

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

NATIONAL IMPLEMENTATION REPORT

Estonia

Content

EXECUTIVE SUMMARY	3
1. INTRODUCTION	5
2. FORMAL ASPECTS OF THE IMPLEMENTATION	6
3. LEGAL CONTENTS OF NATIONAL REGULATION	7
3.1 OBJECT (ART. 1 OF THE DIRECTIVE).....	7
3.2 DEFINITIONS (ART. 2)	7
3.3 PROCEDURE FOR NEGOTIATION OF THE RIGHTS OF INVOLVEMENT OF WORKERS IN THE SCE (ARTICLE 3).....	13
3.4 INVOLVEMENT AGREEMENT (ART. 4)	17
3.5 DURATION OF NEGOTIATIONS (ART. 5)	17
3.6 LEGISLATION APPLICABLE TO THE NEGOTIATION PROCEDURE (ARTICLE 6)	17
3.7 STANDARD RULES (ARTICLE 7)	18
3.8 RULES APPLICABLE TO SCES ESTABLISHED EXCLUSIVELY BY NATURAL PERSONS OR BY A SINGLE LEGAL ENTITY AND NATURAL PERSONS (ARTICLE 8).....	21
3.9 PARTICIPATION IN THE GENERAL MEETING OR SECTION OR SECTORIAL MEETING (ARTICLE 9)	22
3.10 CONFIDENTIALITY OF INFORMATION (ARTICLE 10)	22
3.11 SPIRIT OF COOPERATION (ARTICLE 11)	24
3.12 PROTECTION OF EMPLOYEES' REPRESENTATIVES (ARTICLE 12).....	24
3.13 MISUSE OF PROCEDURES (ARTICLE 13).....	25
3.14 COMPLIANCE (ARTICLE 14).....	26
3.15 LINK BETWEEN THE DIRECTIVE AND OTHER PROVISIONS (ARTICLE 15).....	27
4. PRACTICAL IMPLEMENTATION	27
5. ASSESSMENT OF THE RESULTS OF IMPLEMENTATION	28
6. CONCLUSIONS	28
BIBLIOGRAPHY	30
ANNEX I: LIST AND DESCRIPTION OF THE NATIONAL LEGISLATIVE IMPLEMENTATION MEASURES	32
ANNEX II: TABLE OF CORRESPONDENCE	33
ANNEX III: LIST OF ABBREVIATIONS	35

Executive summary¹

European Cooperative Society is a new phenomenon in Estonian legal system. In order to guarantee implementation of the principles of the Directive, the Estonian Parliament has adopted the Act on amending the Involvement of Employees in Activities of Community-scale Undertakings, Community-scale Groups of Undertakings and European Companies on 14 February 2007 which entered into force 23 March 2007. The Member States were obliged to transpose the Directive into the national law no later than on 18 August 2006. The transposition of the Directive into the national law was mainly delayed because of the technical reasons. There have been no principal disagreements on the issues regulated by the Directive. The transposition process is completed, as the Act is now in force.

The regulation is sufficiently new and has been in force for a considerably short time, approximately two years. Therefore, it is not possible to identify the real effects of implementation. However, it might be said that the employees involvement in the activities of an SCE will most probably have a marginal practical importance in Estonian legal system, at least in near future.

It must be said that the regulation of the Directive can be described as very detailed and technical which leaves not much to be decided by the Member States. The incorporation of the Directive into Estonian law has been quite successful and the national regulation framework fulfils the requirements of the Directive in the main. Nevertheless, there are some rules of the Directive that have not been transposed into Estonian law with sufficient precision.

1. The main concern, as follows, is the unclear distinction of main and accessory provisions of the Directive which may give rise to some misinterpretations of the Act. The Act has explicitly provided for the application of accessory rules of the Directive only in the case of the election of the members of the SNB and of the RB.
2. In order to get a correct understanding who is the employees' representative provided for by national law in the context of the Act, one should have an overview of the regulation of the Act, as well of the TUIS and of the AÜS. Taking into consideration the need to make a distinction between main and accessory provisions of the Act, it would be clear and precise to make also a reference to the relevant provisions of the TUIS and of the AÜS. The explicit reference to national provisions providing for the employees' representatives would avoid debates on different interpretations in practice.
3. The rules of the Directive concerning reservation and confidentiality are not sufficiently clearly transposed into Estonian law and therefore may cause misinterpretations on confidentiality issues. The Act provides neither for the confidentiality obligation of the employees' representatives provided for by national law nor their right to initiate judicial appeal procedures in case of the confidentiality of information and of employer's refusal to provide information. However, the TUIS, passed on 13 December, provides explicitly for the obligation of an employee trustee not to reveal any information which has expressly been provided to him or her in confidence and the right of a trustee to initiate

¹ Report drafted by Merle Muda

judicial appeal procedure when an employer demands confidentiality or does not give information. The meaning and the wording of the respective provisions in the TUIS have followed the idea of the Directive. In interaction with the TUIS and based on methodical interpretation, an employees' representative has a confidentiality obligation, regardless of information received on the national or Community-wide level, and the right to appeal. Although, it may still give rise to misunderstandings as the Act or the TUIS do not clearly refer to the rules of confidentiality and to the right to judicial appeal procedures in the TUIS or in the TKS. There is no clear distinction between main and accessory provisions in the Act. In case the confidential information is allowed to forward, the law should also prescribe that the information should be clearly forwarded as confidentially received information.

4. The Act provides no explicit word-for-word definition of a *subsidiary* of a participating legal entity or of an SCE. However, the TKS defines a subsidiary through a definition of a controlled undertaking and exercising of a dominant influence provided in TKS § 10. The term *subsidiary* can be deduced from the wording of section 10. Nonetheless, definition of a *subsidiary* is not clear. The unambiguous wording referring to section 10 benefits to the overall understanding of the TKS.
5. The definition of consultation does not follow the exact wording of the Directive. Nevertheless, it does not undermine the overall understanding of the meaning of the consultation and its purpose in the TKS. The main concept of consultation is clear.

Taking into account beforesaid, in order to ensure complete implementation of the rules of the Directive in Estonia, the following must be provided in the TKS:

- clear distinction between the main and accessory provisions of the Directive, *inter alia* the reference to the TUIS and/or, as the case may be, to the AÜS in respect of specifying the employees' representative provided for by national law and the confidentiality obligation of the employees' representatives provided for by national law and their right to initiate judicial appeal procedures in case of the confidentiality of information and of employer's refusal to provide information; and
- clear definition of the term *subsidiary*.

1. Introduction

European Cooperative Society (hereinafter SCE) is a new phenomenon in the Estonian legal system after adoption of the relevant legislation in Estonia.

A legal entity of the same type in national law is regulated by the Commercial Associations Act (hereinafter TÜS)². According to TÜS § 1 (1) a commercial association is a company the purpose of which is to support and promote the economic interests of its members through joint economic activity in which the members participate: 1) as consumers or users of other benefits; 2) as suppliers; 3) through the use of services; 4) through work contribution or 5) in any other similar manner. The provisions concerning companies apply to associations, unless otherwise provided for in the TÜS. According to the national legislation provided for in the Employment Contracts Act (hereinafter TLS)³ § 1 (1), an employee is a natural person who does work for another person (employer) in subordination to the management and supervision of the employer on the basis of an employment contract. All persons falling into the specified category are considered as employees. In the context of the cooperatives there is no difference compared to the employees and employment relationships of other undertakings. Employees of cooperatives are submitted to the general labour law regulation. The general rules on employees' representation and involvement (information, consultation) are similarly and under the same conditions applicable in cooperatives, as in other types of undertakings. There are no rules on employees' participation provided for by the Estonian law.

An SCE may be set up within the territory of the Community on the basis of the Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (hereinafter Regulation)⁴. The Regulation has been supplemented by the Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees (hereinafter Directive)⁵. The Member States were obliged to transpose the Directive into the national law no later than on 18 August 2006. The Directive has several similarities with Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company (hereinafter SE) with regard to the involvement of employees.

Estonia has adopted the necessary Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society Implementation Act on 14 December 2005 which entered into force on 18 August 2006.⁶ The act transposing the Directive into the Estonian legal system

² Tulundusühistuseadus (Commercial Associations Act). Passed on 19 December 2001 - RT I 2002, 3, 6; 2008, 59, 330 (Available in English at the website: <http://www.legaltext.ee/text/en/X50057K2.htm>).

³ Töölepingu seadus (Employment Contracts Act). Passed on 17 December 2008 - RT 2009, 5, 35; 2009, 29, 176 (Available in English at the website: <http://www.sm.ee/eng.html>).

⁴ Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society - OJ L 207, 18.8.2003, pp. 1-24.

⁵ Council Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees - OJ L 207, 18.8.2003, pp. 25-36.

⁶ Euroopa Liidu Nõukogu määruse (EÜ) nr 1435/2003 „Euroopa ühistu (SCE) põhikirja kohta“ rakendamise seadus (Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society Implementation Act). Passed on 14 December 2005 - RT I 2005, 71, 543. (Available in English at the website: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XX00044&keel=en&pg=1&ptyyp=RT&tyyp=X&query=%FChistu>).

was adopted by the Parliament on 14 February 2007 and entered into force on 23 March 2007. The Directive is transposed into Estonian legal system by the Act amending the Involvement of Employees in Activities of Community-scale Undertakings, Community-scale Groups of Undertakings and European Companies Act (hereinafter Act)⁷. The Act amended the title of the Involvement of Employees in Activities of Community-scale Undertakings, Community-scale Groups of Undertakings and European Companies Act and renamed it as the Community-scale Involvement of Employees Act (hereinafter TKS)⁸.

Estonia did not follow the prescribed date of transposition of the Directive. The transposition of the Directive into the national law was mainly delayed because of the technical reasons. There have been no principal disagreements and real discussions on the issues regulated by the Directive. It can be said that the harmonisation process concerning SCE is now entirely completed in Estonia.

The TKS was drawn up in order to regulate the involvement of employees on the Community level. The TKS harmonises Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees and Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees; as well as Directive 2003/72/EC is harmonised.

The Act passed the coordination process with different ministries and social partners. Confederation of Estonian Trade Unions (hereinafter EAKL)⁹, Estonian Employees' Unions' Confederation TALO (hereinafter TALO)¹⁰ and Estonian Employers' Confederation (hereinafter ETTK)¹¹ did not make any comments on the draft Act. Also, the draft Act was forwarded to the Estonian Chamber of Commerce and Industry, who presented minor proposals.

In order to compile the report, the author has thoroughly analysed the corresponding regulation of the Act comparing it with the Directive.

2. Formal aspects of the implementation

Procedure used for transposition

In order to transpose the Directive, the Parliament adopted the Act on 14 February 2007 which entered into force on 23 March 2007. The ministry preparing the corresponding draft acts has an obligation to send the draft acts to coordination with relevant ministries and other

⁷ Üleühenduselise ettevõtja, üleühenduselise ettevõtjate grupi ja Euroopa äriühingu tegevusse töötajate kaasamise seaduse muutmise seadus (Act amending the Involvement of Employees in Activities of Community-scale Undertakings, Community-scale Groups of Undertakings and European Companies Act). Passed on 14 February 2007 - RT I 2007, 22, 112 (Available in Estonian at the website: <https://www.riigiteataja.ee/ert/act.jsp?id=12799883>).

⁸ Töötajate üleühenduselise kaasamise seadus (Community-scale Involvement of Employees Act). Passed on 12 January 2005 - RT I 2005, 6, 21; 2009, 5, 35 (Available in English at the website: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90012K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=%FCle%FChenduselise>).

⁹ Eesti Ametiühingute Keskkliit (Confederation of Estonian Trade Unions).

¹⁰ Teenistujate Ametiliitude Keskorganisatsioon TALO (Estonian Employees' Unions' Confederation TALO).

¹¹ Eesti Töoandjate Keskkliit (Estonian Employers' Confederation).

institutions. The Ministry of Social Affairs prepared the draft act in question. In addition, the Government has an obligation to send the acts on social law to social partners in order to receive their opinion. There have been no principal debates and problems with the social partners on transposition of the Directive.

Date of transposition

The Directive is transposed into Estonian legal system. The Parliament has adopted the Act on 14 February 2007. The Act entered into force on 23 March 2007. The Act is officially published in *Riigi Teataja* (State Gazette).

According to Article 16 of the Directive the Member States had to comply with the Directive no later than on 18 August 2006. Estonia has not followed the prescribed date. The transposition of the Directive into national law is mainly delayed because of the technical reasons. There have been no principal disagreements on the issues regulated by the Directive.

Method of national transposition regulations

There is no specific national regulation background. In order to transpose the Directive, the Parliament has adopted the Act.

National consensus

The Government has an obligation to send all draft acts on social law to social partners in order to receive their opinion. The Ministry of Social Affairs consulted with the EAKL, the TALO and the ETTK during the coordination process of the Act. Social partners have made no comments on the Act, apart from the Estonian Chamber of Commerce and Industry, who presented minor technical proposals.

3. Legal contents of national regulation

3.1 Object (art. 1 of the Directive)

As with regard to many others provisions of the Directive, there was no legislation in Estonia prior to adoption of the Directive. In some cases, only similar provisions related with the European Company (SE) can be found in the TKS. When something interesting could be remarkable before the transposition of the Directive, this will be mentioned specifically.

According to the Act amending TKS §§ 1 2) and 2 2), the TKS provides for the legal basis for the involvement of employees in the affairs of SCEs. The purpose of the TKS is to promote involvement of employees which means provision of information and consultation to employees and their participation in the activities of an SCE.

3.2 Definitions (art. 2)

Legal situation prior to adoption of the Directive: There was no regulation concerning SCEs. A legal entity of the same type in national law is regulated by the TÜS. According to TÜS § 1 (1) a commercial association is a company the purpose of which is to support and promote the economic interests of its members through joint economic activity in which the members participate: 1) as consumers or users of other benefits; 2) as suppliers; 3) through the use of services; 4) through work contribution or 5) in any other similar manner. The provisions concerning companies

apply to associations, unless otherwise provided for the TÛS. Pursuant to TÛS § 5 (1) and (3) in order to found an association, the founders shall enter into a memorandum of association. Upon entry into a memorandum of association, the founders shall also approve the statute of association as an appendix to the memorandum of association. Wherefore every cooperative has its statute.

Implementation of the Directive in the national regulation framework: The Act amending TKS § 42 2) provides for the definition of an SCE. SCE means any cooperative society established in accordance with Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE) (OJ L 207, 18.8.2003, pp. 1–24).

- **“Participating legal entities”**

The Act amending TKS § 43 2) provides for the definition of participating legal entities. For the purposes of the TKS, participating legal entities means companies within the meaning of the second paragraph of Article 48 of the Treaty, including cooperatives, as well as legal bodies formed under, and governed by, the law of a Member State, directly participating in the establishing of an SCE.

- **“Subsidiary”**

Legal situation prior to adoption of the Directive: Commercial Code (hereinafter *ÄS*)¹² § 6 prescribes that if a company is a partner or shareholder of another company and owns a majority voting interest therein, the participating company shall be called the parent undertaking, and the company in which it participates shall be called a subsidiary. A company in which another subsidiary or subsidiaries, with or without the parent undertaking, have a majority voting interest is also a subsidiary of the parent undertaking. A subsidiary is also a company in which another company (parent undertaking) has control as a partner or shareholder, on the basis of an agreement or without an agreement. In addition to a subsidiary specified by the *ÄS*, TKS § 10 provides for the definition of *a controlled undertaking*.

Implementation of the Directive in the national regulation framework: Taking into consideration the trans-national nature of the Directive, the TKS has followed Article 2 c of the Directive, not *ÄS* § 6 in specifying the term. The TKS defines a subsidiary of a participating legal entity or of an SCE through the definition of the controlled undertaking provided for in TKS § 10. The same article also prescribes the exercising of a dominant influence.

For the purposes of the TKS, “controlling undertaking” means an undertaking which belongs to a group of undertakings and which can exercise a dominant influence

¹² *Äriseadustik* (Commercial Code). Passed on 15 February 1995 – RT I 1995, 26/28, 355; 2009, 27, 164 (Available in English at the website:

<http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X0001K17&keel=en&pg=1&ptyyp=RT&tyyp=X&query=%E4riseadustik>).

over another undertaking (the controlled undertaking) by virtue, for example, of ownership, financial participation or the rules which govern it or by any other means by which it is possible to exercise direct or indirect influence on the other undertaking. The ability to exercise a dominant influence shall be presumed, without prejudice to proof to the contrary, when, in relation to another undertaking directly or indirectly: 1) holds a majority of that undertaking's subscribed capital, 2) controls a majority of the votes attached to that undertaking's issued share capital, 3) can appoint or remove more than half of the members of that undertaking's directing body. A dominant influence shall not be presumed to be exercised solely by virtue of the fact that functions are exercised in liquidation proceedings, recovery of payment debts or analogous proceedings. Where two or more undertakings from a group of undertakings satisfy one or more of the criteria specified above, the undertaking which satisfies the criterion provided for in clause 3) shall be regarded as the controlling undertaking. If no undertaking belonging to a group of undertakings satisfies the criterion provided for in clause 3), the undertaking which satisfies the criterion provided for in clause 2) is deemed to be the controlling undertaking without prejudice to proof that another undertaking is able to exercise a dominant influence. Notwithstanding the aforesaid, an undertaking is not deemed to be a controlling undertaking with respect to another undertaking in which it has holdings where the former undertaking is a company provided for in Article 3 (5) (a) or (c) of the Council Regulation 139/2004/EC on the control of concentrations between undertakings (OJ L 24, 29.01.2004, p. 1–22). The law applicable in order to determine whether an undertaking is a controlling undertaking shall be the law of the Member State which governs that undertaking. Where the law governing that undertaking is not that of a Member State, the law applicable shall be the law of the Member State within whose territory the representative of the undertaking or, in the absence of such a representative, the central management of the group undertaking which employs the greatest number of employees is situated.

The Act amending the TKS provides no explicit word-for-word definition of a *subsidiary* of a participating legal entity or of an SCE. However, the TKS defines a subsidiary through a definition of a controlled undertaking and exercising of a dominant influence provided in TKS § 10. The term *subsidiary* can be deduced from the wording of section 10. Nonetheless, definition of a *subsidiary* is not clear. The unambiguous wording referring to section 10 benefits to the overall understanding of the TKS.

- **“Concerned subsidiary or establishment”**

The Act amending TKS § 44 provides for the definition of a concerned subsidiary or establishment. For the purposes of the TKS, a 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.

- **“Employees` representatives”**

Legal situation prior to adoption of the Directive: The Parliament has adopted an act on employee trustee. The Parliament passed Employee Trustee Act (hereinafter TUIS)¹³ on 13 December 2006. The TUIS entered into force on 1 February 2007. According to TUIS § 2 (1) a trustee is an employee of an undertaking who is elected by a general meeting of employees of an undertaking to represent all the employees in labour relations with the employer. In the context of cooperatives the rules on employee representation do not differ from the situation in other types of undertakings.

In addition to the trustee who represents all the employees in the undertaking where can also be a trade union's representative (hereinafter shop-steward) in the undertaking. According to the amendments made by the TUIS, Trade Unions' Act (hereinafter AÜS)¹⁴ § 16 (4) provides for the definition of a shop-steward. A shop-steward is an employee of an undertaking who is elected by a trade union and fulfils the duties provided for AÜS § 21. A shop-steward represents the employees who are the members of a trade union. Thus, a shop-steward is a representative of a trade union and is not considered to be an employees' representative as he or she is not elected by a general meeting of employees and is not authorised to represent all the employees working in the undertaking. However, in order to guarantee the same protection prescribed for a trustee, a shop-steward is considered as an employees' representative in the meaning of the TLS which provides for social guarantees for employees' representatives.¹⁵

Besides, AÜS § 22 provides for a shop-steward an equal right with a trustee in information and consultation. The employer has an obligation to inform and to consult with a shop-steward under the same conditions and rules as prescribed for a trustee. In case there are two kinds of representatives in the undertaking – a trustee and a shop-steward – the employer has an obligation to inform and to consult with both of them.

Implementation of the Directive in the national regulation framework: Adoption of the TUIS changed national concept on employees' representatives. The employees' representatives provided for by national law as referred in the Directive Article 2 e, can be an employees' representative - trustee, regulated by the TUIS and/or, as the case may be in the context of information, consultation and protection, a shop-steward regulated by the AÜS. An employees trustee is defined by TUIS § 2 (1) and a shop-steward by AÜS § 16 (4) (see V.1).

The Act amending TKS §§ 54, 66 and 76 stipulates the election of members of the SNB, the RB and supervisory or administrative board of the SCE who represent

¹³ Töötajate usaldusisiku seadus (Employee Trustee Act). Passed on 13 December 2006 – RT I 2007, 2, 6; 2009, 5, 35 (Available in English at the website: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XX10005&keel=en&pg=1&ptyyp=RT&tyyp=X&query=t%F6%F6tajate+usaldusisiku>).

¹⁴ Ametiühingute seadus (Trade Unions Act). Passed on 14 June 2000 – RT I 2000, 57, 372; 2009, 13, 78 (Available in English at the website: <http://www.legaltext.ee/text/en/X30087K1.htm>).

¹⁵ Töötajate usaldusisiku seadus. Kommenteeritud väljaanne (Employee Trustee Act. Commented.). Koostaja T. Kaadu. Tallinn: Juura, 2008, lk 44, 108-109. (Available in Estonian.)

Estonian employees. TKS § 80 refers to them as employees' representatives participating in involvement. Members of the SNB, the RB and supervisory or administrative board of the SCE are considered to be employees' representatives as well, but only in issues concerning the activities of an SCE.

In order to get a correct understanding who is an employees' representative provided for by national law in the context of the TKS, one should have an overview of the regulation of the TKS, as well as on the TUIS and on the AÜS. Taking into consideration the need to make a distinction between main and accessory provisions of the TKS, it would be clear and precise to make also a reference to the relevant provisions of the TUIS and of the AÜS. The explicit reference to national provisions providing for the employees' representatives would avoid debates on different interpretations in practice.

- **“Representative body”**

The Act amending TKS § 48 stipulates that a representative body means the body representative of the employees set up by the agreement on arrangements for the involvement of the employees within the SCE or in accordance with the provisions on standard rules, with the purpose of informing and consulting the employees of an SCE and its subsidiaries and establishments situated in the Community and, where applicable, of exercising participation rights in relation to the SCE.

- **“Special Negotiating Body”**

The Act amending TKS § 47 provides that a special negotiating body is the body which is formed in order to hold negotiations with the competent organs of the participating legal entities on the establishment of a procedure for the involvement of employees in the SCE.

- **“Involvement of employees”**

Legal situation prior to adoption of the Directive: There was no regulation, except similar provisions related with an SE in the TKS. There are no specific rules in the national legislation concerning the involvement (information, consultation) of employees in cooperatives. The general rules on employees' involvement (information, consultation) are similarly applicable in cooperatives, as in other types of undertakings. There are no rules on employees' participation in the national legislation.

According to the national legislation provided for TLS § 1 (1), an employee is a natural person who does work for another person (employer) in subordination to the management and supervision of the employer on the basis of an employment contract. All persons falling into the specified category are considered as employees. In the context of the cooperatives there is no difference compared to regulation on employees and employment relationship of other undertakings. Employees of cooperatives and employment in cooperatives are submitted to the general rules of labour law. There is no difference for employees being members and for employees who are not the members of cooperatives.

Implementation of the Directive in the national regulation framework: The Act amending TKS § 2 2) stipulates that the involvement of employees means provision of information and consultation to employees and their participation in the activities of an SCE. The definition on involvement of employees does not follow the exact wording of the Directive. However, the meaning of involvement of employees becomes clear in interaction with definitions on information, consultation and participation defined further in the TKS.

- **“Information”**

Legal situation prior to adoption of the Directive: The term information is defined in the national context by TUIS § 19 (1). More or less, it provides for the same wording as TKS § 3 1).

Implementation of the Directive in the national regulation framework: According to TKS § 3 1), information means the informing of the employees' representatives on an appropriate level which allows the employees to receive a clear and sufficiently detailed overview of the structure and economic and employment situation of an undertaking on time, and the possible development of the structure and situation and other circumstances affecting the interests of employees, and to understand the impact of the situation and other circumstances on the employees. In addition to a basic definition on the information, the Act amending TKS § 45 provides for the extent of informing employees' representatives. The competent organs of the SCE shall inform the RB or the employees' representatives on issues relating to the SCE and any of its subsidiaries or establishments located in the Member States or which exceed the competence of an organ of an establishment operating in one Member State. Informing shall take place at a time, in the manner and with a content which allows the employees' representatives to thoroughly examine the possible effect of the decisions and, if necessary, prepare for consultations with the competent organ of the SCE.

- **“Consultation”**

Legal situation prior to adoption of the Directive: The term “consultation” is specified in the national context by TUIS § 19 (2). More or less, it provides for the same wording as TKS § 3 2).

Implementation of the Directive in the national regulation framework: According to TKS § 3 2), consultation means the establishment of dialogue and exchange of views between the employees' representatives and an undertaking on an appropriate level which allows the employees' representatives to express opinions and receive reasoned responses to the submitted opinions from the undertaking. The definition of consultation does not follow the exact wording of Directive Article 2 (j). Nevertheless, it does not undermine the overall understanding of the meaning of consultation and its purpose in the TKS. The main concept of consultation is clear.

- **“Participation”**

Legal situation prior to adoption of the Directive: There is no regulation, except similar provisions related with a SE in the TKS.

Implementation of the Directive in the national regulation framework: The Act amending TKS § 46 prescribes that participation of employees means the influence of the representative body of employees or the employees in the affairs of a legal entity by way of: 1) the right to elect or appoint some of the members of the legal entity's supervisory or administrative board, or 2) the right to recommend or oppose the appointment of some or all of the members of the legal entity's supervisory or administrative board.

3.3 Procedure for negotiation of the rights of involvement of workers in the SCE (Article 3)

Responsibility of procedure; start of procedure (Article 3.1.)

The Act amending TKS § 50 provides for the necessary measures for initiation of negotiations. Where the management or administrative boards of participating legal entities draw up a plan for the establishment of an SCE, they shall as soon as possible take the necessary steps, including providing information about the identity of the participating legal entities, concerned subsidiaries or establishments, and the number of their employees, to start negotiations with the representatives of the legal entities' employees on arrangements for the involvement of employees in the SCE. Information on the number of employees shall be presented by each Member State and information shall be indicated concerning all relevant undertakings and establishments separately. If employees in participating legal entities have the right to participate, information shall also be provided on the form and extent of participation and the proportion of employees' representatives of the total number of employees in all the participating legal entities shall be indicated.

Constitution and composition of the SNB (Article 3.2.a)

According to the Act amending TKS § 51, an SNB shall be formed from the employees' representatives of participating legal entities and relevant subsidiaries and establishments in order to start negotiations on arrangements for the involvement of employees in the SCE. Members of an SNB are elected or appointed in proportion to the number of employees employed in each Member State where the participating legal entities and concerned subsidiaries or establishments are located, by allocating in respect of a Member State one seat per portion of employees employed in that Member State which equals 10 per cent of the number of employees employed by the participating legal entities and concerned subsidiaries or establishments in all the Member States taken together. Members shall be elected in each Member State pursuant to the procedure for election or appointment prescribed in the Member State.

The Act amending TKS § 52 provides for the special regulation on election of additional members in case of formation of the SNB upon formation of the SCE by way of merger. If the members of an SNB are elected or appointed according to TKS § 51 (2) and an SCE is formed by way of merger, additional members shall be elected or appointed according to the legislation of the corresponding Member State if the participating legal entity terminating its activities as an independent legal person as a result of the merger is not represented through

its member. The number of additional members corresponds to the number of participating legal entities who are not represented in the SNB. The number of such additional members does not exceed 20 per cent of the number of members designated according to TKS § 51 (2). If, according to TKS § 51 (2), the number of participating legal entities which are not represented through a member in a SNB is less than 20 per cent of the number of members in the SNB, each participating legal entity which is not represented shall present one additional member. If, according to TKS § 51 (2), the number of participating legal entities which are not represented through a member in a SNB is more than 20 per cent of the number of members in the SNB, the additional seats shall be divided between cooperatives which are not represented. The division shall be made pursuant to the number of employees in cooperatives. The division of additional seats shall be commenced from the largest cooperative and shall be continued by decreasing order pursuant to the number of employees.

Constitution and composition of the SNB; election of the members of the SNB (Article 3.2.b)

According to the Act amending TKS § 41 (1) and (2), the provisions on the election of the members of the SNB apply to the election of the members of the SNB who represent Estonian employees. Here, the TKS has explicitly provided for the application of accessory rules of the Directive.

The Act amending TKS § 54 determines the method to be used for the election or appointment of the members of the SNB who represent Estonian employees. The provision refers back to the same method which is used to elect the members of the SNB regarding the establishment of a European Works Council or another procedure for informing and consulting provided for by TKS § 17. In other words, the members of the SNB are elected by the general meeting of the employees and in case, there are several undertakings or establishments located in Estonia, a joint representation formed of the employees' representatives shall elect the members of the SNB.

According to TKS § 54 a member or members of an SNB representing the employees of a participating legal entities and a concerned subsidiary or establishment located in Estonia shall be elected pursuant to the procedure provided for in § 17 of the TKS, taking account of the specifications arising from this section. The joint representation shall take the following conditions into account upon election of a representative or representatives of Estonia in an SNB: 1) if possible, each participating legal entity is represented in the SNB through at least one member; 2) if the number of Estonian members in the SNB is smaller than the number of participating legal entities located in Estonia upon foundation of the SCE, the participating legal entity employing the largest number of employees is taken into account first. If Estonia has the right to elect additional members to an SNB, these members shall be elected pursuant to the same procedure.

According to TKS § 17, members of the SNB representing employees of a participating legal entity and a concerned subsidiary or establishment shall be elected by the general meeting of employees. The procedure for the election of a member or members of the SNB shall be approved by the general meeting of employees. The election procedure shall ensure that all employees have the possibility to participate in the elections. If several participating legal entities and concerned subsidiaries or establishments are located in Estonia, a joint

representation formed of the employees' representatives shall elect the members of the SNB. Three employees' representatives elected from among the employees pursuant to the procedure for the election of members of the SNB shall belong to the joint representation in each concerned undertaking or establishment. The joint representation shall be convened by the eldest employees' representative of a participating legal entity or a concerned subsidiary or establishment which employs the greatest number of employees. The number of votes of a member of the joint representation shall be determined in proportion to the number of employees in a participating legal entity and a concerned subsidiary or establishment represented thereby. Employees' representatives of the same participating legal entity and a concerned subsidiary or establishment shall each have the same number of votes.

The TKS does not provide whether the members of the SNB are obliged or not to be the employees of the corresponding undertakings. Therefore, the members of the SNB can be either the employees of the undertakings or not. Consequently, the members of the SNB can be as well the representatives of a trade union, even if it is not explicitly stated in the TKS.

Equal treatment in election of employees' representatives is ensured by the Gender Equality Act¹⁶. The Act applies to all areas of social life. It provides for the prohibition on discrimination based on sex in the private and public sectors, as well as the obligation of employers to promote gender equality of men and women.

The functions of the SNB; concluding an agreement and informing the SNB (Article 3.3.)

The Act amending TKS § 56, prescribes that an SNB and the competent organs of participating legal entities shall determine, by a written agreement, the procedure for the involvement of employees in the SCE. Therefore, the competent organs of the participating legal entities shall inform the SNB of a plan to found the SCE and the actual process of foundation of the SCE until the SCE is entered in the register. An agreement is, after the entry into force thereof, binding to an SCE, subsidiaries and establishments located in a Member States and the employees of the SCE, subsidiaries and establishments.

Decision-making in the SNB (Article 3.4.)

The Act amending TKS §§ 57 and 55 provides for a decision-making process in the SNB. The SNB shall take decisions by an absolute majority of its members, provided that such a majority also represents an absolute majority of the employees. Each member of the SNB has one vote. Should the result of the negotiations lead to a reduction of participation rights of employees, the majority required for a decision to approve such an agreement shall be the votes of two thirds of the members of the SNB representing at least two thirds of the employees, including the votes of members representing employees employed in at least two Member States if: 1) an SCE is to be established by way of merger and participation covers at least 25 per cent of the overall number of employees of the participating cooperatives, or 2) an SCE is to be established by any other way and if participation covers at least 50 per

¹⁶ Soolise võrdõiguslikkuse seadus (Gender Equality Act). Passed on 7 April 2004 - RT I 2004, 27, 181; 2008, 56, 315 (Available in English at the website: <http://www.legaltext.ee/text/en/X80041.htm>).

cent of the overall number of employees of the participating legal entities. Reduction of participation rights means a proportion of members of the supervisory or administrative boards of the SCE, which is lower than the highest proportion existing within the participating legal entities. If the number of represented employees is of determinative importance upon voting in the SNB, the members elected from Estonia represent employees in a number which shall be calculated by dividing the total number of employees of all participating legal entities and concerned subsidiaries or establishments located in Estonia by the number of Estonian representatives in the SNB.

Involvement of experts in negotiations (Article 3.5.)

The Act amending TKS § 58 provides that for the purpose of the negotiations, the SNB may request experts of its choice to assist it with its work. Among others, representatives of appropriate Community level trade union organisations may be involved. Such experts may be present at negotiation meetings in an advisory capacity at the request of a member of the SNB, where appropriate to promote coherence and consistency at Community level.

The functions of the SNB; decision of the SNB not to open negotiations or to terminate negotiations already opened (Article 3.6.)

The Act amending TKS § 60 prescribes that the SNB may decide by the majority 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. Such a decision shall stop the procedure to conclude the agreement on involvement of employees. In this case, the standard rules provided for by the TKS do not apply.

The majority required to make a decision shall be the votes of two thirds of the members of the SNB representing at least two thirds of the employees, including the votes of members representing employees employed in at least two Member States.

The SNB shall be reconvened on the written request of at least 10 per cent of the employees of the SCE, its subsidiaries and establishments, or their representatives, at the earliest two years after a decision specified above is made, unless the parties agree to negotiations being reopened sooner. If the SNB decides to reopen negotiations but no agreement is reached as a result of those negotiations, none of the standard rules provided for by the TKS apply.

In the case of an SCE established by way of transformation, TKS § 60 does not apply if there is participation of employees in the cooperative to be transformed.

Expenses of the SNB (Article 3.7)

TKS § 20 (6) and the Act amending TKS § 61 provides that any reasonable expenses relating to the formation or functioning of the SNB and to negotiations with participating legal entities shall be borne by the participating legal entities so as to enable the SNB to carry out its task in an appropriate and unhindered manner. If an expert is involved on the initiative of the SNB, the participating legal entities shall compensate for the expenses of inviting of at least one expert.

3.4 Involvement agreement (art. 4)

The Act amending TKS § 62 provides for the regulation on the content of the agreement. The competent organs of participating legal entities and the SNB shall negotiate in a spirit of cooperation and mutual trust with a view to reaching an agreement on arrangements for the involvement of the employees within the SCE.

The written agreement between the competent organs of participating legal entities and the SNB shall specify: 1) the scope of the agreement; 2) the composition, number of members and allocation of seats on the RB which will be the discussion partner of the competent organ of the SCE in connection with arrangements for the procedure for information and consultation of the employees of the SCE and its subsidiaries and establishments; 3) the functions and the procedure for information and consultation of the RB; 4) the frequency of meetings of the RB; 5) the financial and material resources to be allocated to the RB; 6) if, during negotiations, the parties decide to establish one or more information and consultation procedures instead of a RB, the arrangements for implementing those procedures; 7) if, during negotiations, the parties decide to establish arrangements for the participation of employees, the substance of those arrangements including, if applicable, the number of members in the SCE's supervisory or administrative board which the employees will be entitled to elect, appoint, recommend or oppose, the procedures as to how these members may be elected, appointed, recommended or opposed by the employees, and their rights; 8) 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. The agreement should be renegotiated in the event of structural changes in the SCE and its subsidiaries and establishments which occur after the creation of the SCE.

The parties can subject the agreement to the standard rules only if they agree on that. An agreement shall be signed by the representatives of participating legal entities and members of the SNB who voted in favour of the agreement. The minutes of the meeting, which sets out the voting results of the SNB shall be appended to the agreement.

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 cooperative to be transformed into an SCE. Any agreements which derogate from the aforesaid provisions are void. In this case, the standard rules apply.

3.5 Duration of negotiations (art. 5)

The Act amending TKS § 59 prescribes that negotiations shall commence as soon as the SNB is established and may continue for six months thereafter. The SNB shall inform the relevant third persons, including trade unions, of initiation of negotiations. The parties may decide, by joint agreement, to extend negotiations beyond six months up to a total of one year from the establishment of the SNB.

3.6 Legislation applicable to the negotiation procedure (Article 6)

The Act amending TKS § 41 (1) and (2) prescribes that the regulation of the TKS providing for the involvement of employees at SCE level applies if the registered office of an SCE which is being founded is Estonia. Regardless of the registered office of an SCE, the

corresponding provisions of the TKS apply to the election of the members of the SNB and the RB who represent Estonian employees.

3.7 Standard rules (article 7)

The Act amending TKS §§ 63, 64 provides for the general provisions on implementing the standard rules on employee involvement. According to TKS § 63 the RB shall be founded as of the date of registration of an SCE in Estonia according to the standard rules if the parties so agree or within the term provided for in TKS § 59 no agreement has been concluded, and the competent organ of each of the participating legal entities decides to continue with its registration of the SCE, and the SNB has not taken the decision not to open negotiations or to terminate negotiations already opened.

TKS § 64 provides for the cases when regulation on employee participation will be applied. The provisions regulating employee participation apply in the case of an SCE established by transformation and merger (thus, not making use of the exception of article 7.3 of the Directive) and in the case of an SCE established by any other way.

The provisions regulating employee participation apply in the case of an SCE established by transformation, if the rules of a Member State relating to employee participation in the supervisory or administrative board were applied to a cooperative transformed into an SCE.

The provisions regulating employee participation apply in the case of an SCE established by merger if: 1) before registration of the SCE, one or more forms of participation applied in one or more of the participating cooperatives covering at least 25 per cent of the total number of employees in all the participating cooperatives, or 2) before registration of the SCE, one or more forms of participation applied in one or more of the participating cooperatives covering less than 25 per cent of the total number of employees in all the participating cooperatives and if the SNB so decides.

The provisions regulating employee participation apply in the case of an SCE established by any other way if: 1) before registration of the SCE, one or more forms of participation applied in one or more of the participating legal entities covering at least 50 per cent of the total number of employees in all the participating legal entities, or 2) before registration of the SCE, one or more forms of participation applied in one or more of the participating legal entities covering less than 50 per cent of the total number of employees in all the participating legal entities and if the SNB so decides.

The SNB shall inform the competent organs of the participating legal entities of any aforementioned decisions.

If none of the participating legal entities was governed by participation rules before registration of an SCE, the latter shall not be required to establish provisions for employee participation.

Standard rules for composition of the RB

The Act amending TKS §§ 65-69¹ provides for the standard rules on regulation of the RB. The RB shall be composed of employees of an SCE and its subsidiaries and establishments elected or appointed in each corresponding Member State pursuant to the procedure

prescribed therefor. The provisions of the election of the members of the SNB apply to the election of the members of the RB who represent Estonian employees (see paragraph 2.2.3., chapter III.2.).

Members of the RB are elected or appointed in proportion to the number of employees employed in each Member State by the participating legal entities 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 per cent of the number of employees employed by the participating legal entities and concerned subsidiaries or establishments in all the Member States taken together. The competent organ of an SCE shall be informed of the composition of the RB.

If the number of employees of participating legal entities changes significantly or the structure of the participating legal entities changes and these changes affect the allocation of seats and the number of members, the allocation and number of seats of the RB shall be brought into conformity with the changes.

The RB may form a select committee with up to three members. The RB shall adopt its rules of procedure. An SCE shall compensate for any reasonable expenses relating to the activities of the RB and the select committee so as to enable the RB and the select committee to carry out their task in an appropriate and unhindered manner. The SCE shall primarily compensate for the following expenses: 1) expenses related to the organisation of meetings; 2) expenses related to the provision of the translation services; 3) travel and accommodation expenses incurred by members; 4) expenses related to inviting at least one expert. Also, in so far as this is necessary for the fulfilment of their tasks, the members of the RB shall be entitled to time off for training without loss of wages. At least 14 calendar days a year shall be ensured for training without loss of average wages.

Four years after the RB is established it shall examine whether to open negotiations for the conclusion of the agreement on involvement of employees or to continue to apply the standard rules provided for by the TKS. If a decision is made to hold negotiations for the conclusion of an agreement, the RB has the same rights and obligations as the SNB. Where, by the due date by which the negotiations come to an end, no agreement has been concluded, the arrangements initially adopted in accordance with standard rules shall continue to apply.

Standard rules for information and consultation

The Act amending TKS §§ 70-74 provides for information and consultation procedure.

Upon informing and consulting, the competence of the RB shall be limited to 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. There are provisions on regular informing and consulting of RB and on informing and consulting if exceptional circumstances become evident.

The RB has the right to be informed and consulted on the basis of regular reports prepared by the competent organ, which concern the activities and further development of an SCE, and to meet the competent organ of the SCE at least once a year for that purpose. Local persons responsible for management shall also be informed thereof. The competent organ of an SCE shall provide the RB with the agenda for meetings of the administrative board or the

management body and supervisory board, and with copies of all documents submitted to the general meeting of its members. The meeting shall relate in particular 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, division, transformation or closures of undertakings and transfer of establishments or important parts thereof, and collective redundancies.

Where there are exceptional circumstances affecting the employees' interests to a considerable extent, particularly in the event of closure of establishments or undertakings, relocations, take-overs and collective redundancies, the RB has the right to be informed. The RB has the right to meet, at its request, the SCE competent organ or persons responsible for management having their own powers of decision on any level of management of the SCE in order to receive information on measures significantly affecting employees' interests and hold consultations on these questions. In urgent matters, the select committee has the right to request a meeting on the basis of a decision of the RB. Where the competent organ decides not to act in accordance with the opinion expressed by the RB, this body has the right to a further meeting with the competent organ of the SCE. At the further meeting, the parties attempt to seek agreement. In the case of a meeting organised with the select committee, those members of the RB who represent employees who are directly concerned by the measures in question also have the right to participate in the meeting. The meetings do not affect the prerogatives of a competent organ.

Before any meeting with the competent organ of an SCE, the members of the RB or the select committee, where necessary enlarged, shall be entitled to meet without the representatives of the competent organ being present. The RB or the select committee may use the assistance of experts chosen thereby.

Members of the RB shall inform the employees' representatives of an SCE and its subsidiaries and establishments of the content and results of a procedure for informing and consulting.

Standard rules for participation

The Act amending TKS §§ 75 and 76 prescribes the standard rules on employee participation in SCE.

In the case of an SCE established by transformation, if the national provisions of a Member State relating to employee participation in the supervisory or administrative board were applied before the registration of the SCE, all aspects of employee participation shall continue to apply to the SCE.

In other cases of the foundation of an SCE, the employees of the SCE, its subsidiaries and establishments or their RB have the right to elect, appoint, recommend or oppose the appointment of a number of members of the supervisory or administrative board of the SCE equal to the highest proportion in force in the participating companies concerned before registration of the SCE.

In the case of one or more forms of participation applied in the participating legal entities, the SNB shall decide the form which is established in the SCE. The SNB shall inform the competent organs of the participating legal entities of the decision made.

The RB shall decide on the allocation of seats within the supervisory or administrative board 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 boards according to the proportion of the SCE's employees in each Member State. If, as a result of allocation of seats, employees of one or several Member States do not have a representative in the supervisory or administrative board, the RB shall give one of the seats allocated to the Member State, primarily if the Member State is a Member State of the registered office of the SCE. If a seat has already been allocated for the representative of the Member State of the registered office of the SCE, the seat shall be given to the Member State employing the greatest number of employees.

Every member of the supervisory or administrative board of an SCE who has been elected, appointed or recommended by RB or the employees shall be a full member with the same rights and obligations as the members representing the members of cooperative, including the right to vote.

If one or several seats have allocated for Estonia in the supervisory or administrative board of an SCE, a member or members representing employees shall be elected taking account of the specifications for the election of members of the supervisory or administrative board of an SCE. The provisions of the election of the members of the SNB and of the RB apply to the election of members of supervisory or administrative board of SCE who represent Estonian employees (see paragraph 2.2.3., chapter III.2. and paragraph 2.2.7., chapter II.2.).

3.8 Rules applicable to SCEs established exclusively by natural persons or by a single legal entity and natural persons (article 8)

The Act amending the TKS provides for the specific rules related to SCEs established by natural persons or by a single legal entity and natural persons. According to TKS § 41¹ 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 main provisions of the TKS concerning the procedure on the involvement of employees shall apply (chapter 3 part 2 of the TKS).

In the case of an SCE 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, employee involvement shall be governed by the following: in the SCE itself, the provisions of the Member State of the SCE's registered office, which are applicable to other entities of the same type, shall apply, in its subsidiaries and establishments, the provisions of the Member State where they are situated, and which are applicable to other entities of the same type, shall apply. 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 employee participation rights shall continue to apply.

In the aforesaid cases employee involvement in the SCE or in its subsidiaries or establishments shall be governed by the provisions which are applicable to other entities of the same type. In national law a cooperative is regulated by the TÛS. According to TÛS § (1) a commercial association is a company the purpose of which is to support and promote the economic interests of its members through joint economic activity in which the members participate: 1) as consumers or users of other benefits; 2) as suppliers; 3) through the use of services; 4) through work contribution or 5) in any other similar manner. According to the national legislation provided for TLS § 1 (1), an employee is a natural person who is working under the supervision and control on the basis of an employment contract for the employer. The provisions of the ÄS concerning companies apply to associations, unless otherwise provided for the TÛS. Information and consultation in associations is governed by the TUIS. In the context of cooperatives there are no differences compared to rules on employees' involvement in other types of undertakings. There are no rules on employees' participation provided for by the Estonian law.

If, after the registration of an SCE, where the employees involvement is governed by the rules of the Member State of the SCEs registered office, 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 if the total number of employees reaches or exceeds 50 employees in at least two Member States, the main provisions of the TKS concerning the procedure on the involvement of employees shall apply (chapter 3 part 2 of the TKS), *mutatis mutandis*. In this case, 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.

3.9 Participation in the general meeting or section or sectorial meeting (article 9)

The Act amending the TKS provides no such rules. The national law prescribes no right for employees' participation in the general meetings or in the section or sectorial meetings with voting rights.

3.10 Confidentiality of information (article 10)

Legal situation prior to adoption of the Directive: TUIS §§ 11, 15 and 16 provide for an obligation of an employee trustee not to reveal any information which has expressly been provided to him or her in confidence upon performance of his or her duties to third parties and for an employer's right to refuse to transmit information when its nature is such that, according to objective criteria, it seriously harms or may harm the functioning of the employer. Also, AÛS § 22 (3) refers back to the TUIS in relation to a shop-steward obligation to keep confidential information, as well as to an employer's right to refuse to transmit information. According to TUIS § 9 7) an employee trustee has the right to initiate judicial appeal procedure when an employer demands confidentiality or does not give information.

Implementation of the Directive in the national regulation framework: The Act amending TKS §§ 78 and 79 provides for the regulation on reservation and confidentiality. Members of the SNB, members of the RB, involved experts and translators and employees' representatives participating in a procedure for informing and consulting if, during negotiations, the parties decided to establish one or more information and consultation

procedures instead of a RB, are not authorised to reveal any information which has expressly been provided to them in confidence upon performance of their duties to third parties or use the information otherwise in conflict with the TKS. The obligation to maintain the confidentiality of information also applies after the expiry of the terms of office of the specified persons. If the persons specified afore, except experts and translators, do not agree with the confidentiality of the communicated information, the supervisory or administrative board of an SCE or of a participating legal entity is required to justify the confidentiality of the information at the request of an employees' representative.

The obligation of confidentiality does not extend to the communication between members of the RB and other members of the corresponding RB and employees' representatives of an SCE, its subsidiaries and establishments if they must be informed of the content and results of a procedure for informing and consulting, and to the communication with translators and experts who assist the RB in its work. Also, the obligation of confidentiality does not apply to: 1) the communication between members of the SNB and experts and translators and 2) employees' representatives participating in a procedure for informing and consulting if, during negotiations, the parties decided to establish one or more information and consultation procedures instead of a RB, who communicates with translators and experts and employees' representatives of the SCE located in Estonia, its subsidiaries and establishments in the course of a procedure for informing and consulting, if they must be informed of the content and results of the procedure for informing and consulting.

The supervisory or administrative board of an SCE or of a participating legal entity may refuse to transmit information when its nature is such that, according to objective criteria, it seriously harms or may harm the functioning of the participating legal entity, of the SCE or its subsidiaries and establishments. This right does not extend to the number of employees. If provision of information is refused, the supervisory or administrative board of an SCE or of the participating legal entity is required to give justification based on objective criteria why transmission of the information seriously harms or may harm the functioning of the undertaking.

Members of the SNB, members of the RB and employees' representatives participating in a procedure for informing and consulting if, during negotiations, the parties decided to establish one or more information and consultation procedures instead of a RB, have the right of recourse to courts in order to resolve disputes arising from the confidentiality of information and refusal to provide information.

The rules of the Directive concerning reservation and confidentiality are not sufficiently clearly transposed into Estonian law and therefore may cause misinterpretations on confidentiality issues. The Act amending the TKS provides neither for the confidentiality obligation of the employees' representatives provided for by national law nor their right to initiate judicial appeal procedures in case of the confidentiality of information and refusal to provide information. However, the TUIS, passed on 13 December 2006, provides explicitly for the obligation of an employees' representative not to reveal any information which has expressly been provided to him or her in confidence and the right of an employees' representative to initiate judicial appeal procedure when an employer demands confidentiality or does not give information. The meaning and the wording of the respective provisions in the TUIS has followed the idea of the Directive. In interaction with the TUIS and based on methodical interpretation, an employees' representative has a confidentiality

obligation, regardless of information received on the national or Community-wide level, and the right to appeal. Although, it may still give rise to misunderstandings and misinterpretations, as the TKS nor the TUIS clearly refers to the rules on confidentiality and on the right to judicial appeal procedures respectively in the TUIS or in the TKS. There is no clear distinction between the main and accessory provisions in the TKS. Also, the law should prescribe if the confidential information is allowed to forward, it should be clearly forwarded as confidentially received information.

3.11 Spirit of cooperation (article 11)

According to the Act amending TKS § 49, the competent organ of an SCE and the RB shall cooperate in a spirit of mutual trust with due regard for their reciprocal rights and obligations. The principle also applies to the cooperation between the supervisory or administrative board of an SCE and employees' representatives in connection with a procedure for informing and consulting employees.

3.12 Protection of employees' representatives (article 12)

Legal situation prior to adoption of the Directive: According to TLS § 92 (1) 4), it is prohibited for an employer to terminate an employment contract due to the reason that an employee represents other employees on the basis provided by law. TLS § 92 (3) provides for the burden of proof. If an employer terminates an employment contract with the employees' representative during their term of office or within one year of the expiry of their term of office, it shall be deemed that the employment contract has been terminated due to the reason specified in TLS § 92 (1) 4), unless the employer proves that it terminated the employment contract on a basis permitted in this Act. According to TLS § 94 before terminating of an employment contract with the employees' representative an employer shall seek the opinion of the employees who chose the person to represent them or the trade union about the terminating of the employment contract. The employees who chose the person to represent them or the trade union shall give their opinion within ten working days of being asked for their opinion. The employer shall take the opinion of the employees reasonably into account. The employer shall justify the disregarding of the opinion of the employees.

According to TUIS § 13, at the request of a trustee, an employer is required to allow the trustee to perform his or her duties during working time: 1) if the trustee represents 5 to 100 employees – minimum 4 hours per week; 2) if the trustee represents 101 to 300 employees – minimum 8 hours per week; 3) if the trustee represents 301 to 500 employees – minimum 16 hours per week; 4) if the trustee represents more than 500 employees – 40 hours per week (throughout the working week). TUIS § 14¹ provides for an employee's right to receive from the employer the employee's average wage throughout the period the employee performs the duties of a trustee.

Implementation of the Directive in the national regulation framework: The Act amending TKS § 80 provides for the guarantees of employees' representatives

participating in involvement. The provisions concerning the guarantees prescribed for employees' representatives in the TLS apply to the guarantees of the members of the SNB, of the members of the RB and of the employees' representatives connected with the performance of informing and consulting duties and of the employees' representatives belonging to the supervisory or administrative board of an SCE, and who are the employees of the SCE or its subsidiaries and establishments or of a participating legal entity, provided that they are employed in Estonia. Employees' representatives specified afore shall be granted a period of absence to represent employees to the extent necessary for the performance of their duties arising from the TKS. In the TKS period of absence to represent employees depends on the extent necessary for the performance of duties. The TKS does not provide for the concrete hours for representing employees. Fixed time is prescribed for by the TUIS for representing employees at local level. Average wages shall be continued to the employees' representatives for the period of absence.

3.13 Misuse of procedures (article 13)

The Act amending TKS §§ 81 and 82 provides for the appropriate measures with a view to prevent the misuse of an SCE.

If, after the registration of an SCE, significant changes are made in the SCE in connection with a subsidiary or establishment and it may be concluded that, upon foundation of the SCE, objective was to deny employees the right of involvement or restrict the exercise of such rights, new negotiations shall be held. If an SCE is founded with a purpose to deny employees the right of involvement or restrict the right, holding of the negotiations is not restricted by the changes following the foundation of the SCE.

The negotiations shall be initiated at the written request of the RB or the employees' representatives of new subsidiaries and establishments of an SCE. In order to hold negotiations, arrangements for negotiations on the involvement of employees prescribed upon foundation of an SCE shall be applied, having regard to the following: 1) after the registration of the SCE, the participating legal entities are deemed to be the SCE and its subsidiaries and establishments respectively; 2) the SNB is, after the registration of the SCE, deemed to be the RB; 3) the period prior to the registration of the SCE is deemed to be a period preceding failure of the negotiations.

The significant changes mean changes in the structure, number of employees or registered office of an SCE, its subsidiaries and establishments if these had caused different application of standard rules according to provisions regulating employee participation (TKS § 64) and if the circumstances specified in TKS § 64 had become evident before the foundation of the SCE and the negotiations held during the period had failed. Unless proved otherwise, it is presumed that the significant changes indicate an intention to found an SCE in a manner which denies employees the right of involvement or restricts the right if the significant changes occur within a year after the registration of the SCE.

A member of the RB and an employees' representative of the SCE's new subsidiaries and establishments has the right of recourse to courts to resolve disputes arising from the misuse of an SCE with a claim to recognise the right to negotiate. A claim expires within one year as of the date on which a member of the RB and an employees' representative of the SCE's new

subsidiaries and establishments becomes or should have become aware of the significant changes in the SCE.

3.14 Compliance (article 14)

The Act amending TKS § 77 provides for prohibition on hindering involvement of employees. It is prohibited to restrict the rights of the RB and the SNB, including to hinder and influence their establishment and operation, and the establishment and conduct of a procedure for informing, consulting and participation. It is prohibited to influence and hinder the activities of members of the RB, of members of the SNB and employees' representatives involved in a procedure for informing, consulting and participation through the restriction of their rights or allowing preferences.

Enforcement procedures for compliance with the Directive are provided for by the Act amending TKS, as well as by the TKS (TKS §§ 83 and 88). State supervision over compliance with the requirements of the TKS, regardless of whether or not the SCE has its registered office in Estonia, is exercised by the Labour Inspectorate according to the procedure prescribed by the 6th chapter of the Occupational Health and Safety Act¹⁷. Upon violation of the requirements, a labour inspector or the head of a regional office of the Labour Inspectorate has the right to issue a precept. Upon failure to comply with a precept, a labour inspector or the head of a regional office of the Labour Inspectorate may impose a penalty payment. The upper limit of penalty payment for each imposition thereof is 50 000 kroons/3195,5824 euros¹⁸.

Violation of the prohibition on international informing and consulting and involvement of employees is punishable by a fine of up to 200 fine units, which is 12 000 kroons/766,9397 euros. The same act, if committed by a legal person, is punishable by a fine of up to 50 000 kroons/3195,5824 euros. According to Penal Code¹⁹ § 47 (1), a fine unit is the base amount of a fine and is equal to 60 kroons/3,8346 euros. Failure to perform the obligation of annual informing and consulting or informing and consulting under exceptional circumstances, as well as failure to inform or submit of incomplete or false information of the number of employees or of the distribution of employees between Member States is punishable by a fine of up to 200 fine units, which is 12 000 kroons/766,9397 euros. The same act, if committed by a legal person, is punishable by a fine of up to 50 000 kroons/3195,5824 euros. Violation of the obligation not to reveal any confidential information by the members of the SNB, of the RB, the involved experts and translators and the employees' representatives participating in a procedure for informing and consulting, if, during negotiations, the parties decided to establish one or more information and consultation procedures instead of a RB, is punishable by a fine of up to 100 fine units, which is 6000 kroons/383,4698 euros. Extra-judicial proceedings concerning the misdemeanours of the TKS shall be conducted by the

¹⁷ Töötervishoiu ja tööohutuse seadus (Occupational Health and Safety Act). Passed on 16 June 1999 - RT 1999, 60, 616; 2009, 29, 176 (Available in English at the website: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30078K6&keel=en&pg=1&ptyyp=RT&tyyp=X&query=t%F6%F6tervishoiu+ja+t%F6%F6ohutuse+seadus>).

¹⁸ One euro is 15,6466 Estonian kroons.

¹⁹ Karistusseadustik (Penal Code). Passed on 6 June 2001 - RT I 2001, 61, 364; 2009, 30, 177. (Available in English at the website: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30068K8&keel=en&pg=1&ptyyp=RT&tyyp=X&query=karistusseadustik>).

Labour Inspectorate. The provisions provided for in the implementation of the Directive are similar to the usual National ones.

In addition to state supervision exercised by the Labour Inspectorate and extra-judicial proceedings concerning the misdemeanours conducted by the Labour Inspectorate, there is a special right of recourse to courts in order to resolve disputes arising from the confidentiality of information and refusal to transmit information (TKS § 79), as well as the right of recourse to courts to resolve disputes arising from the misuse of an SCE (TKS § 82).

3.15 Link between the Directive and other provisions (article 15)

According to the Act amending TKS § 41 (3), if an SCE is a Community-scale undertaking or a controlling undertaking of a Community-scale group of undertakings, the rules on involvement of employees at SCE level apply to the SCE and its subsidiaries. The rules on involvement of employees on level of Community-scale undertakings and Community-scale groups of undertakings apply if the SNB of the SCE decides not to initiate negotiations or to terminate the already initiated negotiations.

Application of the TKS does not restrict the right of employees to be informed and consulted which is prescribed by other acts.

There are no provisions concerning the transposition of Article 15.2 of the Directive into national law, as the Estonian law prescribes no rules on the participation of employees in company bodies.

4. Practical implementation

Effects of implementation

Prior to the transposition of the Directive into Estonian law, the positive law provided for no right to involvement (information, consultation and participation) of employees in the affairs of SCE. Also, it was not possible to form an SCE. Establishment of the SCE and procedure for the involvement of employees in the SCE at a Community wide level is a new legal category.

However, it has to be noted and bear in mind that the Act has passed by the Parliament on 14 February 2007 and it entered into force 23 March 2007. Taking into consideration the aforesaid, the regulation on involvement of employees in the SCE based on the Directive has been in force approximately two years and there is no real information concerning the practical application of the relevant provisions of the TKS, as well there is neither changes caused by interpretation nor corresponding jurisprudence.

There are no specific action strategies of social agents concerning the implementation of rules of the Directive in Estonia.

Transposition of the Directive into Estonian law has certainly impacted on the development of national law. Prior to the incorporation, Estonian commercial law did not know the special form of the cooperative established on the Community level, called SCE. Also, labour law did not know the concept of involvement of employees in the SCE. Transposition of the

Directive into Estonian law has created a legal basis for the employees' right to be informed, consulted and, if it is a case, to participate in activities of SCE. Legal regulation on the involvement of employees has most certainly benefited to better understanding on the involvement of employees and to stressing the importance of promoting the social dialogue in the undertakings.

Position of the social partners

The Act passed the coordination process with different ministries and social partners. The social partners made no comments during the coordination process of the draft. Presented proposals were minor technical ones. There have been no principal debates and problems with the social partners on transposition of the Directive.

Statistical information on impact

There is no statistical information on impact of the implementation of the TKS.

5. Assessment of the results of implementation

Incorporation of the Directive into Estonian law has been quite successful and the national regulation framework fulfils the requirements of the Directive in the main. Nevertheless, there are some rules of the Directive that have not been transposed into Estonian law with sufficient precision.

Following the Directive, Estonian law should be amended in the following issues which are mostly due to unclear distinction between the main and accessory provisions of the Directive:

- definition of the *subsidiary*;
- identification of employees' representatives; and
- confidentiality obligation of the employees' representatives provided for by national law and their right to initiate judicial appeal procedures in case of the confidentiality of information and refusal to provide information.

6. Conclusions

The Act has been in force approximately two years. The regulation is sufficiently new and has been in force for a considerably short time. Real effects of practical implementation can not be identified yet. No problems have been emerged in practice and in jurisprudence. It might be said that because of the modest position of the regulation of an SCE, the employees involvement in the activities of an SCE will most probably have a marginal practical importance in Estonian legal system in near future.

There have been no dissenting opinions among social partners and government in preparatory work of the Act. The EAKL, the TALO and the ETTK have made no comments during the coordination process of the draft Act, as well as during the proceedings in the Parliament.

It must be said that the regulation of the Directive can be described as very detailed and technical which leaves not much to be decided by the Member States. The incorporation of

the Directive into Estonian law has been quite successful and the national regulation framework fulfils the requirements of the Directive in the main. Nevertheless, there are some rules of the Directive that have not been transposed into Estonian law with sufficient precision.

1. The main concern is the unclear distinction of main and accessory provisions of the Directive which may give rise to misinterpretations of the some provisions of the Act. The Act has explicitly provided for the application of accessory rules of the Directive only in the case of the election of the members of the SNB and the RB.
2. The Act defines a subsidiary through the definition of the controlled undertaking provided in TKS § 10. The term of subsidiary can be deduced from the wording of the section. However, there is no explicit definition of the *subsidiary*. The clear wording benefits to the overall understanding of the Act.
3. In order to get a correct understanding who is the employees' representative in the context of the Act, one should have an overview of the TKS, as well of the TUIS and, as the case may be, of the AÜS. Taking into consideration the need to make a distinction between main and accessory provisions of the TKS, it would be clear and precise to make a reference to the TUIS. The explicit reference to national provisions providing for the employees' representative would avoid debates on different interpretations in practice.
4. The rules of the Directive concerning reservation and confidentiality are not transposed into Estonian law with sufficient accuracy. The Act provides explicitly neither for the confidentiality obligation of the employees' representatives provided for by national law nor their right to initiate judicial appeal procedures in case of the confidentiality of information and of the employer's refusal to provide information. However, in interaction with the TUIS providing for an employee trustee an obligation to maintain any confidential information and for the right to recourse to a court, an employees' representative has a confidentiality obligation, regardless of information received on the national or Community-wide level, as well as the right to initiate judicial appeal procedures. Although, it may still give rise to misunderstandings and misinterpretations, as there is no clear reference to the TUIS provided for by the Act and no clear distinction between main and accessory provisions in the Act.

Bibliography

Directive

- **Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees** - OJ L 207, 18.8.2003, pp. 25–36.

Regulation

- **Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society** - OJ L 207, 18.8.2003, pp. 1-24.

Acts

- **Commercial Associations Act.** Passed on 19 December 2001 - RT I 2002, 3, 6; 2008, 59, 330 (Available in English at the website: <http://www.legaltext.ee/text/en/X50057K2.htm>).
- **Commercial Code.** Passed on 15 February 1995 – RT I 1995, 26/28, 355; 2009, 27, 164 (Available in English at the website: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XX0001K17&keel=en&pg=1&ptyyp=RT&tyyp=X&query=%E4riseadustik>).
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- **Penal Code.** Passed on 6 June 2001 - RT I 2001, 61, 364; 2009, 30, 177 (Available in English at the website: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30068K8&keel=en&pg=1&ptyyp=RT&tyyp=X&query=karistusseadustik>).
- **Employment Contracts Act.** Passed on 17 December 2008 - RT 2009, 5, 35; 2009, 29, 176 (Available in English at the website: <http://www.sm.ee/eng.html>).
- **Trade Unions Act.** Passed on 14 June 2000 - RT I 2000, 57, 372; 2009, 13, 78 (Available in English at the website: <http://www.legaltext.ee/text/en/X30087K1.htm>).

- **Occupational Health and Safety Act.** Passed on 16 June 1999 - RT 1999, 60, 616; 2009, 29, 176 (Available in English at the website: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30078K6&keel=en&pg=1&ptyyp=RT&tyyp=X&query=t%F6%F6tervishoiu+ja+t%F6%F6ohutuse+seadus>).

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Annex I: List and description of the national legislative implementation measures

Annex I a) List of main national legislative implementation measures

Act

Act amending the Involvement of Employees in Activities of Community-scale Undertakings, Community-scale Groups of Undertakings and European Companies Act. Passed on 14 February 2007 - RT I 2007, 22, 112 (Available in Estonian at the website: <https://www.riigiteataja.ee/ert/act.jsp?id=12799883>), 21.06.2009. Consolidated text Community-scale Involvement of Employees Act available in English at the website: <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90012K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=%FCle%FChenduselise>), 21.06.2009.

Annex I b) Description of the national legislative implementation measures

In order to transpose the Directive into Estonian law, the Parliament amended the TKS. The TKS harmonises the Directive in question, as well as Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees and Directive 2001/86/EC on supplementing the Statute for a European company with regard to the involvement of employees. The Act amending the third chapter of the TKS provides the legal basis for the mechanism on involving the employees in the affairs of the SCE.

Annex II: Table of correspondence

Content	Articles in the Directive 2003/72/EC	National implementing provisions
Objective	1	TKS §§ 1 2), 2 2)
Definitions	2 (a)	TKS § 42 (2)
	2 (b)	TKS § 43 (2)
	2 (c)	TKS § 10
	2 (d)	TKS § 44
	2 (e)	TUIS § 2 (1), AÜS § 16 (4) as the case may be
	2 (f)	TKS § 48
	2 (g)	TKS § 51 (1)
	2 (h)	TKS § 2 2)
	2 (i)	TKS §§ 3 1), 45
	2 (j)	TKS § 3 2)
	2 (k)	TKS § 46
Creation of a special negotiating body	3.1	TKS § 50
	3(2)	TKS § 51 (1)
	3(2) (a) (i)	TKS § 51 (2)
	3 (2) (a) (ii)	TKS § 52
	3(2) b	TKS § 54
	3(3)	TKS § 56
	3(4)	TKS §§ 55, 57
	3(5)	TKS § 58
	3(6)	TKS § 60
	3(7)	TKS § 61
Content of agreement	4	TKS § 62
Duration of negotiations	5	TKS § 59
Legislation applicable to the negotiation procedure	6	TKS § 41 (1), (2)
Standard rules	7	TKS §§ 63, 64
	Annex part 1. a)	TKS §§ 65-69 ¹
	Annex part 1. b)	TKS §§ 65-69 ¹
	Annex part 1. c)	TKS §§ 65-69 ¹
	Annex part 1. d)	TKS §§ 65-69 ¹
	Annex part 1. e)	TKS §§ 65-69 ¹
	Annex part 1. f)	TKS §§ 65-69 ¹
	Annex part 1. g)	TKS §§ 65-69 ¹
	Annex part 2 a)	TKS §§ 70-74
	Annex part 2 a)	TKS §§ 70-74
	Annex part 2 b)	TKS §§ 70-74
	Annex part 2 c)	TKS §§ 70-74
	Annex part 2 d)	TKS §§ 70-74
	Annex part 2 e)	TKS §§ 70-74
	Annex part 2 f)	TKS §§ 70-74
	Annex part 2 g)	TKS §§ 70-74
	Annex part 2 h)	TKS §§ 70-74
	Annex part 3	TKS §§ 75, 76
Rules applicable to SCEs established exclusively by	8	TKS § 41 ¹

Content	Articles in the Directive 2003/72/EC	National implementing provisions
natural persons or by a single legal entity and natural persons		
Participation in the general meeting or section or sectorial meeting	9	No such regulation
Reservation and confidentiality	10	TKS §§ 78, 79; TUIS §§ 11, 15, 16; AÜS § 22 (3)
Operation of the representative body and procedure for the information and consultation of employees	11	TKS § 49
Protection of employees' representatives	12	TKS § 80
Misuse of procedures	13	TKS §§ 81, 82
Compliance with this directive	14	TKS §§ 77, 83-88
Link between this Directive and other provisions	15	TKS § 41 (3), (4)

Annex III: List of abbreviations

Act	–	Act amending the Involvement of Employees in Activities of Community-scale Undertakings, Community-scale Groups of Undertakings and European Companies Act
AÜS	–	Trade Unions Act
Directive	–	Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees
EAKL	–	Confederation of Estonian Trade Unions
ETTK	–	Estonian Employers' Confederation
RT	–	<i>Riigi Teataja</i> (the State Gazette)
RB	–	Representative Body
SCE	–	European Cooperative Society
SNB	–	Special Negotiating Body
TALO	–	Estonian Employees' Unions' Confederation
TKS	–	Community-scale Involvement of Employees Act
TLS	–	Employment Contracts Act
TUIS	–	Employee Trustee Act
TÜS	–	Commercial Associations Act
ÄS	–	Commercial Code