

**Studies on the implementation of Labour Law Directives  
in the enlarged European Union**

**Directive 2003/72/EC supplementing the Statute  
for a European Cooperative Society with regard  
to the involvement of employees**

**NATIONAL IMPLEMENTATION REPORT**

 **Austria**

NATIONAL IMPLEMENTATION REPORT – AUSTRIA

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## Executive summary<sup>1</sup>

The transposition of directive 2003/72/EC was primarily carried out by amending the Labour Constitution Act (Arbeitsverfassungsgesetz – ArbVG). The Federal Act BGBl I 104/2006 introduced a new section VII to the ArbVG providing special regulations for the involvement of employees in an SCE.

A few regulations transposing directive 2003/72/EC were implemented in the Labour and Social Security Courts Act (Arbeits- und Sozialgerichtsgesetz – ASGG), the Post Labour Constitution Act (Post-Betriebsverfassungsgesetz – PBVG) and the Agricultural Labour Act (Landarbeitsgesetz – LAG), partly due to the distribution of legislative competences, partly due to factual connection of regulations' contents.

As regards content according to § 256 ArbVG in every SCE either a special negotiating body and a SCE works council have to be established or another procedure of employees' involvement has to be created. The Austrian legislator availed himself of the fact that the regulations stipulated by directive 2003/72/EC resemble those of directive 2001/86/EC to a large extent. That's why Austria just transposed the provisions deviating from directive 2001/86/EC and says that "for the rest" the provisions of part VI of the ArbVG ("Involvement of employees in the European Company") also apply to the SCE (§ 257 Abs 1 ArbVG). § 257 Abs 2 to 7 ArbVG then stipulates some specific regulations applicable exclusively to the SCE.

In this way Austrian law not only incorporates the fundamental system of directive 2003/72/EC (and 2001/86/EC respectively) but also adopts every detail laid down by European law. That's why the Austrian legislator primarily adopted the content of directive 2003/72/EC as it stands, that is to say almost literally, by referring to the regulations dealing with the employees' involvement in an SE (part VI of the ArbVG).

Thus the ArbVG now contains detailed provisions for the establishment, activities and competences of the "special negotiating body" which is assigned to negotiate with the competent organs of the participating companies and – if procurable – reach an agreement on arrangements for the involvement of the employees within the SCE. Subsidiarily a system of "standard rules" provides a rudimental involvement of employees. For these purposes the Austrian legislator created a "SCE works council by virtue of law". Inasmuch as the directive gives leeway to the Austrian legislator the transposition could refer to existing regulations providing a high standard of protection for both employees and their representatives.

In compliance with the requirements of Article 16 of directive 2003/72/EC the amendments became effective on 18<sup>th</sup> August 2006 (§ 259 Abs 18 ArbVG). Altogether the analysis leaves no doubt that Austrian law is entirely consistent with European law requirements.

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<sup>1</sup> Report elaborated by O. Univ.-Prof. Dr. Franz Marhold.

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### 1. Introduction

According to § 1 Abs 1 of the Austrian Cooperatives Act (Genossenschaftsgesetz) a cooperative is defined as an association with an unlimited number of members, primarily founded for the purpose of the promotion of the acquisition or the economy of its members.

Employees of cooperatives in Austria are submitted to the general Austrian labour law. There is also no difference whether they are just “normal” employees or members with an employee contract.

The involvement of employees in Austrian labour law is mostly provided through their representatives. The employee representation is carried out in the first instance by the works council, which is independent from Trade Unions and represents all workers of the company (unionised and non-unionised). In Austria, however, there are also employee representative bodies outside the company which safeguard the interests of employees in particular industries and geographical regions. Those representatives are the trade unions and the statutory Chambers of Labour. The existence of these separate structures has implemented a dual-channel system of representation.

The labour laws can, as far as not stated otherwise, be set aside by a collective agreement. In this point, the Trade Unions are of great importance, because those collective agreements are negotiated and signed between the concerned Trade Union and the Chamber of Commerce.

The legal basis for the work of the employee representatives on company level is set by the Labour Constitution Act (Arbeitsverfassungsgesetz - ArbVG). This act stipulates the rights of the representative bodies regarding consultation and co-determination in social, staff and economic matters.

The works council is the main employee representative body within the establishment. It is responsible for executing the above mentioned rights. The council is elected by the workforce (essentially all employees within the establishment aged 18 and over, with the exception of executive staff), by direct secret ballot following the principles of personal and equal suffrage.

The works council in Austria has extensive rights granted by law:

#### 1. Information, consultation and participation rights (§§ 89 et seq ArbVG):

The employer is required to hold regular discussions with the works council and keep it informed on matters which are important for the workforce. Consultation meetings must take place at quarterly or (at the council's request) monthly intervals and the council may invite Chamber of Labour or union representatives to attend. The council itself may demand information on all matters of interest to employees, and the employer is also obliged to inform it of any kind of computerized collection and processing of personal data on employees. In addition, the council is entitled to present complaints to the employer on all matters of concern to employees and to request appropriate measures or demand the correction of shortcomings (general right of intervention). It is also entitled and required to monitor the employer's observance of rules laid down under labour law, social security law and employee protection law.

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2. Participation rights in social matters (§§ 94 et seq. ArbVG):

The works council must participate in the regulation of all social matters within the establishment. For certain measures the acceptance of the works council is mandatory to become legally effective, for other measures this acceptance can be substituted by a decision of an arbitration board if an agreement with the employer cannot be reached.

The most common mode of this co-decision making is the works agreement. Austrian law lists all measures on which a works agreement can be concluded (§ 97 ArbVG). All other measures are subject to collective agreements.

3. Special consultation rights in staff matters (§§ 98 et seq. ArbVG):

Whenever an employer intends to recruit new employees, the works council must be provided with specific information on the planned recruitment. The works council can demand to be consulted on the matter and must be notified of each resultant engagement of an employee. The employer must also inform the council of any intended promotion of an employee and, if it so requests, consult the council on that matter. The works council must likewise be informed of any intended permanent transfer and, if it entails less favourable terms and conditions of employment for the employee concerned, has a right to object. The employer is also obliged to inform the works council of every intended dismissal. If he fails to do so, the dismissal is not valid; the council has the right to challenge any dismissals, to which it has lodged an objection, in the courts.

4. Special consultation rights in economic matters (§§ 108 et seq. ArbVG):

Every employer must provide the works council with regular information on the firm's economic and financial situation, including its business trend, inflow of orders and turnover and, if the works council so requests, consult it on that situation. Where the company concerned is a part of a corporate group, the employer must also provide information on any measures planned by the controlling company (such as reorganization programmes and structural changes) which could affect employees. In large companies the employer has to transfer a copy of the annual report (and the group annual report where appropriate) to the works council and, if the council so requests, explain and clarify the content. In addition, the employer is obliged to inform the works council on any projected change to the establishment that implies far-reaching consequences. If the change entails serious disadvantages for a significant proportion of the workforce, the council can demand the arrangement of a social plan (redundancy programme) in the form of an imposable works agreement, providing for measures to prevent, eliminate or mitigate these disadvantages.

5. Participation rights in the supervisory body (§ 110 ArbVG)

One third of the supervisory body of Austrian cooperatives with permanently more than 40 employees is formed by workers' representatives, who are delegated into the supervisory body by the works council.

## 2. Formal aspects of transposition

Council Regulation (EC) No 1435/2003 establishes a **Statute for a European Cooperative Society (SCE)** and is accompanied by Council Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, aiming at ensuring that the establishment of an SCE does not entail the disappearance or reduction of **practices of employee involvement** existing within the entities participating in the establishment of an SCE.

If **participation rights** exist within one or more entities establishing an SCE, they should in principle be preserved through their transfer to the SCE, once established, unless the parties decide otherwise. The concrete procedures of employee transnational information and consultation, as well as, if applicable, participation, to apply to each SCE should be defined primarily by means of an agreement between the parties concerned or, in the absence thereof, through the application of a set of subsidiary rules. It is a **fundamental principle** and stated aim of directive 2003/72/EC to **secure employees' acquired rights** as regards involvement in company decisions. Employee rights in force before the establishment of SCEs should provide the **basis for employee rights** of involvement in the SCE (the "before and after" principle).

The transposition of directive 2003/72/EC was primarily carried out by amending the **Labour Constitution Act** (Arbeitsverfassungsgesetz – ArbVG). The Federal Act BGBl I 104/2006 introduced a new section VII to the ArbVG providing **special regulations** for the involvement of employees in an SCE.

Due to their objective coherence a few regulations transposing directive 2003/72/EC were included in the **Labour and Social Security Courts Act** (Arbeits- und Sozialgerichtsgesetz – ASGG) and in the Post Labour Constitution Act (Post-Betriebsverfassungsgesetz – PBVG). § 254 ArbVG limits the scope of part VII of the ArbVG to companies in terms of the second part of this act, which is basically applicable for companies of any kind except agricultural companies, authorities and offices, public teaching and education establishments and private households (§ 33 ArbVG). This **limitation** results from the distribution of legislative competences between the Federation on one hand and the provinces (Länder) on the other hand.

An amendment to the **Agricultural Labour Act** (Landarbeitsgesetz – LAG) introduced regulations applicable for companies of agriculture and forestry that by and large correspond to the provisions of the ArbVG dealing with the involvement of employees in an SCE. Concerning the other companies excluded from the scope of the ArbVG the Austrian legislator(s) could desist from a specific transposition of directive 2003/72/EC because the companies mentioned do not have all the qualities to found an SCE anyway (RV 1421 BlgNR XXII. GP, 29).

The amendments necessary to comply with directive 2003/72/EC became effective on **18<sup>th</sup> August 2006** (§ 259 Abs 18 ArbVG). Thus Austria complied with the term set by Article 16 of directive 2003/72/EC.

According to § 256 ArbVG, in every SCE either a **special negotiating body** and a **SCE works council** have to be established or another procedure of employees' involvement has to

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be created. Due to the directive's 2003/72/EC similarity to directive 2001/86/EC the Austrian legislator decided to primarily refer to the existing regulations concerning employees' involvement in the SE (§§ 208 to 253 ArbVG) and to just create a few regulations dealing with specific aspects additionally demanded by European law.

### 3. Material aspects

#### A) Global aspects – “Transposition by reference”

The Austrian legislator availed himself of the fact that the regulations stipulated by directive 2003/72/EC resemble those of directive 2001/86/EC to a large extent (RV 1421 BlgNR XXII. GP, 29). That's why Austria just transposed the provisions deviating from directive 2001/86/EC and says that “for the rest” the provisions of part VI of the ArbVG (“Involvement of employees in the European Company”) also apply to the SCE (§ 257 Abs 1 ArbVG). **§ 257 Abs 2 to 7 ArbVG** then stipulates some **specific regulations applicable exclusively to the SCE**. All things considered Austrian law provides for the following legal framework:

#### B) Specific observations

##### I. Definitions and scope (Articles 2 and 8 of directive 2003/72/EC)

###### **Cooperative**

A cooperative in Austria is defined as an association with an unlimited number of members, primarily founded for the purpose of the promotion of the acquisition or the economy of its members (§ 1 Abs 1 of the Austrian Cooperatives Act).

###### **Employee**

Employees, as defined by § 36 Abs 1 ArbVG, are all persons who are employed within a company, including apprentices and home worker. Members of the representative body of an entity and executives who have decisive influence on the management are not considered as employees (§ 36 Abs 2 Z 1 and 3).

###### **SCE**

§ 254 ArbVG says that the provisions of part VII are applicable for companies founded according to the regulation 1435/2003 and having their registered **office in Austria**. Consistent with Article 8 para 1 of directive 2003/72/EC **§ 254 Abs 2 ArbVG** provides that in the case of an SCE **established exclusively by natural persons or by a single legal entity and natural persons**, which together employ **at least 50 employees** in at least **two Member States**, the provisions of part VII of the ArbVG apply. **§ 254 Abs 3 and 4 ArbVG** deals with the case where an SCE is established exclusively by natural persons or by a single legal entity and natural persons, which together employ fewer than 50 employees, or employ 50 or more employees in **only one Member State** (Article 8 para 2 of directive 2003/72/EC).

In this case the regulations of part VII of the ArbVG are applicable provided that at least one third of the total number of employees of the SCE and its subsidiaries and establishments in at least two different Member States so requests, or that the total number of employees reaches or exceeds 50 employees in at least two Member States, and with the proviso that the

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words "participating legal entities" and "concerned subsidiaries or establishments" are replaced by the words "SCE" and "subsidiaries or establishments of the SCE" respectively (Article 8 para 3 of directive 2003/72/EC). The transposition of Article 8 para 2 sentence 3 directive 2003/72/EC was taken out of context and implemented in § 257 Abs 6 ArbVG. The content of the regulation of course remains unaffected.

§ 255 ArbVG adopts the definitions laid down in Article 2 of directive 2003/72/EC.

### **Participating legal entities**

Means companies and firms directly participating in the establishing of an SCE (§ 255 Abs 1 ArbVG).

### **Subsidiary**

Subsidiary of a participating legal entity or of an SCE means an undertaking over which that legal entity or SCE exercises a dominant influence defined in accordance with § 176 ArbVG (transposing directive 94/45/EC) (§ 255 Abs 2 ArbVG).

### **Concerned subsidiary or establishment**

Means a subsidiary or establishment of a participating legal entity which is proposed to become a subsidiary or establishment of the SCE upon its formation (§ 255 Abs 3 and 4 ArbVG).

Further definitions in terms of Article 2 of directive 2003/72/EC arise from either the specific regulations of part VII or the reference to part VI stipulated in § 257 Abs 1 ArbVG.

### **Employees' representatives**

Employees' representatives are listed up in § 40 ArbVG including the special negotiating body and the SCE works council in § 40 Abs 4d ArbVG, giving them the same status as national employees' representatives. Austrian law uses the term of "organs of the work force".

### **Representative body**

Means the body representative for the employees with the purpose of informing and consulting the employees of an SCE and its subsidiaries and establishments. Therefore in Austria it is mandatory to establish a special negotiation body and a works council or another practice for the involvement for employees. (§ 256 ArbVG)

### **Special Negotiating Body**

This means the body established in accordance with § 215 ff ArbVG to negotiate the establishment of arrangements for the involvement of employees within the SCE between the competent body of the participating legal entities and the employees' representatives.

### **Involvement of employees**

The involvement of employees is implemented in § 212 Abs 1 ArbVG and covers every process where employees' representatives may exercise an influence on decisions to be taken within the SCE, including the right of information, consultation and participation.

### **Information**

According to § 212 Abs 2 ArbVG "information" means the informing of the body representative of the employees and/or employees' representatives by the competent organ of



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the SCE on questions which concern the SCE itself and any of its subsidiaries or establishments situated in another Member State or which exceed the powers of the decision-making organs in a single Member State at a time, in a manner and with a content which allows the employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations with the competent organ of the SCE.

### **Consultation**

§ 212 Abs 3 ArbVG defines “consultation” as the establishment of dialogue and exchange of views between the body representative of the employees and/or the employees' representatives and the competent organ of the SCE, at a time, in a manner and with a content which allows the employees' representatives, on the basis of information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within the SCE.

### **Participation**

§ 212 Abs 4 ArbVG says that “participation” means the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of the right to elect or appoint some of the members of the company's supervisory or administrative organ, or the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.

## **II. Provisions that apply to SCEs based in Austria**

### **a. Field of implementation (Article 15 of directive 2003/72/EC)**

§ 252 Abs 1 ArbVG establishes that where an SCE is a Community-scale undertaking or a controlling undertaking of a Community-scale group of undertakings, within the meaning of § 171 ArbVG, the provisions of the 5<sup>th</sup> part of ArbVG (this are the provisions transposing Directive 94/45/EC and 97/74/EC into national law) shall not apply. However, this exclusion will not take place if the SCE is only a part of a Community-scale undertaking or a group of undertakings in sense of § 171 ArbVG or the SNB decides, in accordance with § 227 Abs 1 ArbVG, not to open negotiations or to terminate the ones already opened.

§ 110 ArbVG, which lays down the rules of **participation of employees in the supervisory body**, shall not apply to SCEs to which the 7<sup>th</sup> part of ArbVG applies. § 110 ArbVG does apply to the subsidiaries of the SCE or to SCEs to which the 7<sup>th</sup> part of ArbVG does not apply (§ 252 Abs 2 ArbVG in connection with § 257 Abs 5 ArbVG).

Apart from that, the existing rights to involvement of employees provided by the 2<sup>nd</sup> part of ArbVG shall not be prejudiced (§ 252 Abs 3 ArbVG).

The structures of employee representation in participating legal entities which will cease to exist as separate legal entities are maintained after the registration of the SCE. The management and the administrative board have to ensure, that the employees' representatives still have the rights granted by Austrian law (§ 252 Abs 4 ArbVG).

### **b. Negotiating procedure (Article 3 of directive 2003/72/EC)**

In the execution of European law's order § 213 in connection with § 257 Abs 1 ArbVG stipulates the obligation of the management or **administrative organs** of the companies involved to set the stage and provide for the establishment of a **special negotiating body** and for the establishment of a SCE Works Council or the creation of a procedure for the

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involvement of employees. The competent organ of the SCE and the representative body shall **work together in a spirit of cooperation** with due regard for their reciprocal rights and obligations. The same shall apply to cooperation between the supervisory or administrative organ of the SCE and the employees' representatives in conjunction with a procedure for the information and consultation of employees.

The §§ 215 to 228 ArbVG contain detailed provisions for the establishment, activities and competences of the “**special negotiating body**” that – by virtue of § 257 Abs 1 ArbVG – basically apply to the SCE too. § 257 Abs 2 ArbVG only stipulates exceptions as regards time limits for the demand to implement a special negotiating body. § 216 Abs 1 in connection with § 257 Abs 1 ArbVG ensures that in **electing or appointing members** of the special negotiating body these members are elected or appointed in proportion to the number of employees employed in each Member State by the participating companies and concerned subsidiaries or establishments, by allocating in respect of a Member State one seat per portion of employees employed in that Member State which equals 10 %, or a fraction thereof, of the number of employees employed by the participating companies and concerned subsidiaries or establishments in all the Member States taken together.

In the case of an **SCE formed by way of merger**, according to § 216 Abs 2 in connection with § 257 Abs 1 ArbVG there are such further additional members from each Member State as may be necessary in order to ensure that the special negotiating body includes **at least one member representing each participating company** which is registered and has employees in that Member State and which it is proposed will cease to exist as a separate legal entity following the registration of the SCE. The number of such additional members may not exceed 20 % of the number of members designated by virtue of § 216 Abs 1 in connection with § 257 Abs 1 ArbVG. If the number of companies is higher than the number of additional seats available, these additional seats are allocated to companies in different Member States by decreasing order of the number of employees they employ (§ 216 Abs 4 in connection with § 257 Abs 1 ArbVG).

§ 217 in connection with § 257 Abs 1 ArbVG says that Austrian members of the special negotiating body are appointed by a **resolution of the works committee**, of the works council (in the case where a works committee does not exist in a company), of the central works council (in enterprises) or of the group representative body (in corporate groups) (§ 218 in connection with § 257 Abs 1 ArbVG).

The institution competent has to take into account that there should be at least one member representing each participating company which has employees in the Member State concerned (§ 217 Abs 3 in connection with § 257 Abs 1 ArbVG). The decision is taken in the presence of at least half the members and with a majority of those members' votes that represent an absolute majority of the employees in the group, enterprise and company.

According to § 226 in connection with § 257 Abs 1 ArbVG negotiations shall commence as soon as the special negotiating body is established and may continue for six months thereafter. The parties may decide, by joint agreement, to extend negotiations up to a total of one year from the establishment of the special negotiating body.

§ 221 in connection with § 257 Abs 1 ArbVG provides that the **special negotiating body** takes **decisions by an absolute majority** of its members, provided that such a majority also represents an absolute majority of the employees. In cases where the result of the

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negotiations leads to a reduction of participation rights, the majority required for a decision to approve such an agreement is the votes of two thirds of the members of the special negotiating body representing at least two thirds of the employees. The votes of members representing employees employed in at least two Member States have to be included, in the case of an SCE to be established by way of merger, if participation covers at least 25 % of the overall number of employees of the participating companies, or in the case of an SCE to be established by way of creating a holding company or forming a subsidiary, if participation covers at least 50 % of the overall number of employees of the participating companies (§ 221 Abs 2 in connection with § 257 Abs 1 ArbVG). According to § 221 Abs 4 in connection with § 257 Abs 1 ArbVG “**reduction of participation rights**” means a proportion of members of the organs of the SCE which is lower than the highest proportion existing within the participating companies.

For the purpose of the negotiations, the special negotiating body may request **experts** of its choice **to assist** it with its work who may be present at negotiation meetings in an advisory capacity (§ 220 Abs 2 in connection with § 257 Abs 1 ArbVG).

The special negotiating body may decide **not to open negotiations** or to **terminate negotiations** already opened, and to rely on the rules on information and consultation of employees in force in the Member States where the SCE has employees (§ 227 Abs 1 in connection with § 257 Abs 1 ArbVG). Where such a decision has been taken, none of the “standard rules” of the Annex apply (§ 232 in connection with § 257 Abs 1 ArbVG). The majority required to decide not to open or to terminate negotiations is the votes of two thirds of the members representing at least two thirds of the employees, including the votes of members representing employees employed in at least two Member States (§ 227 Abs 1 in connection with § 257 Abs 1 ArbVG). In the case of an SCE established by way of transformation, this regulation does not apply if there is participation in the company to be transformed (§ 227 Abs 2 in connection with § 257 Abs 1 ArbVG). The special negotiating body is reconvened on the **written request of at least 10 %** of the employees of the SCE, its subsidiaries and establishments, or their representatives, at the earliest two years after the abovementioned decision, unless the parties agree to negotiations being reopened sooner. If the special negotiating body decides to reopen negotiations with the management but no agreement is reached as a result of those negotiations, none of the provisions of the Annex apply (§ 228 in connection with § 257 Abs 1 ArbVG).

In accordance with the requirements of Article 3 No 7 of directive 2003/72/EC § 224 in connection with § 257 Abs 1 ArbVG says that any **expenses** relating to the functioning of the special negotiating body and, in general, to negotiations are **borne by the participating companies** so as to enable the special negotiating body to carry out its task in an appropriate manner. Furthermore the Austrian legislator decided to include expenses for interpreters, for (in any case) one expert and for traveling in the funding.

### **c. Content of the agreement (Article 4 of directive 2003/72/EC)**

The competent organs of the participating companies and the special negotiating body shall negotiate in a spirit of cooperation with a view to reaching an agreement on arrangements for the involvement of the employees within the SCE (§ 214 in connection with § 257 Abs 1 ArbVG). Austrian law (§ 230 Abs 1 in connection with § 257 Abs 1 ArbVG) also provides that the **agreement between the competent organs of the participating companies and the special negotiating body** shall specify at any rate the scope of the agreement (Z 1), the

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composition, number of members and allocation of seats on the SCE works council (Z 2), the functions and the procedure for the information and consultation of the representative body (Z 3), the frequency of meetings of the representative body (Z 4), the financial and material resources to be allocated to the SCE works council (Z 5) and the date of entry into force of the agreement and its duration, cases where the agreement should be renegotiated and the procedure for its renegotiation (Z 6). In the event of structural changes, for the negotiations of such an agreement the special negotiating body and the SCE works council respectively have to be reassembled according to the new structure (§ 228 Abs 3 ArbVG). If the parties decide to establish arrangements for participation, the substance of those arrangements shall include the number of members in the SCE's administrative or supervisory body which the employees will be entitled to elect, appoint, recommend or oppose, and the procedures as to how these members may be elected, appointed, recommended or opposed by the employees, and their rights (§ 230 Abs 2 in connection with § 257 Abs 1 ArbVG).

In the case of an SCE established by means of transformation, the agreement shall provide for at least the same level of all elements of employee involvement as the ones existing within the company to be transformed into an SCE (§ 230 Abs 3 in connection with § 257 Abs 1 ArbVG).

### d. Duration of negotiations (Article 5 of directive 2003/72/EC)

The content Article 5 of directive 2003/72/EC was transferred to § 226 in connection with § 257 Abs 1 ArbVG almost literally (exactly the same meaning but not exactly the same words).

### e. Legislation applicable to the negotiation procedure (Article 6 of directive 2003/72/EC)

In compliance with Article 6 of the directive Austrian law provides that the Austrian legislation will be applicable to the negotiation procedure if the registered office of the SCE is to be situated in Austria (§ 254 Abs 1 ArbVG).

## **III. Standard rules (Article 7 and annex of directive 2003/72/EC)**

In compliance with the requirements stipulated by Article 7 and the annex of directive 2003/72/EC the ArbVG (§§ 232 to 248 in connection with § 257 Abs 1) creates **“standard rules” on employee involvement** which apply from the date of the registration of the SCE where either the parties so agree (§ 232 Abs 1 Z 1 in connection with § 257 Abs 1 ArbVG) or by the deadline laid down in § 226 ArbVG, no agreement has been concluded, and the competent organ of each of the participating companies decides to accept the application of the standard rules in relation to the SCE and so to continue with its registration of the SCE, and the special negotiating body has not taken the decision provided in § 227 Abs 1 ArbVG (§ 232 Abs 1 Z 2 in connection with § 257 Abs 1 ArbVG). According to Article 7 No 2 of directive 2003/72/EC the standard rules for participation (part 3 of the annex) **only apply in specific constellations**. This catalogue was transposed to Austrian law (§ 244 ArbVG) almost literally.

Part 1 of the annex (composition of the body representative of the employees) was transposed by creating a **“SCE works council by virtue of law”** (§§ 232 to 238 in connection with § 257 Abs 1 ArbVG). Its members are appointed in proportion to the number of employees employed in each Member State by the participating companies and concerned subsidiaries or establishments, by allocating in respect of a Member State one seat per portion of employees employed in that Member State which equals 10 %, or a fraction

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thereof, of the number of employees employed by the participating companies and concerned subsidiaries or establishments in all the Member States taken together (§ 233 Abs 1 in connection with § 257 Abs 1 ArbVG). The **modalities of appointment** basically comply with those laid down in §§ 217 and 218 ArbVG (see above). The number of members of the SCE works council has to be adapted to take account of changes occurring within the SCE and its subsidiaries and establishments according to § 233 Abs 2 ArbVG. According to § 236 in connection with § 257 Abs 1 ArbVG the SCE works council is enabled to elect a select committee from among its members, comprising at most three members. The SCE works council adopts its rules of procedure (§ 235 Abs 3 in connection with § 257 Abs 1 ArbVG). Its **period of office basically amounts to 4 years**, save as otherwise provided by § 237 ArbVG (i. e. SCE's deletion from the commercial register, resignation, revocation of establishment by court). § 238 in connection with § 257 Abs 1 ArbVG says that any **expenses relating to the functioning** of the SCE works council and the select committee are **borne by the SCE**. Four years after the SCE works council is established, it has to examine whether to open negotiations for the conclusion of the agreement referred to in § 230 or § 231 ArbVG or to continue to apply the standard rules adopted in accordance with this Annex (§ 243 in connection with § 257 Abs 1 ArbVG).

In compliance with the demands of part 2 of the annex (standard rules for information and consultation) the §§ 239 to 243 in connection with § 257 Abs 1 ArbVG assign certain competences and powers to the SCE works council. The SCE works council has the **right to be informed and consulted** and, for that purpose, to meet with the competent organ of the SCE at least once a year, on the basis of regular reports drawn up by the competent organ, on the progress of the business of the SCE and its prospects (§§ 239 and 240 in connection with § 257 Abs 1 ArbVG).

Information and consultation particularly relate to the structure, economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments, and substantial changes concerning organization, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies (§ 240 Abs 2 in connection with § 257 Abs 1 ArbVG).

The competent organ of the SCE has to provide the representative body with the **agenda for meetings** of the administrative or the management and supervisory organ, and with copies of all documents submitted to the general meeting of its shareholders (§ 240 Abs 3 in connection with § 257 Abs 1 ArbVG).

Where there are **exceptional circumstances** affecting the employees' interests to a considerable extent, particularly in the event of relocations, transfers, the closure of establishments or undertakings or collective redundancies, the SCE works council has to be informed and the right to meet at its request the competent organ of the SCE or any more appropriate level of management within the SCE having its own powers of decision, so as to be informed and consulted on measures significantly affecting employees' interests (§ 241 Abs 1 in connection with § 257 Abs 1 ArbVG). Where the competent organ decides not to act in accordance with the opinion expressed by the representative body, this body shall have the **right to a further meeting with the competent organ** of the SCE with a view to seeking agreement (§ 241 Abs 2 in connection with § 257 Abs 1 ArbVG).

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With regard to the members' rights and duties the Austrian legislator transposing the directive could **refer to the existing regulations** concerning independence of employer's directives (§ 115 Abs 2 ArbVG), **ban on discrimination** (§ 115 Abs 3 ArbVG), **time off** to perform their specific obligations (§ 116 ArbVG) and a more extensive **protection against notice and dismissal** (§§ 120 to 122 ArbVG). Merely the entitlement of members of the SCE works council to time off for training without loss of wages was explicitly codified in § 251 Abs 2 ArbVG.

Part 3 of the annex contains "standard rules for participation" transposed into Austrian law by §§ 244 to 248 in connection with § 257 Abs 1 ArbVG. Specific provisions for the SCE were stipulated in § 257 Abs 4 ArbVG that exactly follows Article 7 para 2 of directive 2003/72/EC. According to § 245 in connection with § 257 Abs 1 ArbVG the employees' representatives have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the SCE equal to the highest proportion in force in the participating companies concerned before registration of the SCE. The representative body decides on the allocation of seats within the administrative or supervisory body among the members representing the employees from the various Member States or on the way in which the SCE's employees may recommend or oppose the appointment of the members of these bodies according to the proportion of the SCE's employees in each Member State (§ 246 in connection with § 257 Abs 1 ArbVG). Every member of the administrative body or the supervisory body of the SCE who has been elected, appointed or recommended by the representative body is regarded to be a full member with the same rights and obligations as the members representing the shareholders, including the right to vote. Another time the Austrian legislator could refer to the existing regulations on employees' participation (§§ 110, 248 in connection with § 257 Abs 1 ArbVG).

### **IV. Common Provisions**

#### **a. Reservation and confidentiality (Article 10 of directive 2003/72/EC)**

According to Article 10 No 1 of directive 2003/72/EC Member States shall provide that members of the special negotiating body or the representative body, and experts who assist them, are **not authorized to reveal any information** which has been given to them in confidence. The Austrian Labour Constitution Act has already contained such provisions so that the Austrian legislator could primarily refer to the regulation of § 115 Abs 4 ArbVG and only had to stipulate that this obligation continues to apply even after the expiry of the members' terms of office (§ 250 Abs 1 in connection with § 257 Abs 1 ArbVG).

The Austrian legislator exercised the option laid down in Article 10 No 3 of directive 2003/72/EC allowing **particular provisions** for SCEs which pursue directly and essentially the **aim of ideological guidance** with respect to information and the expression of opinions, on condition that, on the date of adoption of this Directive, such provisions already exist in the national legislation (§ 249 in connection with § 257 Abs 1 ArbVG). On the date of adoption of directive 2003/72/EC § 132 ArbVG already contained particular provisions of that kind. Although § 132 ArbVG not only protects companies which pursue directly and essentially the aim of ideological guidance with respect to information and the expression of opinions (but also political, professional organisational, religious, charitable, educational and scientific

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aims) Austria desisted from protecting every company in terms of § 132 ArbVG trying to meet European law demands.

b. Legal protection and compliance with directive 2003/72/EC (Article 10 No 4 and Article 14 of directive 2003/72/EC)

Article 10 No 4 of directive 2003/72/EC calls on Member States to make provision for administrative or judicial appeal procedures which the employees' representatives may initiate when the supervisory or administrative organ of an SCE or participating company demands confidentiality or does not give information; such procedures may include arrangements designed to protect the confidentiality of the information in question. Furthermore Article 14 para 2 of directive 2003/72/EC requests that Member States shall provide for appropriate measures in the event of failure to comply with directive 2003/72/EC; in particular they shall ensure that administrative or legal procedures are available to enable the obligations deriving from directive 2003/72/EC to be enforced.

According to Austrian law legal disputes about rights and legal relationships in terms of the part VII of the ArbVG are matters of labour law for which the labour and social security courts are competent (§ 50 Abs 2 ASGG). Employees' representatives are entitled to take legal action too (§ 53 Abs 1 ASGG). Apart from these suits § 5d ASGG also constitutes the competence of labour and social security courts saying that for legal disputes referring to the special negotiating body, to the SCE works council, to the procedure of information and consultation or to the employees' participation the local court is competent in which parish the SCE has (or should have) its registered office. Additionally the Austrian legislator created several administrative sanctions that might amount to €2.180,- (§ 253 in connection with § 257 Abs 1 ArbVG).

c. Operation of the representative body and procedure for the information and consultation of employees (Article 11 of directive 2003/72/EC)

Once again the Austrian legislator could refer to the provision dealing with the SE and therefore just says that § 214 ArbVG (saying that the competent organ of the SE and the representative body shall work together in a spirit of cooperation with due regard for their reciprocal rights and obligations) shall be applicable for the SCE too (§ 257 Abs 1 ArbVG).

d. Protection of employees' representatives (Article 12 of directive 2003/72/EC)

Transposing Article 12 of directive 2003/72/EC the national legislator could refer to the existing Austrian law. According to § 251 in connection with § 257 Abs 1 ArbVG employees' representatives are independent of employer's directives (§ 115 Abs 2 ArbVG), protected from discrimination (§ 115 Abs 3 ArbVG), they have the right to time off to perform their specific obligations (§ 116 ArbVG) and enjoy a more extensive protection against notice and dismissal (§§ 120 to 122 ArbVG). Merely the entitlement of members of the SCE works council to time off for training without loss of wages was explicitly codified in § 251 Abs 2 (in connection with § 257 Abs 1 ArbVG).

e. Misuse of procedures (Article 13 of directive 2003/72/EC)

According to Article 13 of directive 2003/72/EC Member States shall take appropriate measures in conformity with Community law with a view to preventing the misuse of an SCE for the purpose of depriving employees of rights to employee involvement or withholding such rights. This stipulation reappears in § 229 in connection with § 257 Abs 1 ArbVG. Furthermore this regulation provides a concretion of the misuse's notion saying that

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such a misuse especially derive from a modification of the SCE's structure. In this case § 229 in connection with § 257 Abs 1 ArbVG requires repeated negotiations according to § 228 ArbVG ("structural changes).

**V. Rules applicable to SCEs established exclusively by natural persons or by a single legal entity and a natural person (Art. 8 of directive 2003/72/EC)**

In the case of an SCE established by natural persons or by one legal entity and natural persons, which together employ at least 50 employees, in at least two Member States, the provisions of §§ 254 to 258 ArbVG, applicable to an SCE established by legal entities, shall apply (§ 254 Abs 2 ArbVG).

After the registration of an SCE established by natural persons or by one legal entity and natural persons, which employed initially fewer than 50 employees, or 50 or more employees in only one Member State, the provisions of articles §§ 254 to 258 ArbVG, applicable to an SCE established by legal entities, shall apply in the following situations (§ 254 Abs 2 ArbVG):

- i. if, at least 1/3 of the employees of the SCE, its subsidiaries and establishments, in at least two different Member States, so requests;
- ii. if the total number of employees of the SCE, its subsidiaries and establishments, reaches or exceeds 50 in at least two Member States.

In these cases, the words 'participating legal entities' and 'concerned subsidiaries or establishments' shall be replaced by the words 'SCE' and 'subsidiaries or establishments of the SCE' respectively.

In the case of transfer from one Member State to another of the registered office of an SCE governed by participation, at least the same level of employees' participation rights shall continue to apply (§ 257 Abs 6 ArbVG).

**VI. Participation in the general meeting or section or sectorial meeting (Article 9 of directive 2003/72/EC)**

The provision of Article 9 of directive 2003/72/EC was transposed by § 257 Abs 1 in connection with § 240 ArbVG.

Regarding the applicability of Article 9 of directive 2003/72/EC it has to be mentioned that § 27 of the Austrian Cooperatives Act, which was already in force on 21<sup>st</sup> of August 2003, states that only members have voting rights in the general meeting.

Under Austrian cooperative legislation there are no section or sectorial meetings. Also, Austrian law doesn't provide a special workers' representation in general assemblies and it's unusual that workers are members at the same time.



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### VII. Legal procedures

#### Compliance with the Directive (Article 14 of directive 2003/72/EC)

Transposing Article 14 of directive 2003/72/EC § 257 Abs 1 ArbVG relates to § 253 ArbVG which transposes the similar Article 12 of directive 2001/86/EC into Austrian law. The Austrian legislator created several administrative sanctions, for not abiding the rules transposing the directive, that might amount to €2.180,- (§ 253 ArbVG).

§ 253 ArbVG specifies that **those who counteract** §§ 213 Z 1 and 2 (**obligation** of the management or administrative organs of the companies involved to **set the stage** and provide for the establishment of a **special negotiating body** and for the establishment of a **SCE Works Council** or the creation of a procedure for the involvement of employees), 215 Abs. 3 (describes the information that has to be included in the written request to form the special negotiating body), 216 Abs. 5 (obligatory change in the **formation of the special negotiating body** if there's a change of structure with the participating companies), 219 Abs. 1 und 4 (**constitution** of the special negotiating body), 225 Abs. 2 (**Obligation to inform** the special negotiating body about the formation of an SCE), 227 Abs. 3 (right to **summon a meeting** of the special negotiating body two years after a resolution to abandon it), 228 Abs. 3 (obligatory change in the formation of the special negotiating body if there's a **change of structure** with the participating companies), 231 Abs. 2 (obligation to inform the employees' representatives on all **affairs concerning the SCE** or her subsidiaries), 235 Abs. 1 (possibility for the works council to establish the special negotiating body, if the board of management refuses to do so), 250 Abs. 1 (**obligation for secrecy**) and 252 Abs. 4 (continuity of the structures of employee representations in participating companies which will cease to exist as separate legal entity) **can be punished with a fine of up to €2180,-**.

According to § 50 Abs 2 ASGG it is also possible to take legal actions against those who counteract the above stated legal norms.

## 4. Practical application

In Austria there are four associations of cooperatives. The two biggest and most important are the Austrian Co-operatives Association (ÖGV Österreichischer Genossenschaftverband) and the Austrian Raiffeisen Association (Österreichischer Raiffeisenverband).

These two associations have about 71.000 employees (Raiffeisen alone had 54.174 on January 1<sup>st</sup> 2007).

It's difficult to say whether some cooperatives are likely to adopt the statute of an SCE. From the present point of view it's more likely that some cooperatives transform into stock corporations than into SCEs.

## 5. Summary and conclusions

The transposition of directive 2003/72/EC was primarily carried out by amending the **Labour Constitution Act** (Arbeitsverfassungsgesetz – ArbVG). The Federal Act BGBl I 104/2006 introduced a new section VII to the ArbVG providing special regulations for the involvement of employees in an SCE. A few regulations transposing directive 2003/72/EC were implemented in the **Labour and Social Security Courts Act** (Arbeits-

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und Sozialgerichtsgesetz – ASGG), **the Post Labour Constitution Act** (Post-Betriebsverfassungsgesetz – PBVG) and the **Agricultural Labour Act** (Landarbeitsgesetz – LAG), partly due to the distribution of legislative competences, partly due to factual connection of regulations' contents.

As regards content according to § 256 ArbVG in every SCE either a special negotiating body and a SCE works council have to be established or another procedure of employees' involvement has to be created. The Austrian legislator availed himself of the fact that the regulations stipulated by directive 2003/72/EC resemble those of directive 2001/86/EC to a large extent. That's why Austria just transposed the provisions deviating from directive 2001/86/EC and says that "for the rest" the provisions of part VI of the ArbVG ("Involvement of employees in the European Company") also apply to the SCE (§ 257 Abs 1 ArbVG). § 257 Abs 2 to 7 ArbVG then stipulates some specific regulations applicable exclusively to the SCE.

In this way Austrian law not only incorporates the fundamental system of directive 2003/72/EC (and 2001/86/EC respectively) but also adopts every detail laid down by European law. That's why the Austrian legislator primarily adopted the content of directive 2003/72/EC as it stands, that is to say almost literally, by referring to the regulations dealing with the employees' involvement in an SE (part VI of the ArbVG). Thus the ArbVG now contains detailed provisions for the establishment, activities and competences of the "special negotiating body" which is assigned to negotiate with the competent organs of the participating companies and – if procurable – reach an agreement on arrangements for the involvement of the employees within the SCE. Subsidiarily a system of "standard rules" provides a rudimental involvement of employees. For these purposes the Austrian legislator created a "SCE works council by virtue of law". Inasmuch as the directive gives leeway to the Austrian legislator the transposition could refer to existing regulations providing a high standard of protection for both employees and their representatives.

In compliance with the requirements of Article 16 of directive 2003/72/EC the amendments **became effective on 18<sup>th</sup> August 2006** (§ 259 Abs 18 ArbVG). Altogether the analysis leaves no doubt that **Austrian law is entirely consistent with European law requirements.**

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## Annex I: Correspondence Table

### Transposition of the ECS-Directive into Austrian Law

Article of the Directive	transposed by
1.1	No implementation needed
1.2	§ 256
2	§§ 255, § 257 (1) in connection with § 212 Labour Constitution Act (ArbVG)
3	§ 257 (1) in connection with § 213; § 257 (1) in connection with §§ 215 – 228; § 257 (2) and (3) ArbVG
4	§ 257 (1) in connection with §§ 214, 226, 230 ArbVG
5	§ 257 (1) in connection with § 226 ArbVG
6	§ 254 (1) ArbVG
7	§ 257 (1) in connection with §§ 232 – 248, § 257 (4) ArbVG
8	§ 254 (2), (3) and (4), § 257 (6) ArbVG
9	§ 257 (1) in connection with § 240 ArbVG
10	§ 115 (4), § 257 (1) in connection with §§ 249 and 250 (1) ArbVG; §§ 5d, 50 (2) and 53 (1) Labour and Social Security Courts Act (ASGG)
11	§ 257 (1) in connection with § 214 ArbVG
12	§ 257 (1) in connection with § 251 (2) and § 251 (1) in connection with §§ 115 (3), 116, 120 – 122 ArbVG
13	§ 257 (1) in connection with § 229 ArbVG
14	§ 257 (1) in connection with § 253 ArbVG
15	§ 252 ArbVG
16	Austria has adopted the laws necessary to comply with this directive!
17	No implementation needed
18	No implementation needed
Annex part I	§§ 233 – 237; § 243 ArbVG
Annex part II	§§ 238 – 242 ArbVG
Annex part II al. g)	§ 251 Abs 2 ArbVG
Annex part III	§§ 244 – 248 ArbVG