

Synthesis report

on the comments on the open consultation on the measures proposed by a study financed by the Commission for the promotion of mutual societies in the EU and the necessity for a Status for a European Mutual Society

EXECUTIVE SUMMARY

1. Introduction

To assess the difficulties that mutual-type organisations (herein after mutuals) face when embarking on an expansion of their businesses within the Single Market the Services of DG Enterprise and Industry financed an external feasibility study¹ on the current situation and prospects of mutual societies in Europe. The study lays out the characteristics and principles of operation of the different mutual-type organisations in all European countries, their legal frameworks, their economic importance, as well as sections about the barriers that these 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..

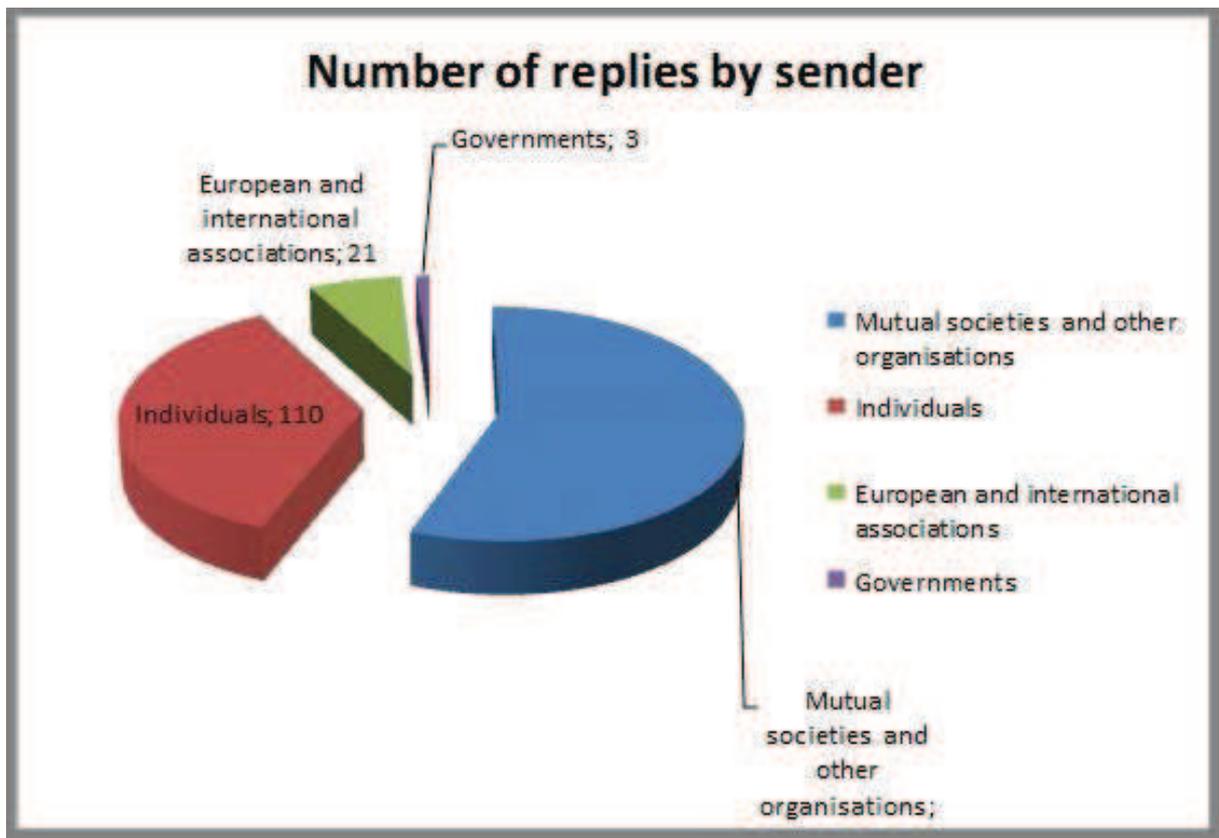
On March 2013, the European Commission launched a consultation (annex) to get feedback on the study and its recommendations as well as more in-depth information on the operational problems that mutuals face when operating cross-border in the Single Market. The questionnaire was targeted to mutual-type enterprises and their associations, to individual members of mutual societies, associations of legal professions and to public administrations. It contained inter alia questions on the need and characteristics of a possible statute for a European Mutual Society (herein after “EMS”) consisting of a Regulation and a Directive on employee participation. In fact, the European Parliament, some stakeholder organisations and one of the two most important large mutual societies clearly voiced their preference on various occasions for such a statute as the most appropriate solution to the problems that national mutuals seem to face when they intend to conduct cross-border activities.

The consultation is part of an assessment of the need for and impact of a possible EU action in this field. It contained five extended questions related to the most important factors affecting the setting up and development of mutuals across EU and the possible EMS.

2. Respondent Statistics

Overall 305 responses coming from 16 Member states (MS) were received. Representatives (directors, managers etc) of mutual societies and other entities of a similar type such as cooperatives, insurance companies sent 169 replies. Individuals who are members insured by mutuals sent 112 replies. European and international associations (consumer associations, associations of mutual societies, organisations of cooperatives, associations of insurance companies, think tanks, legal profession associations, European trade unions) sent 21 replies, and finally, three governments sent responses (France, Finland and The Netherlands).

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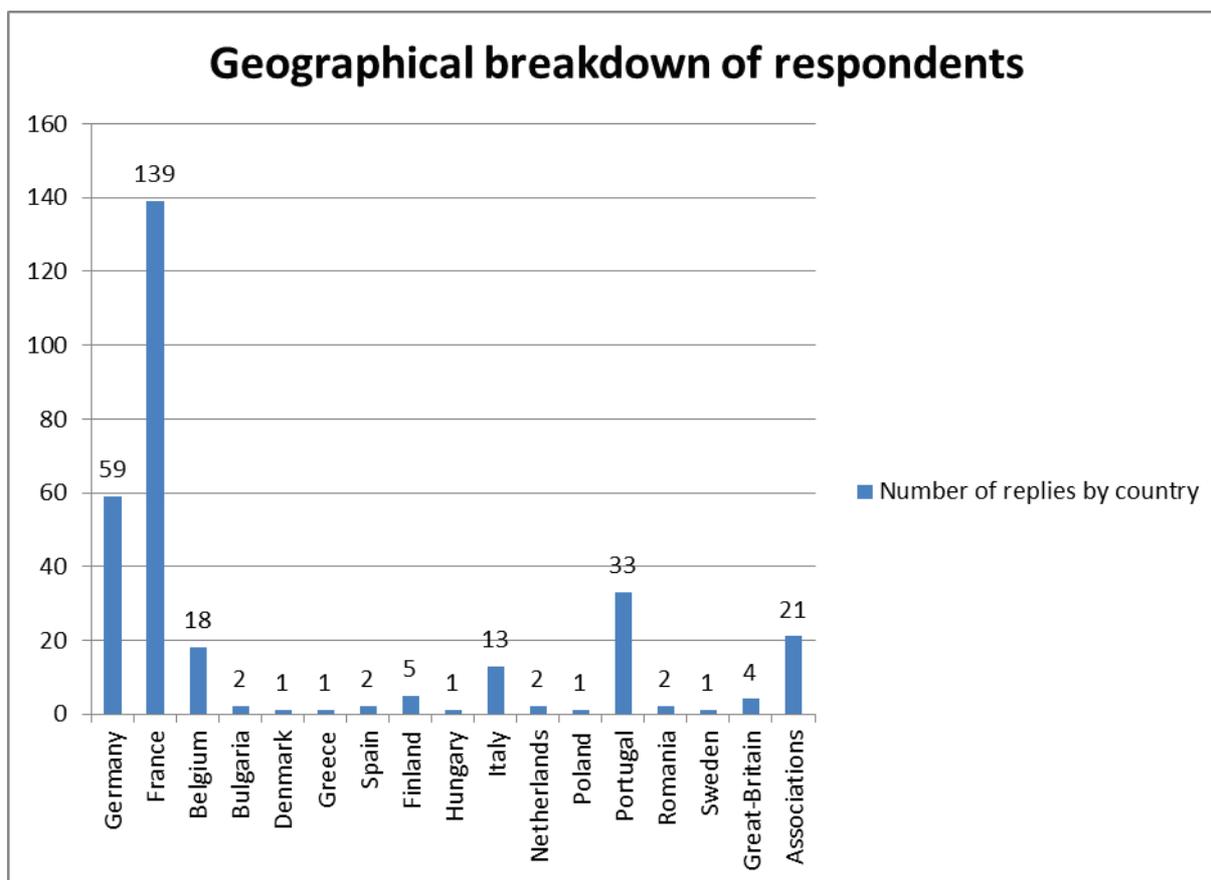


About only 20 respondents declared that they have cross-border activities.

The overwhelming majority (around 97%) of responses came from stakeholders and organisations who are in one way or another directly involved in the everyday life of a mutual, while a large part of these contributions were standard answers and thus identical or quasi-identical.

Distribution of replies by Member States:

Most replies came from France (139 or 46%), Germany (59 or 19%) and Portugal (11%) European associations were the fourth largest contributors with 21 replies (7%).



3. Main Conclusions

The main conclusions stemming from the consultation (see the full list of respondents and their replies in Annex 2) are the following:

- The most important legal barrier that affects mutual societies' possibilities to engage in cross-borders activities is the fact that there are Member States (MS) that do not allow the creation or operation of a mutual society on their territory or that impose restrictions concerning the setup or exercise of certain insurance activities.
- The above situation is to the detriment of expansion of mutuals, since other legal forms of enterprises (like public limited companies) operating in the same fields do not face such limitations. Thus
 - no new mutuals can be created in some MS
 - nor is it possible or easy to create groups of mutuals dominated by one holding entity or a single management (horizontal group) in a number of countries.
- There is strong support amongst the majority of the respondents (almost three out of four replies, coming mostly from FR, but also IT, PT and BE) to promote an EMS statute as a possible solution to the above problem.
- Supporters of the EMS statute explain that in order to engage in cross border operations mutuals conduct their activities by providing services from their home country, or by creating local subsidiaries in the host country in the form of public companies on the basis of their freedom of establishment.

- They claim that the existing European forms are not appropriate for mutuals: the European Cooperative Society – because it provides for the existence of a share capital, while mutuals have certainly funds but not share capital- and the European Company plc, -because it is a capital based profit driven company. The EMS statute should contain uniform mutual specific rules, like those related to the democratic management, solidarity amongst members.
- However, most of the respondents consider that the general lack of understanding of the specificities of mutuals and of the guarantees they can offer as far as solvency requirements are concerned, constitutes an important obstacle to the promotion of mutualism. This seems to be the approach taken by mostly French national insurance supervisory authorities, in a country with very strong mutual tradition. Thus, besides creating a level playing field on the internal market, they see an important role of an EMS statute in enhancing the visibility of and understanding for the mutuals and the principles under which they operate.
- Only a small number of respondents of the group supporting the EMS statute are or plan to be involved in cross-border activities. However, it is believed that this approach will also guarantee promotion of mutualism in Europe as well as a diversity of types of enterprises offering insurance and other services.
- The minority of respondents (mostly all DE respondents and the NL government), do not see the need or show no interest in, or are negative towards, the idea of an EMS statute, and raise questions about the relevance of the barriers identified in the feasibility study. They consider that the above problems are related to the provisions of existing European legislation, mostly in the area of insurance (existing life and non-life Directives and the future Solvency rules) and company law (mergers directive, constitution of groups etc.). Therefore the alternative solution should be to review and amend if necessary these instruments.
- Out of the three governments that replied, France is very positive about an EMS statute, Finland considers the EMS as an important step forward for the expansion of mutualism, while The Netherlands considers it as inappropriate and not a useful legal instrument.

SUMMARY OF THE ANSWERS

(see questionnaire in annex and full texts of replies in DG ENTR site)

4. Barriers to cross-border activities/establishment of mutual society (Question 2)

The overwhelming majority of respondents (3/4) agreed with the study's findings that there are technical and legal difficulties to expand across the borders due to the lack of appropriate legislation in a number of MS. At the same time they said that there is poor knowledge and a weak understanding of the mutual company model and its specific characteristics, and that national authorities have a tendency to take the share-based capital company type of business as a benchmark neglecting social economy enterprises.

This statement was confirmed by all European bodies (Association Internationale des Mutuelles, AIM and Association of Mutual and Cooperatives Insurances AMICE) but also by the European Trade Unions' Committee (ETUC). The Council of Notaries (CNUE) believes that a certain harmonization of laws (related to provisions that regulate company law issues and insurance activities) can offer a solution. However, there are a lot of replies that reject the

approach of harmonisation, because of the risk of damaging or neglecting national values and traditions.

The respondents, who are active in cross-border operations within the Single Market, are using various legal forms to conduct their international activities. Many have subsidiaries (in the form of plc) to provide cross-border services in other Member States while one of the respondents uses and another plans to do it via the Statute of European Cooperative Society (SCE).

Many cross-border activities are carried out in cooperation with a local partner. The replies point out that some mutuals would be ready to develop joint cross-border activities if they had a European statute. For many mutuals the establishment of plc subsidiaries is not compatible with the mutual model. Those who however have established public companies as subsidiaries make an effort to run them in accordance with mutual principles; they have their clients involved in the management, they restrict the payment of dividends to the foreign parent company and adopt methods for offering a profit sharing to their clients.

However, an important association of German mutual insurers does not share these views and points out that in Germany there is neither lack of awareness nor “low” degree of recognition of the legal form of mutual societies. In their view, there are no legal form-related obstacles or difficulties that prevent a mutual insurance society from pursuing cross-border activities.

The Finnish Ministry of Social Affairs and Health (insurance department) and the French authorities agree that the most important barrier is the fact that mutuals are not allowed to operate in all Member States or that they are not allowed to start or conduct certain life or non-life insurance activities. The Dutch Ministry of Social Security and Justice declares that it is not aware of the existence of obstacles for the cross-border activities for mutuals and believes that such activities can anyway be operated through other legal forms e.g. through a cooperative at least in those countries where cooperatives are not restricted (as in France) from providing insurance service.

Finally it was clear that the large majority of respondents, who replied to the question about barriers to cross-border activities, are not interested in proceeding to the transfer of the head-office or registered seat to another Member State. Furthermore, some organisations consider that any transfer should be strictly controlled, since it may be used by a company to avoid regulations and obligations that are stricter in the country of origin. A merger on the contrary is an operation which may be of a certain interest if used to consolidate the financial position of a company so as to better comply with the future Solvency II requirements.

5. Content and form of a possible statute for a European Mutual Society (Question 3)

Most respondents (4/5) agree with the fact that the EMS statute should not be mandatory but optional, and that its adoption by the Council should have no impact on the already existing legislation in those MS, in which mutual societies already exist. An EMS statute should not aim at achieving a harmonization of the existing laws. The objective should not be to alter local traditions, and the EMS statute should only be used to enhance cross-border cooperation and expansion. It should be an addition to the existing regimes. It should not force MS, which do not have the mutual model, to introduce relevant national legislation in their territory. However, it should allow European mutuals from other Member States to establish in the host country as licenced insurers that can operate and compete on an equal footing with the other types of insurance companies. All respondents agree that the EMS statute should include the basic principles and operating rules that are specific to mutualism.

However, referring to the question whether the statute should be a uniform piece of legislation, applicable in the same way and without derogations in all MS, and whether it can be independent from national legislation, the replies diverge.

- For some of them the EMS statute should contain a maximum number of common rules, independently of the business sector of the mutual concerned and should allow the fewest possible options and references (if any) to national law regulating mutual societies or similar type of enterprises.
- On the contrary other respondents argue that the diversity of mutual type societies should be maintained otherwise no mutual will be willing to create an EMS in a given country if it is not possible to benefit from eventually more favourable provisions applicable in that country, which are nevertheless open to the national mutuals operating in that country on the base of national legislation. Thus, references to national laws and options for MS should be maintained> In addition European mutuals should be left free to establish the details of their functioning in the articles of association. The supporters of this approach pointed out that the "one member, one vote" basic principle common to all mutuals does not apply the same way in all countries; differently weighted voting schemes using objective criteria, like the amount of the premiums paid by the policyholder are permitted and are quite usual. For these respondents harmonization of mutual legal forms, which vary so widely from one MS to another, is neither desirable nor needed.

With regard to the question whether the EMS statute could help mutuals to comply with the requirements on corporate governance and internal control procedures imposed by the future Solvency II Directive replies also diverged substantially:

- Half of the respondents pointed out that all mutuals are anyway subject to European solvency rules and have to face the new situation as all other insurance companies. They therefore consider that the future European legal form is not a suitable legal instrument for solving problems stemming from the Solvency II Directive. Difficulties must be examined in the context of the objectives of solvency rules on a basis that is neutral as regards the legal form. Yet, a certain degree of harmonisation of insurance and social security laws may be welcomed.
- Others however feel that the forthcoming solvency rules do not sufficiently take into account the specific modus operandi of mutuals, which are associations of persons and not capital companies. In particular, the new rules concerning the question of the "fitness of the persons managing effectively the undertaking" should not disregard the powers of a mutual's general assembly; therefore an EMS seems to be necessary to regulate these questions.

The French and to a certain degree the Finnish authorities are in favour of a statute for an EMS. Concerning the references to national legislation the Finnish authorities consider that those are necessary, while the French authorities think that the EMS must be independent of the national legislation. For the Dutch authorities, however, it is not clear what problem an EMS statute will solve, and whether the adoption of an instrument allowing the creation of an EMS has a qualitative added value.

On the question whether an adaptation of existing European legislation like the Directive on cross-border mergers could be an alternative solution, some respondents proposed to expand its scope and to provide simpler processes for the merger of mutual insurance societies; cross-border mergers constitute instruments that offer interesting solutions for enterprises when restructuring is needed. The Finnish authorities believe that this is a possibility that could be

examined further. For the Dutch authorities, there is no evidence that mutuals need to proceed to such operations. The French authorities stress that an EMS is needed, because it will allow mergers as a means of development of mutual societies in the EU.

With regard to the question whether the existing European Cooperative Statute might be a solution, if amended to introduce the new legal form of an EMS, that is very similar to the cooperative business model, most respondents rejected this approach explaining that a specific European corporate model is essential for mutuals, because there are differences of legal nature between mutual societies and cooperatives.

Finally a number of mutuals that do not favour the creation of an EMS proposed that if such an instrument were to be promoted, the participation of bodies running mandatory social security schemes like in DE the Krankenkassen should not be allowed to be founders of an EMS

6. The need to create groups of mutual societies. Question 4

The majority of answers point out that for mutual societies being associations of persons, where the prevailing model is the absence of shares, it is not easy to create groups, as public companies with share capital (plc) do. Therefore, only the adoption of an EMS would grant mutual societies a new instrument to create groups and thus to realize economies of scale in areas like asset management, reinsurance, or activity pooling. In addition, the existence of financial solidarity among the members of a mutual group in the form of an EMS would be a strong argument for mutuals when they seek approval of the supervisory authorities controlling their ratio of solvability.

However, for other respondents the creation of groups, in which an entity controls or dominates other companies, can be easily achieved by applying various national provisions of contract law or instruments of company law; the promotion of a national or European law concerning groupings is of relevance only to antitrust authorities (competition rules on mergers). The supporters of no action in this area consider that there are sufficient national provisions in MS offering various options for the setting up of groups between public limited companies, mutual societies and undertakings of other legal forms, including foreign companies.

As to the question whether the creation of groups might be a solution to the problem of increasing the ratio of solvency of mutual societies, the Finnish and French authorities confirm; in France there is a draft for a new legislation that will allow the establishment of groups of mutuals. The Dutch authorities do not consider it an issue, since Dutch mutuals are anyway free to proceed to any kind of restructuring and do not need an EMS to do so.

With reference to the recommendation of the study that proposes options other than the constitution of groups of mutuals, as a substitute allowing them to overcome their (cross-border) barriers for growth, the Finnish and Dutch Authorities do not see a need, while the French stress that only an EMS could address this issue.

7. What other solutions would be appropriate. Question 5

The next question was whether the expansion of mutualism can be helped by political action, by which the approach of MS that do not permit creation of mutuals could be changed. Respondents agreed and propose that the values of mutual societies and the benefits of having a diversified market, with a variety of legal entities, should be better communicated to the responsible policymakers and to national supervisory/regulatory authorities.

In fact, the majority of the respondents believe that mutual societies suffer from a lack of recognition not only in the MS where there is no legislation but also in MS where the movement is rather strong. Some respondents consider that this is due to the fact the Treaty on the Functioning of the European Union (TFEU) does not make a specific mention of the mutual society model alongside the cooperatives and capital companies.

The majority of respondents are of the view that only the adoption of an EMS statute will create a better understanding of the mutuals' beneficial role for the society. It is believed that the entry into force of a new, uniform but optional regime will bring better opportunities for MS that are lagging behind to also embrace the mutual model. The majority of respondents share the view that establishing cross-border cooperation is particularly difficult for national mutual societies in the current state of affairs and that the most significant barriers is the lack of transparency of rules concerning their functioning and fields of activities. Namely mutuals from other countries do not know which legal frameworks are applicable in the host country

and how national supervisory authorities regard mutuals, domestic or foreign as far as solvency requirements are concerned. For them, the adoption of the EMS statute, implies that it will be part of the national law and thus it will boost the recognition of the mutual model.

Other respondents however mention that in their home country there exist no problems related to any low degree of recognition of mutuals by the authorities. Furthermore they say that there would be need for an EMS only if all countries permitted mutual societies on their territory and only if they were unable to solve problems of cross-border business; and this seems not to be the case.

As far as actions that may be undertaken at European level to promote mutual societies are concerned, the Finnish and French authorities point out that the EMS is a good solution, because it will guarantee diversity of the legal forms offering mutual insurance activities and this will have an added value for the economy. Its adoption implies that there will be a broader choice for the consumer while the functioning system of a mutual.

With regard to the possibility of examining whether there are problems relevant to the application of rules referring to the freedom of establishment or right to provide services etc., neither the French (showing their clear preference to an EMS statute) nor the Dutch authorities find it necessary. The Finnish authorities proposed that in addition to an EMS, the scope of the Directive on the (legal) cross-border mergers could be amended to also cover the cross-border mergers of the mutual societies.

8. Asset protection systems (Question 6)

The large majority of respondents (2/3) belonging to the group of supporters of the EMS statute agree that asset protection systems should be maintained in all cases; according to these regimes surplus remaining after the winding up of a national mutual in case of conversion to a plc should not be distributed among members. This rule is meant to discourage demutualization, as the principal incentive for a mutual's members to vote for demutualization, would be to receive shares in the new converted company which could then be quoted on a stock exchange. According to the majority of respondents the members of a mutual society should not have any property rights on the assets of the mutual society: in case of dissolution and winding-up there should be no distribution of (remaining) assets, but a transfer to other mutual societies.

However, for an important number of respondents (1/3) consider that any rule on asset locks is not acceptable. These respondents consider ownership rights to be a core element in any legal business form, which must remain unaffected. An asset lock system is thus a non-admissible interference with the prevailing ownership approach in some countries. A key factor for avoiding demutualization is the good pro-mutual attitude of managers who are not meant to take risks and receive benefits in the same way as managers of plcs. For a mutual the best means to protect its assets is good corporate governance in the sense that the primary objective of the enterprise is acting in the interests of its members.

As regards the prohibition for mutual societies to convert to another legal company form, the Finnish and Dutch authorities are against it, while the French authorities even emphasize that an EMS should not be used for demutualization.

9. Comments on national reports contained in the study (Part III) Question 7

A German association made some comments on their country's report pointing out that the text on Germany's law relating to groups need some revision, explaining in particular, that the statement that a vertical group may not be formed by mutual-insurance societies is not correct.

10. Any other comments. Question 8

A majority of respondents mainly those who support the EMS statute regret that the consultation did not question people on the need to promote mutualism and democratic governance as this is a crucial issue for a social market economy. They consider that an EMS statute would promote social cohesion by giving citizens the opportunity to participate in the decision-making process of their company and to enjoy good social security services at a time when the welfare state in Europe is under pressure.