

**Study on the implementation of the Directive
2003/72/EC (employee involvement in the European
cooperative society) in ten Member States**

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

NATIONAL IMPLEMENTATION REPORT



Belgium

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Executive summaryⁱ

The transposition of the SCE Directive provides proof of the proper functioning of the Belgian model of Industrial relations. Social Partners have delivered a piece of “legislation” profiting from their experience implementing the EWC Directive in good time, which to a large extent satisfies the requirements under the SCE Directive.

The implementation by social partners is operated with greater velocity than that of the parliamentary avenue of implementation. Further legislative interventions were required concerning :

- a) -private International law rules
- b) -the application of the Directive to the Public Sector which falls beyond their bargaining power
- c) -the issue of confidential and secret information
- d) the protection of the workers’ representatives
- e) the protection against an abuse of the recourse to the SCE
- f) the amendment of the Code Judiciaire

The majority of these issues (with the exception of b) and e)) are now being dealt with by the following two statutory acts:

- **9 MAI 2008. - Loi portant des dispositions diverses en ce qui concerne l'institution d'un groupe spécial de négociation, d'un organe de représentation et de procédures relatives à l'implication des travailleurs au sein de la Société coopérative européenne.**
- **9 MAI 2008. - Loi portant des mesures d'accompagnement en ce qui concerne l'institution d'un groupe spécial de négociation, d'un organe de représentation et de procédures relatives à l'implication des travailleurs au sein de la Société coopérative européenne.**

(Both statutes have been published in the *Moniteur belge*, 23/07/2008)

Furthermore, it is important to mention a Royal Decree which defines in an exhaustive way what information *might* constitute secret information.

ⁱ Draft report elaborated by Dr Filip Dorssemont

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- 9 SEPTEMBRE 2008. - Arrêté royal portant exécution de l'article 8 de la loi du 9 mai 2008 portant des mesures d'accompagnement en ce qui concerne l'institution d'un groupe spécial de négociation, d'un organe de représentation et de procédures relatives à l'implication des travailleurs au sein de la Société coopérative européenne.

(published in the *Moniteur belge*, 26/9/2008).

1. Background. Formal aspects and general comments

The Belgian *Société coopérative* is regulated as a purely commercial company in the *Code du Commerce* (Section VII, Articles 141-164).

The co-operating associates are not *per se* bound by a contract of employment with the *societas co-operativa*. The idea underlying the law is that the associates do co-operate *in natura*. Their contribution is not supposed to be purely capitalistic in nature. However, the *Code du Commerce* does not articulate this working relation towards the SC, neither does it hold a definition of the *societas co-operativa*, which could express this historical characteristic.

The *societas* is legally speaking a commercial company.

The Belgian Law does not qualify these co-operating associates as workers within the meaning of the Law on the Employment contract. Employee involvement within the *Societas co-operativa* is not regulated by the *Code du Commerce*. The *Code du Commerce* does not guarantee information and consultation rights, neither specific participation rights related to the status of a worker. Furthermore, the mandatory character of the *Code des Sociétés* precludes that workers or their representatives would be given a vote in the General Assembly through the by laws of a *societas co-operativa*.

Workers' involvement in Belgium has not been structured on the basis of company law. It has been moulded on the idea of the establishment, qualified as an undertaking. The *societas co-operativa*, therefore, has no specific meaning at all for the issue of workers' representation, information, consultation and participation.

The Directive 2003/72/EC has been transposed by a combination of collective bargaining and statutory legislation. The social partners have concluded a Collective Agreement nr 88 in the *Conseil National de Travail* on the 30 of January 2007.

The CCT nr 88 was declared generally binding afterwards by a Royal Decree of March 16 2007. This CCT is close to an identical twin of the CCT 84. The latter has transposed the *Societas europaea* Directive 2001/86 into Belgian Law.

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The bargaining power of the social partners is limited. The legislator and the government would take the necessary steps to complement their agreement. The subjects which fell beyond their bargaining power relate to

- a) private International law rules
- b) the application of the Directive to the Public Sector which falls beyond their bargaining power. : the problem is rather theoretical. Until now, public authorities have never sought recourse to the *societes co-operativa* as a legal framework for public sector companies.
- c) the issue of confidential and secret information
- d) the protection of the workers' representatives
- e) the protection against an abuse of the recourse to the SCE

For obvious reasons, the social partners cannot amend Procedural Law (Code judiciaire). A statute is required to remedy the loophole created by the resolution or termination of the collective agreement.

The common opinion of both the *Conseil National du Travail* (Avis nr. 1.590) and the *Conseil central de l'Economie* of 30 January 2007 serve as an authoritative comment on the relevant collective agreement. Nr. 88.

The necessary and complementary statutory legislation has been drafted and approved.

In this respect, the majority of these issues (with the exception of b) and e)) are now being dealt with by the following two statutory acts:

- **9 MAI 2008. - Loi portant des dispositions diverses en ce qui concerne l'institution d'un groupe spécial de négociation, d'un organe de représentation et de procédures relatives à l'implication des travailleurs au sein de la Société coopérative européenne.**
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(published in the *Moniteur belge*, 26/9/2008).

2. Material aspects: Specific remarks

2.1 Object (art. 1 of the Directive)

See article 1 and 2 of the CCT nr. 88:

Objet et champ d'application

Article 1. La présente convention a pour objet de donner exécution à la directive 2003/72/CE du Conseil de l'Union européenne du 22 juillet 2003 complétant le statut de la Société européenne pour ce qui concerne l'implication des travailleurs.

Elle vise à déterminer les procédures à suivre et les modalités d'implication des travailleurs dans une société européenne.

Art. 2. Des modalités relatives à l'implication des travailleurs doivent être arrêtées, selon la procédure prévue par la présente convention, dans les sociétés co-opératives européennes qui satisfont aux conditions fixées aux chapitres V et VI de la présente convention.

Les modalités relatives à l'implication des travailleurs doivent couvrir l'ensemble de la société co-opérative européenne. Ceci est limité aux entreprises et établissements situés dans les Etats membres, à moins que l'accord visé au chapitre VI prévoit de couvrir d'autres Etats que les Etats membres.

L'accord visé au second alinéa de l'article 2 ne sortit ses effets que dans la mesure où le droit belge est déclaré applicable à la société co-opérative européenne en vertu du règlement (CE) n° 1435/2003 du Conseil du 22 juillet 2003 relatif au statut de la Société co-opérative européenne (SCE)ⁱⁱ.

ⁱⁱ (Unauthorized translation in English, as all those following)

Article 1

The purpose of this agreement is to implement Council Directive 2003/72/EC of July 22 2003 supplementing the Statute for a European co-operative company with regard to the involvement of

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The agreement referred to in the second paragraph of Article 2 only has effect to the extent that Belgian law has been declared applicable to the European company in accordance with Council Regulation (EC) No 1435/2003 on the Statute for a European co-operative company (SCE).

The Belgian social partners have indicated unambiguously that all employees of the *Societas Cooperativa Europaea* need to be covered by the agreement. Contrary to what article 4. 2 SCE Directive suggests the “scope of the agreement” is not subject to the autonomy of the parties. All workers need to be involved. Any agreement which does not guarantee that requirement, will have to be taken with the qualified majority that it needed not to open negotiations (Cf. *Qui peut le plus, peut le moins*).

2.2 Definitions (art. 2 of the Directive)

The definitions of Article 2 of the SCE Directive have been reiterated in article 3 of the *Convention collective nr. 88*. The overall impression is a copy and paste operation. However, the following differences are relevant.

- the definition of a dominant influence in the meaning of the EWC Directive has been implemented by referring to the transposition of the notion of “dominant influence” under Belgian law. Thus, the Belgian definition provides a more clear cut and explicit hierarchy of the (conflicting) criteria which need to be taken into account in order to assess whether an undertaking exercises a dominant influence.
- the convention collective nr. 88 describes the representative body of the employees as an “organe transnational représentant les travailleurs”. The SCE Directive does not refer to the epitheton “cross-border”.
- the notion of “workers’ involvement” enshrined in the convention collective nr. 88 does not reiterate the descriptive definition of the SCE Directive. It opts for an enumerative definition. The “implication des travailleurs” is being described as “information, consultation or participation”. Thus, the contractual autonomy of the special Negotiating Body seems to be restricted in a way which is not in conformity with the EC Directive. In theory, the SNB could opt for a system of workers’ involvement which *does* affect the exercise of

employees. It aims to determine the procedures to be followed and the arrangements governing the involvement of employees in a European co-operative company.

Article 2

Arrangements governing the involvement of employees must be adopted, in accordance with the procedure provided for in this agreement in European co-operative companies which satisfy the conditions laid down in Chapters V and VI of this agreement. The arrangements governing the involvement of employees must cover the entire European co-operative company. This is limited to undertakings and establishments situated in the Member States, except when the agreement referred to in Chapter VI envisages covering states other than the Member States.

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the managerial prerogative in a way which is distinct from participation (for example : co-determination)

- the definition of the notion “consultation” has been reiterated *verbatim* . The definition is important, since it can be used as a catalyst to favour a progressive interpretation of the chronological progress of the consultation. The standard rules are mutant about that chronological order, whereas the subsidiary requirements of the EWC Directive were ambiguous (*as soon as possible*). The social partners have rectified that ambiguity in the process of implementing the EWC Directive, by indicating that the chronology of the consultation in a case of “exceptional circumstances affecting the employees’ interests *to a considerable extent* needed to take place at a moment which guaranteed that it could have an *effet utile*. In the Convention Collective nr. 88 such a useful reference to the *effet utile* has been omitted in the provisions implementing the standard rules.
- the notion of workers’ representative is not being defined in article 3 of the CCT nr. 88 The convention collective does provide sufficient indications in the subsequent articles to identify the Belgian workers’ representatives.
- The notion of a concerned subsidiary or establishment has been transposed by reiterating –just as is the case in the SCE Directive- the concepts ‘subsidiary’ and ‘establishment’. Thus, the notion establishment has not been repeated. The notion ‘establishment’ is not defined in other legal instruments of the Belgian legal order. In the perception of the Belgian lawyer, the concept amounts to an entity which is not endowed with corporate personality. It might be similar to the “*unité technique d’exploitation*” in the Loi portant organisation de l’économie. The Belgian works councils (*conseil d’entreprise*) has been created at the level of the “*unite technique d’exploitation*”. Indeed, in that statutory act the “*undertaking*” is defined as the “*unite technique d’exploitation*”. In this respect, it can be argued that the concept of undertaking in Belgian law refers in fact to the concept of establishment, since social criteria prevail over economic indications of unity. The issue is a debated issue. The distinction between the concepts of “*undertaking*” and “*establishment*” lacks legal clarity.

As far as the employees’ status within the SCE is concerned, the CCT nr. 88 as well as the *Code du Commerce* are mutant about the issue to what extent the *socii* can be employees as well. Neither do these instruments define the notion of employees. However, in the Report to the King preceding the adoption of the provisions amending the *Code du Commerce* in order to transpose the SE regulation refers to the hypothesis of employees being a member of the SCE.

2.3 Procedure for negotiation of the rights of involvement of workers in the SE

1. Responsibility and start of procedure (art. 3.1)

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The responsibility for the start of negotiations as enshrined in article 3.1. of the EC Directive has been transposed in article 6 CCT nr. 88. The CCT nr. 88 goes *beyond* the wording of the Directive by providing a more elaborated content of the information which is to be transferred to the workers' representatives. Thus, it adds that besides the numbers of the participating companies, the proportion of the workforce in these companies to the overall workforce needs to be conveyed. Furthermore, the Belgian law in the line of the *Kühne and Nagel* and *ASD Anker* judgement takes into account the obligations pending on the subsidiary companies to communicate information. It is unclear how these cross-border obligations can be enforced in Belgium.

See in this respect: Article 6 § 2 *in fine*:

Ces informations sont ventilées par sociétés participantes, filiales et établissements de ces entités juridiques participantes. Les informations portent en outre sur le nombre de travailleurs des entités juridiques participantes concernées par un système de participation et sur leur proportion par rapport au total de travailleurs occupés par ces entités juridiques participantesⁱⁱⁱ.

Legal conflicts regarding the sufficient character of that information can be brought before the Tribunal de Travail by those parties having a direct or functional interest (representative trade unions, workers' representatives and even individual workers)

2. Constitution and composition of the SNB (art. 3.2)

The rules regarding the constitution and the composition of the SNB have been properly (*not verbatim*) laid down and transposed in articles 7 and 9 of the CCT nr. 88. There are no significant differences.

One important loophole is remedied by the Belgian CCT nr. 88 The SCE Directive does not provide a scenario wherein the structure of the participating legal entities changes *pendente contractu contrahendo*, id est *during the bargaining process*.

Article 13 of the CCT provides in this respect:

Réaménagement de la composition du groupe spécial de négociation.

Art. 12. Lorsque les organes de direction ou d'administration des entités juridiques participantes modifient le projet de constitution de la SE afin d'y inclure de nouvelles entités juridiques participantes ou filiales ou établissements concernés ou d'exclure certaines ou certains visés par le projet de constitution initial, il y a lieu de

ⁱⁱⁱ This information shall be broken down by participating legal entities subsidiaries and establishments of these participating companies. The information shall also concern the number of employees of the participating legal entities concerned via a system of participation and their proportion vis-à-vis the overall number of employees of these participating companies.

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procéder à une nouvelle information en application de l'article 6 de la présente convention et de constituer un nouveau groupe spécial de négociation, conformément aux articles 9 et suivants de la présente convention.^{iv}

3. The functions of the SNB (art. 3.3 and 3.6)

Both provisions have been correctly and nearly *verbatim* transposed in articles 16 and 18 of the CCT nr. 88.

4. The workings of the SNB (art. 3.4, 3.5 and 3.7)

The working of the SNB as enshrined in the SCE Directive has been properly transposed in articles 17, 19 and 20 of the CCT nr 88. No complementary rules have been added.

The Belgian social partners have decided to restrict the financing of experts to one single expert, *unless* the parties decide otherwise.

The Belgian CCT provides some interesting **innovations**.

- The SCE Directive does not provide a right to preparatory meetings of the SNB to be held without the management of the participating companies. In this regard a provision which echoes Part II d) of the standard rules is absent. Article 15 does provide for such a right to preparatory meetings. The holding of such a meeting is made subject to the approval of the management of the participating companies. This provision does not make the exercise of the freedom of assembly subject to managerial consent. Its scope is financial. In case of consent, it goes beyond doubt that management will have to bear the costs. Furthermore, it can be argued that consent cannot be denied in a discretionary let alone an arbitrary way. Such an attitude would go against the sacro-saint spirit of co-operation.
- It can be stressed that the recognition of the role of representatives of appropriate Community level trade unions in article 3.5 of the SCE Directive has been prefigured by the CCT nr. 62 transposing the EWC Directive 94/45. The EWC Directive is less explicit in this regard.
- The SCE Directive (neither as the EWC Directive) indicate whether the SNB is an *ad hoc* body creating an institution or whether it continues to exist as a party which in theory (unless otherwise provided in the agreement) is able to terminate the agreement regarding workers' involvement in the *Societas*

^{iv} “When the management or administrative bodies of the participating legal entities modify the draft constitution of the SE in order to include new participating legal entities or concerned subsidiaries or establishments or to exclude certain subsidiaries or establishments included in the initial draft constitution, the information shall be provided anew in application of Article 6 of this agreement and a new special negotiating body shall be established in compliance with Articles 9 ff of this agreement.”

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cooperativa europaea . The CCT nr. 88 (in line with the EWC CCT nr 62) indicate that the SNB will be dissolved, unless provided otherwise (article 18)

2.4 Content of the agreement (art. 4)

Articles 22 to 25 provide for a nearly *verbatim* transposition of article 4 SCE Directive.

The following differences between SCE Directive and the Belgian CCT can be highlighted:

- The Belgian CCT indicates in article 22 that the agreement should be a written one. It prescribes that the agreement should provide **a date of conclusion**. Such a provision is absent in the SCE Directive, which only provides for a date of entry into force.
- The Belgian CCT indicates in article 8 that the bargaining process has to be undertaken *with a view to reach an agreement*. The provision is a rare example of the transposition of that passus, since similar expressions stemming from the Collective Redundancy Directive and the Framework Directive 2002/14/EC have *not* been properly transposed into Belgian Law.

2.5 Duration of negotiations (art. 5)

Article 5 of the SCE Directive has been implemented by Article 21 of the CCT nr. 88. The SCE Directive stipulates that the maximum period for negotiations can be extended “to a total of one year from the establishment of the special negotiating body”. The CCT nr 88 clarifies that that date *a quo* coincides with the first meeting of the SNB.

2.6 Reference provisions (standard rules)

The Belgian CTT contains a *rubrica* “Dispositions de référence” which indicates when these provisions are applicable and enumerates these provisions. From a legal point of view, the provision describing the application of the dispositions de référence belongs to the *corpus* of the collective convention and does not constitute a reference provision itself.

a) Field of implementation (art. 7)

Article 7 SCE Directive corresponds with article 39 of the CCT nr 88. The Belgian legislator has not lifted the option provided for in Article 7.3. In article 39 the scenarios are being described which tricker the application of the standard provisions in a way which is perfectly consistent with the article 7 (2) of the SCE Directive. As indicated *infra*, this provision is erroneously displayed under the title “dispositions de reference. Article 39 thus provides a regulation of the issue of workers’

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involvement, including the issue of participation in the absence of any decision by the SNB on the form of participation.

b) Employees’ representative bodies: competences, composition and standard rules (annex 1 and 2)

The rules regarding competence and composition of the representative body have been implemented by articles 41 to 46 of the CCT nr. 88

The following differences and options need to be *highlighted*:

- The SCE Directive provides the possibility to regulate regarding the presidency of the representative body. (Cf Part II d). The Belgian social partners have not opted for a presidency *ex lege* of the management. Such a choice would have been consistent with the *Loi portant organisation de l'économie* (1948) regulating the Belgian Works Councils. The Belgian social partners have relegated the issue of the presidency to a so-called “*Protocol de collaboration*”. Such a choice implies that the issue of the presidency is subject to an agreement between management and labour. The *protocol de collaboration* is not negotiated by the SNB but by the representative body as well as the *comité restreint*. The question arises whether this provision does not limit the autonomy of the SNB. Furthermore, it is unclear how conflicts between the agreement concluded by the SNB and the Protocol de collaboration need to be solved. This conflict can arise, since the Protocol de collaboration is not part of the reference provisions. It is part of the miscellaneous provisions. Thus, it needs to be drafted whether the SNB has reached an agreement or not. In my view, in absence of a protocol de collaboration, the rule prevails that the representative body will not be presided over by the employer.

Article 68 CCT nr. 88 provides:

Art. 68. Pour la bonne organisation des réunions d'information et de consultation, l'organe compétent de la SCE situé en Belgique et, respectivement, l'organe de représentation et le comité restreint doivent régler notamment les points suivants dans un protocole de collaboration: la présidence, le secrétariat et l'agenda des réunions, la convocation des réunions spéciales, la transmission des rapports, les changements de structure ou de dimension de la SCE, la présence d'experts aux réunions, les règles budgétaires, la formation, la traduction et l'interprétation^v.

^v “For the smooth organisation of the information and consultation meetings, the competent organ of the SCE situated in Belgium and, respectively, the representative body and the select committee, shall in particular regulate the following points in a collaboration protocol: the chairmanship, secretariat

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- The Belgian CCT nr 88 innovates insofar as it suggests respecting geographical balances within the select committee; the reference rules do not provide such a provision. In this respect, article 48 provides

Section VII. - Comité restreint.

Art. 48 Si sa taille le justifie, l'organe de représentation élit en son sein un comité restreint comprenant au maximum trois membres.

Le règlement d'ordre intérieur de l'organe de représentation peut prévoir des règles relatives à la répartition géographique des mandats au comité restreint^{vi}.

The Belgian collective agreement recapitulates the possibility to establish a restricted committee « in so far as its size warrants it », without indicating criteria to make such an assessment or without indicating the judge of such an assessment. It is as enigmatic as the wording of the SCE Directive.

- The SCE Directive (Part I b) *in fine*) obliges Member States to lay down rules to ensure that the number of members of and allocation of seats on the representative body shall be adapted to take account of changes occurring within the SE and its subsidiaries and establishments. This provision has been implemented as follows

Art. 45. En cas de changements de structure ou de dimension de la SCE ou de ses filiales et établissements ou en cas de modifications importantes de l'effectif, il y a lieu de procéder à une adaptation ou le cas échéant à une nouvelle composition de l'organe de représentation, conformément aux articles 41 et suivants.

Le protocole de collaboration établi en application de l'article 68 règle les modalités relatives à la composition de l'organe de représentation en cas de changements de structure ou de dimension de la SE^{vii}.

and agenda of the meetings, the convening of special meetings, the transmission of reports, the changes of structure or size of the SE, the presence of experts at the meetings, budgetary rules, training, translation and interpretation.”

^{vi} Where its size so warrants, the representative body shall elect a select committee from among its members, comprising at most three members.

The internal rules of procedure of the representative body may provide for rules governing the geographical breakdown of the mandates of the select committee.

^{vii} In the event of changes in the structure or size of the SCE or its subsidiaries and establishments or in the case of major changes in the workforce, the representative body shall be adapted or where necessary re-established in compliance with Article 41 ff.

The collaboration protocol established in application of Article 68 regulates the arrangements concerning the composition of the representative body in the event of change of structure or size of the SCE.

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c) Participation of employees (annex 3)

The standard rules regarding participation have been implemented *linea recta* in section XI of the CCT nr 88, including the option to determine the allocation of the seats. The Belgian social partners have *not* decided to make use of the faculty which has been provided by Article 7.3 of the SCE Directive).

Article 62 of the Belgian Convention Collective regulates how the Belgian workers' representatives need to be identified according to the reference provisions. The system is based on an indirect election. The representatives will be appointed by a decision of the workers representatives who have a seat in the relevant Belgian works councils. In absence of any works council, the decision is taken by the workers' representatives in the relevant Belgian Comité pour la Prévention et la Protection. In both scenarios, the workers' representatives for the SCE are chosen by and within these bodies. In absence of any such Comité, the workers' representatives in the so-called *Commission Paritaire* at branch level can delegate the shops stewards (*id est : délégués syndicaux*) to appoint the representatives. In absence of any such delegation and or decision by the *délégués syndicaux* the workers of the participating Belgian subsidiaries or establishments have the right to elect or appoint their representatives.

2.7 Section III and Section IV of the Directive (articles 8 and 9)

Both sections have been meticulously and *verbatim* transposed by the following articles in the Convention Collective nr.88

Article 8 § 1 SCE Directive has been transposed by Article 26 of the CCT nr 88

Article 8 § 2 SCE Directive has been transposed by Article 27 of the CCT nr 27 and as far as Article 8 § 2 SCE Directive (*in fine* : transfer of seat) is concerned by Article 28 of the CCT nr 88

Article 8 § 3 of the SCE Directive has been transposed by Article 29 of the CCT nr 88

Article 9 of the SCE Directive has been transposed by Article 38 of the CCT nr 88. Thus, the Belgian Law permit the statutes of a cooperative to provide for the participation of employees' representatives in the general meetings or in the section or sectoral meetings with voting rights. The conditions enshrined in article 38 of the CCT nr 88 are identical to those listed in Article 9 of the SCE Directive. Article 38 read as followed :

Art. 38. Dans les limites fixées à l'article 59, § 4, du règlement 1435/2003 du Conseil européen du 22 juillet 2003 relatif au statut de la société coopérative européenne, les travailleurs de la SCE et/ou leurs représentants sont habilités à participer à l'assemblée générale ou, le cas échéant, à l'assemblée de section ou de branche, et y auront le droit de vote, dans les circonstances suivantes:

1° lorsque les parties le décident dans l'accord visé aux articles 22 et suivants de la présente convention;

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ou

2° lorsqu'une coopérative régie par un système de ce type se transforme en SCE;

ou

3° lorsque, dans le cas d'une SCE constituée par d'autres moyens que la transformation, une entité juridique participante était régie par un système de ce type et :

- que les parties ne parviennent pas à un accord tel que visé aux articles 22 et suivants de la présente convention au cours de la période fixée à l'article 21 de la présente convention;

et

- que l'article 39, alinéa 1er, 2° et les articles 58 à 64 de la présente convention sont applicables;

et

- que l'entité juridique participante régie par un système de ce type, en vigueur dans les entités juridiques participantes concernées avant l'immatriculation de la SCE, a la proportion la plus élevée en matière de participation, au sens de l'article 3, § 7, 3°, de la présente convention.

These transpositions are **verbatim** transpositions, which do not necessitate nor enable further comments

2.8 Common Provisions (with II and III)

2.8.1 Confidentiality of information (art. 10)

The issue of confidentiality and secret information has been regulated in statutory provisions.

The issue of confidentiality and secret information has been regulated in statutory provisions due to the limited bargaining capacity of the social partners. In practice, the implementation of these provisions in line with the Belgian traditions requires the extension of provisions in the penal code and the functioning of administrative and judicial procedures. An implementation regarding *Tendenzbetriebe* was not necessary, in view of the absence of any exemption *de lege lata* for these companies.

Belgium has not made the dispensation to provide information subject to *prior* administrative or judicial authorisation. It has provided a judicial procedure to deal *a priori* with disputes regarding confidentiality and secrecy

It is important to *highlight* some differences between the Belgian transposition law (See Article 8 Law of 9 May *portant mesures d'accompagnement*) and the SCE Directive provisions. The SCE Directive does not explicitly indicate that the management is supposed to stress the confidential character in *an explicit* way. In this regard the wording of the SCE Directive deviates from that of the EWC Directive. Furthermore, the Belgian legislator provides a criterion to determine the confidential character of the information (*dont la diffusion est susceptible de porter gravement préjudice à la société*). As far as the qualification of **secret** information is concerned, the European legislator indicates that the communication of that information will *per se* harm (not: susceptible) the functioning of the SCE. Contrary

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to the SCE Directive, the Belgian legislator has indicated that secret information must *seriously* harm the SCE and that its secret character has to be assessed according to *objective criteria*. (Article 8 Law of 9 May *portant mesures d'accompagnement*).

In case of a *post factum* contestation of the confidential or secret character of the information, a special judiciary procedure has been introduced by the Law of 9 May 2008 (*dispositions diverses*). There is no administrative procedure. The way in which the procedure has been organised does contain sufficient protection against the dissemination of the information alleged to be confidential *pendente lite*.

No posterior *administrative* procedure in a case of contestation of the confidential character has been foreseen, contrary to what is provided for in such a scenario for the Belgian Works Councils.

The Law of 9 May 2008 (*dispositions diverses*) provides a penal sanction in a case of a violation of the obligation of secrecy.(*article 13*) A Royal Decree gives an exhaustive definition of what items constitute secret information. The approach is objective, since it excludes an assessment of the confidential character by a subject, *id est* the manager.

A Royal Decree gives an exhaustive definition of what items constitute secret information. The approach is objective, since it excludes an assessment of the confidential character by a subject, *id est* the manager.

In this regard:

9 SEPTEMBRE 2008. - Arrêté royal portant exécution de l'article 8 de la loi du 9 mai 2008 portant des mesures d'accompagnement en ce qui concerne l'institution d'un groupe spécial de négociation, d'un organe de représentation et de procédures relatives à l'implication des travailleurs au sein de la Société coopérative européenne.

Source : EMPLOI, TRAVAIL ET CONCERTATION SOCIALE

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Entrée en vigueur : 06-10-2008

Article 1. Le présent arrêté transpose partiellement la directive 2003/72/CE du Conseil du 22 juillet 2003 complétant le statut de la Société coopérative européenne pour ce qui concerne l'implication des travailleurs.

Art. 2. Les informations visées à l'article 8, 2°, de la loi du 9 mai 2008 portant des mesures d'accompagnement en ce qui concerne l'institution d'un groupe spécial de négociation, d'un organe de représentation et de procédures relatives à l'implication des travailleurs au sein de la Société coopérative européenne, sont les suivantes :

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1° les informations sur les marges de distribution;
2° le chiffre d'affaires en valeur absolue et la ventilation par entreprise faisant partie de la Société coopérative européenne;
3° le niveau et l'évolution des prix de revient et des prix de vente unitaires;
4° les données sur la répartition des coûts par produit ou par entreprise faisant partie de la Société coopérative européenne;
5° en matière de programme et de perspectives générales d'avenir des entreprises dans le secteur de la distribution : les projets d'implantation de nouveaux points de vente;
6° les informations en matière de recherche scientifique;
7° la répartition par entreprise faisant partie de la Société coopérative européenne des données relatives au compte de résultats.

Art. 3. La Ministre qui a l'Emploi dans ses attributions est chargée de l'exécution du présent arrêté.

Donné à Athènes, le 9 septembre 2008.

ALBERT

Par le Roi :

La Vice-Première Ministre et Ministre de l'Emploi et de l'Egalité des Chances,
Mme J. MILQUET.

In sum, the data which are secret are:

- Information regarding the margins of distribution
- The gross amount of the business output and its division among the undertakings that are part of the SCE
- The level and the evolution of the costs and the selling prices pro unit
- The data regarding the partitioning of the costs for each product or for each undertaking part of the group
- As far as the program and the general prospects of the undertakings in the distribution sector: the projects regarding the implantation of new selling points
- The information in the field of scientific research
- The repartitioning for each enterprise which is part of the SCE of the data related to the results

2.8.2 Spirit of cooperation (art. 11)

The *spirit of co-operation*: the French language version of the EWC Directive refers to the esprit de collaboration. The French language version of the SCE Directive refers to esprit de co-opération. The CCT nr 88 refers to both co-opération and collaboration. In this regard, it is useful to remind the Protocol de collaboration. The interplay between this Protocol and the agreement as well as the règlement interieur is far from clear.

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2.8.3 Protection of employees' representatives (art. 12)

See *verbatim*:

Article 67 CCT nr. 82:

Les membres du groupe spécial de négociation, les membres de l'organe de représentation, les représentants des travailleurs exerçant leurs fonctions dans le cadre de la procédure visée à l'article 24 et les représentants des travailleurs siégeant dans l'organe de surveillance ou d'administration d'une SCE, occupés en Belgique, bénéficient dans l'exercice de leurs fonctions, des mêmes droits et de la même protection que les membres représentant les travailleurs au conseil d'entreprise, en particulier en ce qui concerne la participation aux réunions et aux éventuelles réunions préparatoires et le paiement de leur salaire pendant la durée d'absence nécessaire à l'exercice de leurs fonctions

Article 67 of the CCT nr 88 already contains the idea that the protection granted to these representatives should be similar to that granted to the members of the Works Council.

Since, this protection is based on statutory law, the clause was insufficient to guarantee that the Statutory protection of the Law of 19 March 1991.

The protection of employees' representatives has been moulded on the basis of the protection offered to workers representatives in the works councils and the Comité pou la Prévention et la Protection. Article 9 of the Law of 9 May 2008 (*portant des mesures d'accompagnement*) provides that the protection extends to the members of the SNB; the members representing the workers in the framework of an information and consultation procedure and the workers' representatives in the supervisory board of the board of administration being workers at the SCE, its subsidiaries or establishment and those workers appointed as substitutes.

This statutory provision is a necessary complement to the principle enshrined in article 67 of the CCT insofar as the Statute of 19 March 1991 cannot be extended by collective agreement. The statute affects the functioning of the judiciary, which is beyond the regulatory powers of the social partners.

2.8.4 Misuse of procedures (art. 13)

The Belgian social partners have indicated in their *avis* that there is no need of complementary legislation to prevent *misuse* of an SCE for the purpose of depriving employees of rights to employee involvement or withholding such rights (See *Avis* nr. 1.590). In our view, article 13 primarily has a substantial rather than a procedural scope. It seeks to establish some form of *economic governance*, precluding an abuse of the faculty to establish a *Societas cooperativa europaea*. Such a managerial prerogative could not be used for the sole sake of undermining employees rights to workers involvement. At present, the Belgian law does not provide sufficient and explicit substantial guarantees allowing judges to censor the exercise of such a

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managerial prerogative. Indeed, it is a common attitude of the Belgian Judicature not to enter into the merits of the exercise of the managerial prerogative.

2.9 Provisions applicable to work centres and subsidiary companies in the territory of the Member State (accessory provisions)

a) Sphere of implementation

b) Identification of national employees' representatives (art. 2.1.e)

c) Appointment of employees' representatives in the SNB and representative body (art. 3.2.b and annex 1, b)

With regard a), b) and c):

The scope *ratione personae, materiae et loci* of the accessory provisions has been defined in the Avis nr. 1.590 of the *Conseil National du Travail* as referring to the European cooperative companies immatriculated in Belgium as well as to the subsidiaries and establishments situated in Belgium. The structure of the CCT nr. 88 does not explicitly follow the distinction between “dispositions principales ayant une dimension transnationale” and “dispositions accessoires”. However, the Avis contains a doctrinal catalogue of the provisions in the CCT which can be considered to be “accessory”.

The identification of the **Belgian** workers' representatives in the SNB and in the conventional representative body is concerned is identical. This identification is enshrined in articles 10 and 62. Article 10 states:

Art. 10 § 1er. Les dispositions du présent article visent la désignation des membres-travailleurs du groupe spécial de négociation institué en Belgique ou dans un autre Etat membre.

§ 2. En principe, les membres-travailleurs du groupe spécial de négociation occupés en Belgique sont désignés par et parmi les représentants des travailleurs occupés en Belgique siégeant aux conseils d'entreprise des sociétés participantes et de leurs filiales ou établissements concernés. A défaut d'accord entre ces représentants, les membres-travailleurs du groupe spécial de négociation sont désignés par la majorité de ceux-ci.

A défaut de conseil d'entreprise, les membres-travailleurs du groupe spécial de négociation sont désignés par et parmi les représentants des travailleurs siégeant aux comités pour la prévention et la protection au travail. A défaut d'accord entre

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ces représentants, les membres-travailleurs du groupe spécial de négociation sont désignés par la majorité de ceux-ci.

A défaut de conseil d'entreprise et de comité pour la prévention et la protection au travail, chaque commission paritaire peut autoriser les délégations syndicales des sociétés participantes ou des filiales ou établissements concernés relevant de sa compétence sectorielle à désigner les membres-travailleurs du groupe spécial de négociation.

A défaut de conseil d'entreprise ou de comité pour la prévention et la protection au travail dans les sociétés participantes ou les filiales ou établissements concernés situés en Belgique, et à défaut d'autorisation de la commission paritaire, les travailleurs de la société participante ou de la filiale ou de l'établissement concerné ont le droit d'élire ou de désigner les membres-travailleurs du groupe spécial de négociation.

§ 3. La délégation des membres-travailleurs peut comprendre un représentant des organisations représentatives des travailleurs, qu'il soit ou non occupé par une société participante ou une filiale ou un établissement concerné^{viii}.

This provision does not constitute at first sight a problem from the point of view of EC Community Law which refers to the sovereign competence of the Member States to determine their workers' representatives. The way in which is the identification

^{viii} *Unauthorized Translation in English*

§1. The provisions of this article concern the designation of employee members of the special negotiating body established in Belgium or in another Member State.

§2. In principle, the employee members of the special negotiating body employed in Belgium shall be appointed by and from among the worker representatives who are members of the works councils of the participating legal entities and their concerned subsidiaries or establishments. Failing agreement among these representatives, the employee members of the special negotiating body shall be appointed by the majority of the works council members.

In the absence of a works council, the employee members of the special negotiating body shall be appointed by and from among the employees' representatives who are members of the health and safety committees. Failing agreement among these representatives, the employee members of the special negotiating body shall be appointed by the majority of members of the health and safety committees.

In the absence of a works council and a health and safety committee, each joint committee may authorise the trade union delegations of the participating companies, or of concerned subsidiaries and establishments within its sectoral jurisdiction, to appoint the employee members of the special negotiating body.

. In the absence of a works council and a health and safety committee in the participating legal entities or the concerned subsidiaries or establishments, and in the absence of authorisation from the joint committee, employees of the participating legal entities or the concerned subsidiaries and establishments are entitled to elect or appoint employee members of the special negotiating body.

§3. The delegation of employee members may include a representative of the representative organisations of employees, whether or not he or she is employed by a participating company or a concerned subsidiary or establishment.

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should be operated is far from clear. The Belgian Law provides for a “cascade”. Priority is given to works councils, then to the *Comités pour la Prévention et la Protection* and then in subsidiary order to the *délégués syndicaux* and subsequently in last resort to the workers themselves. The structure of the article seems to indicate that in a case of a multitude of participating companies, situated in Belgium, those companies deprived of works councils, *comités pour la prévention* or *délégués syndicaux* will not have part in the vote at all. According to a grammatical reading of the provisions, only the companies with works councils, or *comité pour la prévention et la protection* or with *délégués syndicaux* seem to have a vote. This might seem contrary to Article 3 2) *in fine* SCE Directive). The problem can, be solved by an interpretation in conformity with the EC Directive. This article stresses that the idea that the SNB should be a body *representative of the employees of the participating legal entities and concerned subsidiaries*. Therefore, it is important to apply the provision in a way which guarantees that the workers’ representatives of all the legal entities are involved in the determination of the Belgian representation.

The accessory provisions prescribe the creation of a *réserve* list in case workers representatives drop out.

2.10 Compliance with the Directive (Article 14)

The registration of the *Societas cooperativa europaea* needs to be operated in conformity with article 67 § 2 of the *Code des Sociétés* and in conformity with article 11 of the *Societas cooperativa europaea* Regulation (EC) nr 1435/2003 according to article 964 of the *Code des Sociétés*. Since the creation of an SCE requires an authentic act, it is obvious that the notaire public will exercise a preventive control regarding the legality of the act. He will refuse his offices, in case of illegality.

The statutes creating the *Societas cooperativa europaea* need to be deposited at the *Grefte* of the *Tribunal de Commerce* of the *arrondissement* where the SCE has its seat.

The law does not explicitly provide that the *Grefte* exercises a control over the legality of the statutes that are being deposited in the light of article 11 of the SCE-Regulation. They might do so in practise.

If the statutes are not in accordance with article 11 of the SCE Regulation, the creation of the SCE is affected by a default which can lead to a request for annulment. According to article 172 of the *Code des Sociétés* such a request needs to be addressed to the *Tribunal de Commerce*. The Tribunal can decide the dissolution or can allow the SE to regularize the situation within a delay specified by the tribunal. (See Articles 172 and ff. of the *Code de Sociétés*).

The representative organisations of workers and employers have standing regarding conflicts arising out of collective agreements (Law on collective Agreements). Furthermore, it needs to be indicated that in Belgium the violation of the normative

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part of a collective agreement declared generally binding constitutes a criminal offence on the basis of the Law on collective redundancies. Furthermore, the observation of the normative part is monitored by the *Inspection Sociale* (See Articles 52 and 56 of the *Loi sur les conventions collectives*).

Furthermore, the legal standing of representative trade unions is confirmed by article 4 of the Law of 9 May 2008 (*dispositions diverses*).

2.11 Provisions that apply to SCE based in Belgium

A. Field of implementation (art. 15)

Article 15.1 relates to the articulation between the SCE and the EWC Directive. This issue is governed and implemented by the amendment of the Convention Collective nr. 62 which currently stipulates in article 3^{ter}:

[Article 3 ter

Lorsque la société coopérative européenne satisfait aux conditions fixées par la convention collective de travail n° 88 du 30 janvier 2007 concernant l'implication des travailleurs dans la société coopérative européenne et est une entreprise de dimension communautaire ou une entreprise qui exerce le contrôle d'un groupe d'entreprises de dimension communautaire au sens de la présente convention collective de travail, les dispositions de la présente convention collective de travail ne lui sont pas applicables, ni à ses filiales"]^{ix}

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Article 15.2 of the SE Directive has **not** been implemented as such. There is an obvious reason for this. The Belgian system of industrial relations does not contain any provision related to participation in the meaning of the SCE Directive. The trade union movement has refuted “corporate participation”. It was in favour of limiting workers’ involvement to the *contrôle ouvrier*, excluding any kind of co-determination.

Article 15.3 of the EC Directive has not been implemented as such by the Convention Collective nr. 88 Other information and consultation rights are being guaranteed at the level of the so-called undertaking, defined as the *unité technique d’exploitation*. This notion does not correspond as such to the level of the corporate person (*Societas cooperativa europaea*). No conflict arises out of the *juxtaposition* of the *Loi portant organisation de l’économie* (1948) regulating the establishment of the works council and the collective agreement. By no means can a collective agreement derogate from statutory legislation which has an *ordre public* character.

^{ix} *If the European cooperative society satisfies the conditions fixed by collective agreement nr 88 regarding the involvement of workers in the SCE and if it constitutes an enterprise which has a community-scale dimension or if it exercises a dominant influence over a group of undertakings with a Community scale dimension in the meaning of this collective agreement, than the provisions of this collective agreement are not applicable to this company neither to its subsidiary companies.*

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Belgium has not used the option described in article 15.4 of the SCE Directive. This option is relevant in a case of merger and of a transformation. In a case of merger, existing provisions related to the transposition of the Transfer of undertaking directive will come into play.

3. Practical application

- a) **Case law:** *Case law is absent*
- b) **Measures set out by national law to ensure that the companies covered abide by the obligations laid down by the Directive:** Obligations stemming from collective agreements declared generally binding are sanctioned by penal law and monitored by the *Inspection Sociale*
- c) **Position of employers' and trade union organizations:** *The Avis nr 1.590* is an authoritative document indicating the views of the social partners

4. Conclusions

The overall quality of the transposition has been profoundly influenced by the transposition of the EWC Directive. The overall quality is high.

The social partners have to a certain extent considered the SCE Directive as a set of minimum requirements, allowing a more (or slightly more) progressive transposition.

The CCT needs to be complemented by statutory legislation regarding

- private International law rules
- the application of the Directive to the Public Sector which falls beyond their bargaining power
- the issue of confidential and secret information
- the protection of the workers' representatives
- the protection against an abuse of the recourse to the SCE
- the amendment of the Code Judiciaire

Minor adjustments which need to be operated concern:

- a statute is required to remedy the loophole created by the resiliation or termination of the collective agreement

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- a statute is needed to provide the creation of a *societas cooperativa europaea* in the public sector
- the notion of “workers’ involvement” enshrined in the convention collective nr. 88 does not reiterate the descriptive definition of the SCE Directive. It opts for an enumerative definition. The “implication des travailleurs” is being described as “information, consultation or participation”. Thus, the contractual autonomy of the special Negotiating Body seems to be restricted in a way which is not in conformity with the EC Directive. It is better to opt for a descriptive definition.

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Annex I: Correspondence Table

Content	Articles Directive 2003/72/EC	National implementing provisions
Objective	1	Article 1 and 2 of the Collective Agreement
Definitions	2	Article 3 Collective Agreement (CA)
Creation of a special negotiating body	3.1	6§ 1 CA
	3.2 a	9 CA
	3.2 b	10 CA
	3.3	16 CA
	3.4	20 CA
	3.5	17CA
	3.6	18 CA
	3.7	19 CA
Content of agreement	4	22, 23, 24 , 25CA
Duration of negotiations	5	21 CA
Legislation applicable to the negotiation procedure	6	4 Law 9 May 2008 (mesures d'accompagnement)
Standard rules	7	37 CA
	Annex part 1. a)	41 CA
	Annex part 1. b)	42CA
	Annex part 1. c)	48 CA
	Annex part 1. d)	54 CA
	Annex part 1. e)	41 CA
	Annex part 1. f)	44 CA
	Annex part 1. g)	47 CA
	Annex part 2 a)	46 CA
	Annex part 2 b)	50 and 51 CA
	Annex part 2 c)	68CA
	Annex part 2 d)	54 CA
	Annex part 2 e)	53 CA
	Annex part 2 f)	55 CA
	Annex part 2 g)	56 CA
Annex part 2 h)	57 CA	
Annex part 3	58-64 CA	
Rules applicable to SCEs established exclusively by natural persons or by a single legal entity and natural persons	8	Article 8 Law 9 May 2008 (mesures d'accompagnement) AND articles 26 to 29 of the CA
Participation in the general meeting or section or sectorial meeting	9	Article 38 CA
Reservation and confidentiality	10	Article 8 of the Law of 9 May 2008 (mesures d'accompagnement) Article 13 Law of 9 May 2008 (dispositions diverses) AR 9 September 2008
Operation of the representative body and procedure for the information and consolation of employees	11	65 and 68 CA
Protection of employees' representatives	12	67 CA and Article 9 Law of 9 May 2009
Misuse of procedures	13	No transposition
Compliance with this directive	14	Articles 25 to 62 Law on Collective Agreements
Link between this Directive and other	15	Article 3 ter of Collective Agreement nr 62

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Content	Articles Directive 2003/72/EC	National implementing provisions
provisions		