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Explanatory Memorandum

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AMICE fully acknowledges the work done in the joint Task Force of its predecessor organisations, ACME and AISAM. AMICE continues the work of ACME and AISAM. References in this document are therefore made to AMICE and AIM wherever current and future work is concerned.



1. INTRODUCTION

- 1.1 Europe's mutual societies play an important part in the economy, with more than 180 billion EUR in premiums representing over 20% of the European insurance market, servicing more than 230 million European citizens through healthcare and social services.
- 1.2 The mutual form is recognised in most Member States. However, cross-border cooperation between mutual societies has been hampered within the European Union by legal and administrative difficulties which should be eliminated in a well operating internal market.
- 1.3 The new statute is inspired by the Statutes for a European Company (SE) and a European Cooperative Society (SCE) but has been tailored to the specific characteristics of mutual societies.

2. OBJECTIVES OF A STATUTE FOR A EUROPEAN MUTUAL SOCIETY

- 2.1 To establish a **level playing field** for all entrepreneurial forms and statutes which gives mutual societies equal possibilities to add a European dimension to their organisation and activities.
- 2.2 To provide mutual societies with adequate legal instruments to facilitate their cross-border and trans-national activities.
- 2.3 To give mutual societies a **European legal instrument to group and/or to develop** their organisation and activities.

3. A SHORT OVERVIEW OF A LONG HISTORY

- 3.1 In **October 2003**, the European Commission published a consultation document on "Mutual societies in an enlarged Europe". This document contains the key elements of a European statute for mutual societies.
- 3.2 On **27 September 2005** the President of the European Commission expressed his intention to withdraw all legal initiatives that should lead towards a European Statute for mutual societies. This decision led to disappointment and dissatisfaction in the mutual sector. Together, the mutual sector, represented by the Association Internationale de la Mutualité (AIM), the European Association of Cooperative and Mutual Insurance Companies (ACME) and the Association Internationale des Sociétés d'Assurance Mutuelle (AISAM) then addressed Member States, the European Commission, the European Parliament and the European Economic and Social Council to raise awareness of the desire and the need for a European statute for mutual societies.
- 3.3 In **March 2006**, and despite the joint campaign of the sector, the European Commission confirmed the withdrawal of the proposal for a statute for a European mutual society from its policy agenda.
- 3.4 On **12 December 2007**, the three representative associations, AIM, ACME and AISAM, sent a joint proposal for a new text, which they had jointly prepared, for a statute for a European mutual society to the President of the European Commission, asking him to re-table the issue on the political agenda.



4. THE RATIONALE BEHIND A EUROPEAN STATUTE

- 4.1 When the Treaties of Rome and Maastricht deal with undertakings they refer to either public or private enterprise. In the second category they invoke joint stock companies and cooperatives (cf. Article 58 of the Treaty of Rome) but make no mention of mutual societies. The fact that mutual societies are not specifically mentioned has undoubtedly undermined their status and led to an almost systematic disregard for their specific nature whenever European and international legal texts are devised. Whether this attitude is deliberate or not, it fails to take into account the fact that mutual societies play an important role in European citizens' everyday life and in the European economy.
- 4.2 The only texts which actually mention mutual societies appear in the annex of the first generation of insurance directives (in 1973 for non-life insurance business and 1979 for life insurance). This quite clearly does not go far enough at European level as they only apply to mutual societies with insurance activities.
- 4.3 Whilst some countries have a long-standing tradition of mutual societies, particularly in the financial and healthcare insurance sectors, a number of other Member States have no mutual societies and do not recognise this kind of society. This is the case for example of the Czech Republic, Slovakia and the Baltic countries. Not only does the mutual option not exist for some specific activities in the Czech Republic and Slovakia, it is barely contemplated in the field of healthcare insurance either.
- 4.4 National laws governing mutual societies – if they exist – are marked by their disparity. In some countries, mutual societies can carry out all sorts of different activities (insurance, banking, property management, etc). In others, they are specialised in insurance and healthcare (France, Belgium, Sweden, etc).
- 4.5 Rules governing the setting up, operating and liquidating of mutual societies differ depending on national, legal or sociological traditions. Member States attach very different degrees of importance to the future of their respective mutual sectors.
- 4.6 Wherever they exist, mutual societies work in the interests of their members and beneficiaries, on the basis of individual responsibility and collective solidarity amongst their members. At the same time, they face stiff competition nationally and internationally, particularly from joint stock (insurance) companies, which now enjoy a competitive advantage through the European Company Statute. It is therefore more difficult for mutual societies to develop their business model and operations throughout Europe since they do not have a legal instrument which recognises their specific nature and allows them to set up cross-border groups.

5. THE NEED FOR A EUROPEAN STATUTE FOR MUTUALS

There are many reasons why there is an urgent need for a European statute for mutual societies:

5.1 Legal

Adopting a European statute for mutual societies would mean formal recognition by the European Union of mutuals' role as an alternative form of business model to the joint stock company model. This statute would provide a legal framework tailored to their way of operating



(absence of share capital, involvement of members in the governance of the company, collective solidarity of their members, etc.) which would be valid throughout the whole of the European Union.

5.2 Discrimination

- 5.2.1 A European statute for mutual societies would re-establish fair conditions for them. Given the availability of European statutes for other corporate forms, mutual societies are still discriminated against.
- 5.2.2 Without a European statute for mutual societies the European market would function at two different speeds since not all operators would have the same legal possibilities nor would they enjoy the same conditions for fair competition.
- 5.2.3 A further aim of a European statute for mutual societies would be to enable cross-border cooperation between existing mutual societies without the need to use holding companies with joint stock company structures or EGEIs (European Group of Economic Interest). These options do not take into account the mutual sector's wish to work together whilst conserving the aspects which make them different from other kinds of corporate structures. This kind of cooperation could take the form of alliances between mutual societies which already operate in different Member States, or the creation of mutual societies with a European dimension and field of operations. The European statute would thus contribute to a better integration of mutual societies within the single market.

5.3 Financial

- 5.3.1 The own funds requirements for one or more mutual societies (from the same country or from different countries) give grounds for setting up a European statute for mutual societies. This financial pressure could become more severe under the draft "Solvency II" Directive. Its capital requirements are difficult to determine precisely at present but they could result in a number of operators being forced out of the market if they lack the right tools to restructure (and consolidate cross-border) before it is introduced.
- 5.3.2 Recently, the Finnish Presidency stressed this issue in a letter to Commissioner G. Verheugen: *"The introduction of a new European risk-based solvency system (Solvency II) increases the pressure for regrouping within the mutual insurance sector. Lack of a proper legal instrument would be likely to lead to unwarranted demutualization of the insurance sector."*

5.4 Development

The European statute for mutual societies should provide a way of promoting the mutualist model throughout an enlarged Europe, especially in the new Member States, where it is not covered by some legal systems. A European regulation, which would naturally be applicable throughout the whole of the European Union, would have the dual advantage of providing these countries with a European reference statute and of contributing to the status and public profile of this kind of undertaking.

5.5 Service

Mutual societies provide services to their members and beneficiaries. The scope of activities and services is defined by the members, according to their needs. There is an ever growing need to provide services and/or to exploit activities that follow mobile members, or to provide services and/or to exploit activities to members in different European Member States.



5.6 Symbolic

A European statute would recognise the mutual society as an existing and vital European corporate structure and provide a reference framework which would allow mutual societies wishing to adopt it, to do so in harmonised conditions. A European regulation would determine a number of homogeneous or equivalent principles (creation, composition, rights and obligations for members and managers, rules of procedure, etc.).

6 VALUE-ADDED OF MUTUAL SOCIETIES

- 6.1 Mutuality is an excellent instrument for engaging citizens in economic life.
- 6.2 Mutual societies play a vital societal, social and economic role through the provision of services focused on meeting the specific short- and long-term expectations of their members.
- 6.3 It is the members who create a mutual society, govern a mutual society via their participation in the relevant governing bodies or decide to liquidate a mutual society.
- 6.4 One of the basics of mutuality is its internal democracy. Mutual societies are set up by members, and are governed and often managed by members. Members have a say in the functioning, activities and missions of their mutual society. This engagement is the distinguishing element that makes mutual societies different from other (legal) entities and is unique as far as participation in economic life is concerned.
- 6.5 As mutual societies do not have shareholders or option-holders, members and/or management do not have an interest in pursuing short-term profits. As a mutual society is created and managed to satisfy members' needs, it inherently pursues long-term goals. Mutual societies therefore are reliable, stable and durable elements in every economy and society.
- 6.6 Mutuality is a useful concept for public-private partnerships.
- 6.7 Especially in the field of social protection, more and more governments of Member States delegate tasks and responsibilities to the private sector. Mutual societies - as private companies which do not seek profit and are collectively organised – can offer a useful tool in executing public tasks within a private framework, without losing on accessibility, solidarity and social responsibility.
- 6.8 Mutuality is key in building up a Social Europe thanks to its specific features. Until now, the European project is mainly based on the Internal Market. A growing attention is paid to the under-developed social aspects of this strategy. The concept of mutuality is a linking pin between business and the welfare state.
- 6.9 A European statute for mutual societies would formally recognise the values of a model which combines the criteria set out in the Lisbon agenda of economic performance and social integration.



7 RISKS ARISING FROM ABANDONING THE EUROPEAN STATUTE FOR MUTUAL SOCIETIES

A full understanding of the benefits of a European regulation for mutual societies requires an analysis of the disadvantages and risks resulting from the lack of such a statute.

7.1 The legal loophole – a source of numerous disputes

Mutual societies are governed by national legislation and supervised by national or regional authorities in line with the activities exercised. The lack of any European reference text however prolongs distortions in regimes and competition. This could result in the mutual societies themselves bringing legal disputes before the Court of Justice in Luxembourg.

7.2 The decline of the mutual model

7.2.1 Due to the lack of a specific European statute, mutual societies may end up being classified as joint stock companies whenever legislation proposed by the European Commission concerns them: the mutual sector is adamantly opposed to this assimilation: an establishment fund is not share-capital; member-policyholders are not shareholders.

7.2.2 Unless the necessary precautions are taken, the tendency to equate the framework for mutual societies to that of joint stock companies is likely to entail a major risk for the mutual societies - their demutualization.

7.3 Blocking innovations

The lack of a pan-European legal framework for mutual societies will hamper innovation and adaptation to ever changing needs of members. Without such a framework, mutual societies are condemned to stay local, regional or national players.

8 MISUNDERSTANDINGS ABOUT MUTUALITY AND MUTUAL SOCIETIES

8.1 Mutuality is old-fashioned

Mutuality is as old as citizens' attempts to organise their activities in such a way that their needs are met and that their participation in management and gains is guaranteed. A long and successful history cannot be confused with being out-dated because:

- The success of mutuality has been proven by the fact that most existing mutual societies were created a long time ago. If the concept was wrong, useless or un-successful, these mutual societies would have disappeared already;
- New mutual societies are still created: this proves that there is a continuous need felt by European citizens to organize their (economic) activities in an alternative, mutualist way which differs from stock-owned companies, cooperatives or other legal economical entities, as they aim to guarantee solidarity among their members, guarantee their involvement in the governance and they do not pursue profits only for the sake of profits.



8.2 Mutuality is declining

The success of the concept of mutuality cannot be measured by the number of mutual societies only. Mergers and acquisitions reduce the statistical number, as they do for other corporate structures too. In health care, mutuality is steadily growing as the favoured model for organizing the financial access to provisions and services (see the Dutch example).

8.3 Mutuality is a French concept

The concept of mutuality particularly blossomed in certain Member States such as France, Spain, Finland, the Netherlands and successfully translated in most other European countries and beyond. Across the EU, mutual societies today are present in all 15 'Old Member States'. With the enlargement of the EU, the number of Member States where mutual societies exist has grown.

8.4 Mutuality is a relic of the 'Old Europe'

Whereas mutuality is vibrant in the so-called old Member States of the European Union, it is true that in some of the so-called new Member States, the concept of mutuality is relatively unknown today. This divide is primarily due to the fact that in countries formerly influenced by the collectivism put in place by the Soviet regimes, mutuality has often been suppressed in favour of a state monopoly. Prior to the Second World War however, these countries had a rich and important mutual **tradition**. Signals are there to testify that the concept is making headway again.

8.5 Mutual societies can use the European Cooperative Statute

Mutual societies are fundamentally different from cooperatives. They differ on many levels:

- Type of members: in the case of a mutual, its members are commonly at the same time its customers; this is not necessarily the case for cooperatives which tend to be suppliers' cooperatives, where the members deliver services to non-members as well.
- Cooperative share capital vs no share capital, hence no right to property.
- Ownership: Mutuals are controlled by their members, and sometimes even directly managed by the representatives of their clients; in a mutual the control is given to some persons elected by the members among themselves; each mutual has its own electoral designation system (which is dependent upon its size, its geographical setting, its history, its legal framework etc.), but the authority within the company emanates from the appointment by the members - or their representatives - of the management bodies among themselves.

8.6 Mutual societies can use the cross-border merger Directive to consolidate international activities.

Consideration could be given to using the cross-border merger Directive only in the event that the text is adapted to the mutual society's specificities. This should include stripping it of its share-capital and shareholders provisions. In doing so, a tailored text for mutual societies would call for a tailored statute too.



8.7 The mutual sector is divided

- 8.7.1 Since the withdrawal of the project by the European Commission, the mutual sector in Europe has been united in raising awareness for the issue and in trying to re-table the European statute for mutual societies.
- 8.7.2 Together, the representative associations of mutual societies in Europe – AIM and AMICE have drafted a joint text for a European statute for mutual societies, which has been approved by the associations' respective Boards.
- 8.7.3 Jointly, the two representative associations have initiated the specific campaign "Mutuality in Europe Today". This ongoing campaign aims at raising awareness for the mutual society as an organisational concept, the vital role mutual societies play in European citizens' everyday life, and the dynamism mutuality brings within the European social and economic model.

9 CONCLUSION

- 9.1 Today, mutual societies operate within an insecure European environment. They are disadvantaged and challenged legally, economically, and financially. A European legal framework that recognises mutual societies will create a level playing field that gives them equal instruments and opportunities to those available to other social and economical organisational structures.
- 9.2 Apart from the European Commission – as an executive body of the European Union, and as such the instance that has to propose new legislation – all stakeholders are convinced of the need for a European statute for mutual societies.
- 9.3 The sector, represented by AIM and AMICE, has drafted a joint text, describing the basics of mutual societies. This text reflects the sector's needs and ideas about what a European statute should contain.
- 9.4 Together, AIM and AMICE are campaigning to raise political awareness for a European statute for mutual societies. They do so by organising conferences, providing information about the socio-economic role and impact of mutual societies and by contacting officials of all European institutions.
- 9.5 The European Parliament has repeatedly called upon the European Commission for action and for the creation of a European statute for mutual societies.
- 9.6 During the Finnish European Presidency, a consultation was launched among Member States, resulting in positive feedback from many Member States. The outgoing Portuguese Presidency, the current Slovenian and the upcoming French Presidencies have shown a clear interest in the creation of a European statute for mutual societies.



Appendix

Main characteristics of the text

Definition:

A European mutual society is a legal person which organises solidarily financed goods and services in the interest of its members.

A European Mutual Society (EMS) is a non compulsory legal statute such as:

- other existing European statutes, e.g. the European Cooperative Statute (SCE), the Societas Europaeae (SE), the European Economic Interest Grouping (EEIG);
- others statutes which are in the pipeline: the European Private Company (SPE) , European Association and European Foundation.

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This broad legal statute provides the possibility for the creation of an EMS whatever the activity.

The European Mutual Society has the same characteristics as the classic mutual model:

- its object: to provide goods and services, solidarily financed in the interest of the members;
- no share capital but a formation fund;
- no members' rights on the net assets;
- a governance based on democracy.

Mutualist Principles:

Upon liquidation of an EMS, net assets shall be distributed in accordance with the **principle of disinterested distribution**, or, where permitted by the law of the Member State in which the EMS has its registered office, in accordance with an alternative arrangement set out in the statutes of the EMS.

Allocation of available surplus: available surplus can be allocated to members in proportion to their paid-up contributions when allowed by the bylaws of the EMS. This principle is important as it acts as an important factor of differentiation with joint stock companies.

Constitution

One of the main characteristic of the EMS statute is the possibility to create a European Mutual Group Society (EMGS). The aim in this case is to coordinate or create financial links between two or more legal entities, based on contract. In this case, the group has to be created by two or more legal entities based in two or more Member States.

A European Mutual Society can be formed:

- by creation, decided by
 - at least two mutual societies, including or not their subsidiaries which fall within the law of at least two different Member States;
 - five or more natural persons resident in at least two Member States.
- Conversion of a mutual society, including or not their subsidiaries.
- Merger of mutual societies, including or not their subsidiaries which have their registered office and head office within the European Union, if at least two of them fall within the law of two different Member States.



- Merger of at least one mutual society with another legal entity provided that the absorbing legal entity is the mutual society which has its registered office and head office within the European Union, and that at least two of the entities fall within the law of two different Member States

Democracy

A European Mutual Society can choose either a supervisory organ and a management organ (two-tier system) or an administrative organ (one-tier system) for its governance.

General meeting rules:

- Voting rights: the principle is «one member, one vote» with the possibility of giving more votes to one member according to the extent of his activities in the EMS. No single such member shall hold a majority of the votes.
- Quorum and voting modalities:
 - Normal decisions:
 - Quorum: 1/ 4
 - Absolute majority of the votes cast by the members or delegates present or represented including postal or electronic voting,
 - Amendments to the statutes:
 - Quorum: 1/ 3
 - Qualified majority of 90 % of the votes cast by the members or delegates present or represented excluding by postal or electronic voting.
 - Important decisions which could lead to demutualisation (merger, winding-up, liquidation, transfer of the legal seat within another member State, or another state, transfer of portfolio, or main activity):
 - Quorum: 2/ 3
 - Qualified majority of 90 % of the votes cast by the members or delegates present or represented excluding by postal or electronic voting.