. If these advantages are established, their inclusion in the draft terms of merger seems logic, since they should be known by the members when approving the merger.

Finally, it should be noted that unlike Law 27/1999, the ECS establishes the inclusion in the draft terms of the merger of information on the procedures through which the conditions of the employees' involvement are determined in accordance with Directive 2003/72/CE, as well as with the statutes of the SCE. In this respect, it should be highlighted that when the latter are not part of the draft terms of the merger covered by Law 27/1999, as we will see later, they include the information that this law states to make available for the members before the meeting called to approve the merger.

Apart from the clauses defined as contents of the draft terms of merger, the ECS includes the possibility that merging cooperatives add other elements to the draft text (art. 22.2. ECS).

There is no indication in the ECS about the approval of the draft terms of merger by the administrative organs of the cooperatives, or about the time limit of validity of this document to be ratified by the general meeting of the merging cooperatives. Nevertheless, the ECS regulates (art. 22.3 ECS) that the law applicable to public limited-liability companies concerning the draft terms of a merger shall be applied by analogy to the cross-border merger of cooperatives for the creation of an SCE.

Upon consulting the SECO, we find that it does not include any indication in this respect either. Therefore, for matters concerning mergers not covered by ECS, each cooperative shall be governed by the provisions of the Law of the Member State to which it is subject that apply to mergers of cooperatives. So, according to Law 27/1999, the managers of Spanish cooperatives will approve the draft terms of the merger, and after that they should refrain from carrying out any act or any contract that could create obstacles to its approval by the general meetings or modify the proportion of the members' share in the resulting cooperative (art 63.5. Law 27/1999). On the other hand, the draft terms of merger will have no effect if the merger is not approved by all the cooperatives involved within 6 months from the date of approval by administrators (art. 63.6 Law 27/1999).

### ***Independent experts' report***

Clause i) of the draft terms of the merger defined by the ECS points out another substantial difference regarding the process established by Law 27/1999. ECS establish for each merging cooperative that one or more independent experts shall examine the draft terms of merger and draw up a written report for members (art. 26 ECS), clause that is not included in Law 27/1999.

This is another example of the approach of the crossborder cooperative merger to the merger of public limited-liability companies, since this report is part of the documents that the administrators should commission in the mergers of public limited-liability companies regulated by the SECO (art 22 SECO), which is also referred to in the procedures of formation by merger regulated by the Third Directive (art 10 Third Directive).

The ECS confers all cooperatives the possibility to commission a single report, although only when their national laws so permit. Regarding the contents of the report, the ECS only states that it should include an opinion about the share exchange ratio or the value of the shares to be distributed in exchange for the assets of the merging cooperatives, which shall be aimed at being part of the documentation on the merger available for the members.

### ***Administrators' report***

Another obligation of the administrative body of each cooperative in crossborder mergers is to draft a comprehensive report which explains and justifies from the legal and economic point of view the draft terms of the merger, especially the exchange ratio, and also includes any special difficulty during the evaluation process (art. 23 ECS). Again, this brings us closer to mergers of companies or firms, and appears away from the Spanish cooperative law in force, since an identical requirement is included in article 9 of the Third Directive, as well as in article 237 of the Spanish Law applicable to the domestic mergers of public limited-liability companies (Legislative Royal Decree 1564/1989, of 22 December, adopting the Consolidated Text of the Company Law, hereinafter TRLSA).

It should be pointed out that article 63.7.b) of Law 27/1999 includes the administrators' obligation of drafting a report, but it only indicates that it shall express the adequacy and effects of the merger proposed. Therefore, it does not define it as a document aimed at justifying the draft terms of merger in their legal and economic aspects, but rather it is aimed at expressing the management or administrative organ's opinion about the merger, as well as the effects and consequences it is expected to generate.

With regard to the drafting of the report according to the ECS, applicable therefore to merger of crossborder cooperatives, there are several bibliographical references about their content, as it has identical characteristics to the report of

similar transactions in companies or firms. In this sense, Largo, R. (2000, p. 449) recommends that administrators select those headings of the draft terms of the merger with a special interest for the members and emphasize them, especially those related with the valuation and the establishment of the exchange ratio.

***Public disclosure of the draft terms of merger***

Regarding the publication of the draft terms of merger, the ECS refers us to the laws governing mergers of public companies limited by shares again, which will apply by analogy to each merging cooperative, although it indicates that the additional national requirements of each Member State should also be respected. In addition, it specifies that the publication of the draft terms of merger in the national gazette should include the following information (art. 24 ECS):

- a) the type, name and registered office of each merging cooperative;
- b) the address of the place or of the register in which the statutes and all other documents and particulars are filed in respect of each merging cooperative, and the number of the entry in that register;
- c) an indication of the arrangements made in accordance with Article 28 for the exercise of the rights of the creditors of the cooperative in question and the address where the complete information on those arrangements may be obtained free of charge;
- d) an indication of the arrangements made in accordance with Article 28 for the exercise of the rights of the members of the cooperative in question and the address where the complete information on those arrangements may be obtained free of charge;
- e) the name and registered office proposed for the SCE
- f) the conditions determining the date on which the merger will take effect pursuant to Article 31.

The ECS does not provide further explanations on the Official Journal to publish the mentioned information or about the form in which it must be published, what leads us, given its reference to the Company law concerning the disclosure of the draft terms of merger, to consult the SECO.

In this context, the SECO includes identical requirement for the publication of the information mentioned about the merging societies, and states that it will be published in the Official Journal of the Member State where each cooperative has its registered office. At the same time, its article 6 states that the draft terms of merger will be subject to public disclosure according to the forms foreseen by the legislation of each Member State, in accordance with article 3 of Directive 68/151/CEE, for each one of the merging companies, at least one month before the

date of the meeting of the general Assembly called to decide on the draft terms of merger.

### ***Information to members***

The members of the merging cooperatives are entitled to consult the documentation listed in Table 4 in the registered office of the cooperative, at least 1 month before the date of the general assembly of the merger, and they can request a copy or summary at no charge (art. 25 ECS) .

As pointed out in Table 4, the information provided to the members is very similar to the information detailed in Law 27/1999; some aspects should be highlighted:

Regarding the accounting statement regulated by the ECS, drafted in accordance with the provisions applicable to internal mergers of public limited-liability companies (TRLSA in Spain), spanish cooperatives shall use as merger balance the last annual balance approved, provided that it had closed within the six months previous to general meeting that approved the merger. Otherwise, a merger balance shall be drafted *ex profeso* and different to the last financial year balance approved, which will be carried out following the same methods and approaches of presentation of the last annual balance, in addition to being closed after the first day of the third month previous to the date of approval of the draft terms of merger. At the same time, the merger balance shall be verified by the society's auditors, provided that there is obligation to audit, and subject to the board that decides on the merger (art. 239 TRLSA).

The circumstances established by Law 27/1999 and those provided by the ECS, for which a cooperative involved in a merger should draft a new merger balance are identical, although these latter take into consideration two requirements with regard to this accounting statement that was not covered in Law 27/1999: to be closed after the first day of the third month previous to the date of approval of the draft terms of merger, and to be audited, when the society is required to audit its accounts.

Law 27/1999 does not include either in the information to provide the members with the expert's report about the value of the shares to be divided in exchange for the assets of the cooperatives. Nevertheless, we consider that the independent expert's report on the draft terms of the merger is an additional guarantee for members in any case.

On the other hand, unlike Law 27/1999, the ECS does not include among the documentation to consult by members the statutes that will govern the new society, since they are part of the draft terms of merger, or the statutes of the rest of societies involved in the merger.

**Table 4. Information to provide to members in the registered office according to Council Regulation (EC) no 1.435/2003 on the European Co-operative Statute, and the Spanish cooperative Law 27/1999.**

ECS	Spanish Law 27/1999.
Draft terms of the merger	
The annual accounts and management reports of the merging cooperatives for the three preceding financial years.	The annual accounts and management reports of the merging cooperatives for the three preceding financial years, and if applicable, the auditors' reports
An accounting statement drafted in accordance with the provisions applicable to the internal mergers of public limited-liability companies, to the extent that such a statement is required by these provisions;	The merger balance of each one of the cooperatives when different from the last annual balance approved. Merger balance shall be the last annual balance approved, to the extent that it had been closed within the six months previous to the meeting that has to decide on the merger.
The experts' report on the value of shares to be distributed in exchange for the assets for the merging cooperatives or the share exchange ratio as provided for in Article 26	----
The report from the cooperative's administrative or management organs as provided for in Article 23.	The reports, prepared by the Decision-making Councils of each one of the cooperatives on the convenience and effects of the merger projected.
Included in the SCE's draft terms of merger	The draft Statute of the new cooperative or the entire text of the amendments that have to be introduced in the Statutes of the acquiring cooperative.
----	The Statutes in force of all the merger cooperatives.
----	The list of names, last names, age, if natural persons, or the names or registered office if legal persons and in both cases, the nationality and the address of the consultants of the merging companies and the date from which they hold their positions, and if applicable, the same indications of those who will be proposed as consultants as a consequence of the merger

Source: Own elaboration from the ECS and Law 27/1999.

Lastly, the information regulated in the ECS does not include either the list of the consultants of the merging societies and the date from which they will hold their positions, and if applicable, the same indications of those who will be proposed as consultants as a consequence of the merger.

This deficiency is somehow beyond understanding, since it does not exist in the case of mergers to form a European Company. In fact, this information is provided to the members in the case of Spanish public limited-liability companies involved in the formation of a European Company, since although the European Company regulation does not include in any article the information to provide to members, it is complementarily applied to the TRLSA, which indeed includes it (art 238 TRLSA).

#### ***Approval of the merger and disclosure of the agreement***

The ECS specifies that the merger shall be approved by the general meeting of each merging cooperative, but it does not state the type of majority required. So, Spanish cooperatives shall require the majority provided for by the Cooperative Law by which they are regulated (autonomous or Law 27/1999)<sup>1</sup>. Thus, in the case of Law 27/1999 it is two thirds of the votes present and represented (art. 64, law 27/1999); the majorities stated in the rest of the autonomous Laws are shown in table 5.

Once the merger is approved, the ECS establishes that each cooperative makes it public, through the procedures foreseen in the legislation of each Member State, in accordance with the legislation that regulates the mergers of public limited-liability companies (art 32 ECS). Therefore, in the case of the Spanish cooperatives involved in a merger, and following a similar procedure as in public limited-liability companies, it shall be published three times in the “Official Journal of the Business Register” and in two newspapers of large circulation of the provinces in which each society has its registered office, including in each announcement the right of each of the members and creditors to obtain the entire text of the agreement adopted and the balance of the merger (art. 242 TRLSA).

#### ***Protecting the interests of creditors, bondholders and members***

Regarding the rights of those creditors of the merging cooperatives, as well as of the bondholders, the ECS (art 28 ECS) refers again to the public limited-liabilities companies Law on mergers of the Member State in which each participant cooperative is registered (in Spain TRLSA).

1 According to article 20 ESCE, for matters not covered by it, each cooperative shall be governed by the provisions of the Law of the Member State to which it is subject that apply to mergers of cooperatives.

As a consequence, new differences will arise between their rights, given a national merger (regulated in Spain by autonomous or Law 27/1999) and a crossborder cooperative merger (regulated for Spanish cooperatives by TRLSA).

Consequently, although Law 27/1999, applied to national cooperative mergers, has a deadline of 2 months from the publication of the merger announcement, during which creditors (it does not specify whether bondholders or not) can oppose to the merger, the TRLSA, concerning crossborder cooperative mergers, has 1 month, starting from the date of the last announcement of the general meeting's agreement, giving the same term to bondholders, provided that the merger had not been approved by the bondholders assembly (art. 243 TRLSA).

Regarding the safeguarding of the members in disagreement with the merger, not considered by the ECS, we should refer to the cooperative law of the Member States of the merging cooperatives, which in Spain corresponds to the provisions of the different autonomous cooperative laws and Law 27/1999. Thus, this latter establishes for these members the right to cancel their membership from the cooperative, provided that it is requested in writing to the President of the management or administrative organ within forty days from the publication of the announcement of the agreement. The merging cooperative should also assume the obligation of repaying their subscribed capital within the period established under Law 27/1999 for the case of justified cancellation of membership and according to the statutes of the cooperative of the member (art. 65 Law 27/1999). The autonomous cooperative laws establish the same procedure, although they differ in the deadline to send the writing to the management or administrative organ, as shown in Table 5.

### ***Control of the procedure and the legality of the merger and registering of the SCE***

Each merging cooperative shall control the legality of the merger, in compliance with the legislation applicable to the cooperative merger of the Member State to which it is subject, and failing that, in accordance with the dispositions applicable to the internal mergers of public limited-liability companies. The ECS also states that a court, a notary or another competent authority shall issue a certificate to confirm the completion of the acts and formalities before the merger (art. 29 ECS).

This certificate will be submitted later on by each cooperative to the competent authority regarding control of the legality of the cooperative merger concerning the merging and constitution of the SCE (failing that, of the merger of public limited-liability companies) of the Member State of the future registered office of the SCE, within six months from its issuing, and a copy of the draft terms of merger approved by the cooperative (art. 30. ECS).



**Table 5. Majority required to approve a merger in the Spanish cooperative law and deadline for cancellation for members in disagreement: A Comparison by Regions.**

Cooperative law	Majority for the merger agreement	Separation time limit for members from the publication of the latest announcement of the merger agreement
País Vasco	2/3 of votes present and represented	40 days
Navarra		30 calendar days from the publication of the announcement of agreement in the Official Journal of Navarra
Extremadura.		40 days
C. de Madrid.		1 month
C. Andaluza.	1 call: 3/5 votes present and represented 2 call: 2/3 votes present and represented	
Law 27/1999).	2/3 of votes present and represented	40 days
Galicia.		2 months
Aragón.		1 month
La Rioja.		40 days
Castilla y León.		1 month
Cataluña.	2/3 of social votes of persons present	
Castilla-La Mancha.	2/3 of votes present and represented	40 days
C. Valenciana.	2/3 of votes present and represented, which in turn represent the majority of votes of the cooperative	40 days from the adoption of the agreement or the reception of the agreement if absent from the meeting.
Baleares.	2/3 of votes present and represented	1 month

Source: Own elaboration from cooperative legislation.

The mentioned authority shall verify in particular that the cooperatives have approved the draft terms of the merger in a similar way, the dispositions regarding

the involvement of employees as provided by Directive 2003/72/CE, and that in the cases of merger by acquisition, the constitution of the SCE is adjusted to the conditions laid down in the legislation of the Member State of the registered office.

These formalities are a necessary condition for the registration of the SCE, which will take place in accordance with article 11 of the ECS in the Member State of its registered office, in the register stated by its legislation in accordance with the legislation of public limited-liability companies, which seems to lead us – if the registered office of the new SCE chosen is in Spain - to register it in the Business Register.

In fact, articles 11 and 12 of the ECS direct the SCE to the application of the rules of disclosure established by the First Directive for public limited-liability companies, which according to Vicent (2004), “will determine the registration of the SCE in the Business Register, since there is a Community interest in a unified disclosure in all the legal forms of company, and without a doubt of the SCE, what does not condition the legislative competence of the Autonomous Communities.”

In Spain, the different Cooperative Registers have the competent authority in what concerns the legality of formation of cooperatives by merger. In fact, as stated in article 4 of Royal Decree 136/2002, which approves the Regulation of Cooperative Registers, the qualification and inscription of cooperatives is one of its objectives, as well as the acts and legal businesses provided for by Law 27/1999 and in the Regulation itself.

Regarding public limited-liability companies, the control of the legality requested by the mergers by the Third Directive is attributed to the Business Register corresponding to the registered office of the acquiring company or of the new society, after the inspectors corresponding to the registered office of the disappearing societies have declared the nonexistence of register obstacles for the merger, in connection with each one of those societies” (Sánchez, 1998).

However, in the field of cooperatives, we do not find completely logic that the ECS refers to the Business Register regarding: the deposit and disclosure of the draft terms of the merger, the appointment of the experts in charge of draft terms analysis, the publication of the agreement once approved the merger, and the register of the new SCE if the registered office of the resulting entity is in the Spanish territory, when on the other hand, the Cooperative Registers are in charge of the legality of the merger. In fact, unlike the Business register, which covers the explicit procedure for mergers, the Cooperative register does not mention this aspect.

On the other hand, when registering the SCE it is essential to have reached an agreement of the employees' involvement in the SCE, pursuant to article 4 of Directive 2003/72/EC, which shall detail, among others, the composition of the employees' representative body, which shall decide, among other aspects, on the

division between the employees' representatives of the different Member states, of the positions in the administration or supervisory body of the SCE.

In addition, regarding the labor conditions of the workers of the different cooperatives involved in the merger, they shall be transferred to the SCE. In fact, article 33.4. of the ECS specifies the transfer to the SCE of the rights and obligations of the participant cooperatives regarding employment conditions, individual or collective, derived from the legislation and national practices, of the individual contracts or of the industrial relations on the date of registration.

Finally, upon registering the merger, the ECS specifies that the SCE shall report immediately to the members of the acquired cooperative on its registration in the register of members and on the number of shares they have.

## **Conclusion**

The Cooperative movement, as an unequivocal element of the associative sector, is clearly identified by its values and principles as a component of the social economy; indeed, given its long tradition and social weight, it is probably the most representative part of what is called the market social economy.

The increasing interest in this type of enterprises has arisen because they provide a response to social demands that are not adequately satisfied either by the public sector or by other private initiative companies. In fact, cooperatives can contribute to a more harmonious and balanced economic development that counts on people, envisages commitment to the area and, above all, does not widen the wealth gap between developed and developing countries, as has occurred to date.

Moreover, they can help to minimise the risks stemming from the globalisation process. As they develop and extend their sphere of action while retaining their values and principles, they will be in a position to act as bridges between the local and the global and become agents of what has been termed “glocalisation” (Jeantet, 2003).

However, we must not turn a blind eye to the fact that for this contribution to be effective, cooperatives must adopt the necessary business strategies to enable them to compete in the market place, which in many cases requires them to undertake resizing to achieve greater business concentration, as is being done by their competitors, particularly in sectors such as agri-food, banking and distribution. Although there are other specialized sectors offering specific activities where smaller units can operate, these will undoubtedly have to operate within the framework of networks to increase their efficiency and give them a more effective market presence.

In this respect, the ECS is a highly valuable tool for European cooperatives regarding the reorganization and restructuring of its activities on a Community scale, enabling their constitution of cooperatives integrated by members (natural and/or legal persons) from different Member States, and allowing them to overcome the obstacles to the merger operations, given the different laws in force in the UE countries.

Thanks to this statute, the formation of a SCE by merger appears as a business integration formula that European cooperatives may choose, which will allow them to intensify their presence in the whole European area.

The serious difficulties which arose in enacting ECS are undeniable. Consider for example the different ways in which the Member States regulate cooperatives.

All this meant that it was essential to try to establish common denominators, with particular attention to safeguarding aspects that are vital to cooperative identity such as company control by user partners through a democratic decision making process or the generation of indivisible assets, by introducing concepts and practices that are permitted in the regulations of some States. Hence the continuous references throughout the ECS to the provisions of the member States' legislation (limited plural vote, sector assemblies, etc.).

The articles of the ECS that regulate mergers are characterized, among other aspects, by a constant reference to the current legislation regarding formation by merger of public limited-liability companies, being distanced in many cases from the dispositions in this respect covered in the Spanish cooperative law.

On the other hand, we find in the ECS some lacks with regard to the Spanish cooperative legislation. In fact, it does not consider the possibility of participation of non-cooperatives in a merger aimed at an SCE, and refers in its definition of the process to "Cooperative merger" (art. 2.). It does not include formulas like the so-called special merger, covered by Law 27/1999 which regulates the merger between cooperatives and other legal forms of enterprise.

In addition, the dispositions included in the ECS concerning the applicable legislation to the SCE, sets new aspects to consider in the procedures of formation by merger, nonexistent in those of internal or national character. In fact, the ECS establishes that the SCE shall be governed by the Regulation itself, by its statutes in those aspects specifically authorized, and in those areas not regulated or only partly regulated, by the cooperative law of the Member State of its registered office.

Therefore, the Member State in which the registered office is located will be a decisive factor for the freedom of the future performance of the SCE, since in the aspects not regulated by the ECS, and provided that this is not explicitly referred to in the statutes of the cooperative, the rules of the Member State where it is registered shall apply. Therefore, this aspect will be considered by the merging

cooperatives when deciding the type of merger to choose (formation or acquisition), the assigning of the role of the acquiring or acquired company in the cases of merger by acquisition, and in the case of merger by formation, the choice of the Member State in which to register the resulting cooperative. In addition, in the Spanish territory, the possibilities multiply, given the existing legislative plurality on cooperatives.

Special consideration should be given, for its influence on the resulting SCE from the merger, to the possibility covered in the ECS that in the event of liquidation, the net assets (assets remaining after the payment of all the amounts due to creditors and the reimbursement of the money contributions by the members), can be allocated according to the principle of disinterested adjudication or, when the legislation of the Member State of the registered office of the SCE allows, by means of an alternative system specified in the statutes of the SCE (art. 75).

From the above, it could be considered that the cooperative's assets that cannot be divided, became distributable after the merger, provided that it had a registered office in the appropriate Member State and the option was included in the statutes. Nevertheless, we understand that the participation of a cooperative subject to the Spanish legislation in a cooperative merger that includes in its statutes such a possibility, for the purpose of asset valuation before the merger, should be related to the formula of special merger mentioned above, in which the non-divisible social funds are dedicated according to the provisions in case of liquidation.

On the other hand, we should emphasize that when approaching these processes it is necessary to overcome a number of obstacles, regardless of legal considerations, derived from possible oppositions to the merger by governing bodies, managers or members; differences between cooperatives in the operative, logistical, productive or administrative area, among others; configuration of a new directive structuring, etc., which will be necessary to overcome during the negotiation process.

In fact, crossborder mergers will require even more efforts, since it will also be necessary to overcome language differences, as well as those derived from different customs and cultures in the different Member States, which undoubtedly will be reflected in their cooperatives.

Finally, we would like to point out that the ECS should be regarded as a historical turning point for European cooperatives as, by regulating the sector at EU level, it enables them to operate throughout the European Union, facilitating transnational or cross-border activities, which in recent years, in the present market context, cooperative organisations had been demanding with great insistence.

## References

- COGECA (2000). La cooperación agraria en la Unión Europea. Tendencias y temas de actualidad. (<http://www.ccae.es>)
- European Commission (2001). Co-operatives in Enterprise Europe (Consultation document). (<http://www.aciamericas.coop/documentos/coopem.pdf>)
- European Commission (2001). European Economy. Supplement A. Mergers and acquisitions. December.
- Eurostat (2001). A pilot study on cooperatives, mutuals, associations and foundations. ([http://europa.eu.int/comm/enterprise/entrepreneurship/coop/social-cmaf\\_agenda/doc/pilot-study-cmaf-eurostat.pdf](http://europa.eu.int/comm/enterprise/entrepreneurship/coop/social-cmaf_agenda/doc/pilot-study-cmaf-eurostat.pdf))
- Fajardo García, G. (2002). “Una solución unificada con muchas excepciones”. *Cuadernos de las cooperativas de consumidores*. Confederación Española de Cooperativas de Consumidores y Usuarios, pp. 14-18.
- International Co-Operative Alliance (ICA) (1998). Statistics and informations on European cooperatives, Geneva.
- Jeantet, T. (2003). *La economía social europea*. Ed. CIRIEC. 2<sup>a</sup> ed. Valencia, pp. 380.
- Juliá Igual, J.F, Server Izquierdo, R., Meliá Martí, E. (2004). *Los procesos de fusión en cooperativas agrarias. Manual de procedimiento*. Ed. Mundi-Prensa, pp.145
- Juliá Igual, J.F, Meliá Martí, E. (2004). “The future of the cooperative movement in the building of Europe”. International co-operative Alliance Research Conference: The future of co-operatives in a growing Europe. Spain.
- Largo Gil, R. (2000). *La fusión de sociedades mercantiles. Fase preliminar. Proyecto de fusión e informes*, 2<sup>a</sup> ed. Ed. Cívitas Ediciones S.L., pp.556.
- Llaudet, O., Sabé, J. (2004). “Fusiones y adquisiciones como modelos de crecimiento”. *Harvard Deusto. Finanzas y Contabilidad*, n<sup>o</sup>59, pp. 32-42.
- Meliá Martí, E., Marín Sánchez, MM. (2004). “Merger as a formula to establish European Cooperative Societies”. International co-operative Alliance Research Conference: The future of co-operatives in a growing Europe. Spain
- Sánchez Oliván, J. (1998). *La fusión y la escisión de sociedades. Aportación de activos y canje de valores. Cesión global del activo y del pasivo. Estudio económico, Jurídico, Fiscal y Contable*, Ed. De Derecho Reunidas, Madrid, pp. 763.
- Vicent Chuliá, F. (2003). “La sociedad cooperativa europea”. *Revista Jurídica de Economía social y cooperativa*, n<sup>o</sup>14, pp. 51-82.

## **Legal references**

### ***European Union***

First Council Directive 68/ 151/ EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community.

Third Directive 78/855/CEE, of 9 October 1978, based on Article 54 (3) (g) of the Treaty concerning mergers of public limited-liability companies. Official Journal, no L 295, of 20 August 1978.

Council Directive 98/50/CE, of 29 June 1998, on the safeguarding of employees' rights in the event of transfers of companies. Official Journal no L 201 of 17 July 1998.

Directive 2003/ 72/ EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to employee involvement. Official Journal no L 207 of 18 August 2003.

Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE). Official Journal no L 294 of 10 July 2001.

Council Regulation (EC) No 1435/ 2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) Official Journal no L 207 of 18 August 2003.

### ***Spain***

Legislative Royal Decree 1564/1989, of 22 December, adopting the Recast text of Company Law. BOE n 28, of 1.02.1990.

Royal Decree 1784/1996, of 19 July, adopting the Business Register's regulations. BOE no 184, 31 of July 1996.

Cooperative law 27/1999, of 16 July. BOE n 170, of 17.07.1999.

Royal Decree 136/2,002, of 1 February, adopting the Cooperative Society's regulations. BOE no 40, 15 of February 2002.

### ***Autonomous Laws***

LAW 4/1993, of 24 June, on Cooperatives in País Vasco, amended by law 1/2000, of 29 June. OJ. País Vasco nº 146, 1.08.2000.

LAW 12/1.996, of 2 July, on Cooperatives in Navarra. BOE n 245, 10.10.1996.

LAW 2/1.998, of 26 March, on Cooperatives in Extremadura. BOE n 49, 2.05.1998.

LAW 4/1999, of 30 March, on cooperatives in the Community of Madrid. BOEM n 87, of 14.04.1999.

LAW 2/1.999, of 31 March, on Cooperatives in Andalucia. BOJA n 46, 20.04.1999.

Cooperative LAW 27/1999, of 16 July. BOE n 170, of 17.07.1999.

LAW 5/1998, of 18 December, on Cooperatives in Galicia. BOE n 72, 25.03.1999.

LAW 9/1998, of 22 December, on Cooperatives in Aragon. BOA n 23 of 27.01.1999.

LAW 4/2001, of 2 July on cooperatives in La Rioja. BOE n 172, of 19.07.2001.

LAW 4/2002, of 11 April, on cooperatives in the Community of Castilla y León. BOCL n 79, of 26 May 2002.

LAW 18/2002, of 5 July, on Cooperatives in Catalonia. BOE n. 179 of 27.07.2002

LAW 20/2002, of 14 November, of cooperatives in Castilla – La Mancha. BOE n. 301 of 17.12.2002

LAW 8/2003, of 24 March, on cooperatives in the Valencian Community. DOGV-N 4468, 27.03.2003.

LAW 1/2003, of 20 March, on Cooperatives in Baleares. BOE n. 91 of 16.04.2003.