

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

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

**NATIONAL IMPLEMENTATION REPORT**



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## **Executive summary**

In the Netherlands Directive 2003/72 has been transposed by law. The Directive has been – together with the SE-directive – implemented in the involvement of employees (European Societies) Act. The implementation Act closely followed the directive. On a few points there are differences. The structure and the contents of the provisions are almost identical to the implementation law of the SE-directive.

In the implementation process, there have been no major discussions. All in all, the implementation process has been rather technical, following the implementation of the SE-directive. The SCE is more or less a non-issue in the Netherlands, including the subjects before and after and misuse.. No SCE's have been established as yet (September 2007)

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## 1. Introduction

This report concerns the transposition of Directive 2003/72 EC of 22 July 2003 supplementing the statute for a European Cooperative Society (SCE) with regard to the involvement of employees in the Netherlands. In this article we will, by subject, describe the articles of the Dutch implementation law. Thereby we follow the article – for – article technique.

The Dutch legislator implemented the SCE – directive together with the SE – directive in one act. This means that the structure and the contents of the provisions are almost identical to the provisions of the SE transposition law. Thus, this report substantially corresponds with our national report on the implementation of the SE – directive.

Co-operative societies in the Netherlands are covered by Book 2 (Legal persons, company law) of the Dutch Civil code, as a subspecies of the association. Another subspecies of the association is the mutual insurance society. The main difference with the co-operative is that mutual societies are defined as having insurance as their field of activity. The definition of co-operative in Dutch law is: “A cooperative is an association established as a cooperative by notarial deed. Under its articles its object must be to provide for certain material needs of its members under agreements, other than insurance agreements, concluded with them in the business it conducts or causes to be conducted to that end for the benefit of its members.”(article 2:53 (1). The definition of mutual society is: “A mutual insurance society is an association established as a mutual insurance society by notarial deed. Under its articles its object must be to conclude insurance agreements with its members or to keep members and, possibly, others insured as regulated by statute, each in the insurance business it conducts to that end for the benefit of its members.

Cooperatives and mutual insurance associations have no share capital, only members. If members have a labour contract, they are considered to be employees under national legislation. With respect to information and consultation rights, there is no difference between cooperatives and mutual insurance associations on the one hand and other undertakings on the other hand.

For large cooperatives and mutual insurance associations there is system of worker participation in which works councils have the right to nominate members of the supervisory board (which is compulsory for larger cooperatives and mutual insurance associations). The works council also has the right to oppose the appointment of members of the supervisory board that are nominated by the management or the general meeting of members). Large means:

- the net assets exceed 13 million euro; and
- the cooperative or its dependent company has, pursuant to a legal obligation, established a works council; and
- the cooperative and its dependent companies together regularly employ at least one hundred employees in the Netherlands

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## 2. Implementation

### 2.1 Formal Aspects

The Dutch legislator used the procedure of legislation for the implementation of Directive 2003/72.

The transposition of the SCE directive is implemented in the transposition law of the European company. This law is published in the National Gazette of the kingdom Netherlands (Staatsblad 2006, 361). The law came into force at the same date as the official deadline 18 Augustus 2006. There was no (formal) consultation of cooperatives' organisations.

The transposition of the SCE directive is in line with the transposition law of the SE directive. The choice been made in the latter serve as a basis for the implementation of the SCE directive. Both regulations are implemented in the involvement of employees (European societies) act (wet rol werknemers bij Europese rechtspersonen). Chapter 1 of this law contains the provisions regarding the involvement of employees in a European company and chapter 2 the provisions regarding the involvement of employees in the European Coöperative Society.

The Ministry of Social Affairs didn't consult the Social Economic Council about the transposition process, because the transposition follows the transposition of the Directive of the European company very closely. This means that employer' organizations and trade unions hadn't any influence on this transposition process.

### 2.2 Regulation contents

#### 2.2.1 Objective and definitions (art. 1 and 2)

Section 1 of chapter 2 contains the general provisions of the SCE. Article 2.1. concerns the general definitions, like participating legal entities, subsidiaries, Special Negotiation Body, information, consultation and participation.

Article 2:1 contains the following definitions of the companies concerned. There is no definition of undertaking in Dutch law.

The definition of concernid subsidiary or establishment: a subsidiary or establishment of a participating legal body, which according to the proposal for establishment of a SCE will become a subsidiary or establishment of the SCE

The definition of participating legal body: legal bodies that participate directly in the establishment of the SCE.

The definition of a subsidiary of a participating legal body oro f a SCE: an undertaking over which the parent company has a controlling influence as defined in article 2:2

The other definitions generally follow the Directive, but on some points there are differences from or elaborations of the text of the Directive. These differences concern the following points:

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- the definition of information is rather different than the definition in the Directive. The Dutch law defines information as the informing of the SCE-works council or the employee representatives on questions which concern the SCE or one of more of her subsidiaries or establishment in a Member State, or which exceed the power of the decision – making organs in a member state.
- the Dutch law contains a definition of the registration of a SCE;
- the Dutch definition of participation is different than the regulation and the implementation law of the SE-directive. It contains a supplement in case the participation concerns the appointment of members of the administrative board. In that case the participation rights regard just the non-executives of the board.
- The definition of consultation is more restricted than the definition in the Directive. The reason for this restriction is that in the Dutch law concurs with the definition of consultation in the European Works Council Directive, which definition is also used in the transposition law of the European Company Directive. Consultation is, according to 2:1 the dialogue and exchange of views between the European Cooperative Society and the SCE-works council or the employee representatives. The obligation that dialogue and exchange of views should be established ‘at a time , in a manner and with a content which allow the employees’ representatives, on the basis of the information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within the SCE’, has been left out from the definition as such, and has been included only in the Annex.
- Article 2:1(2) determines that acting or refraining of the board of the SCE or one of the participating legal entities will be attributed to the person who maintains the company.

Article 2.2. contains the definition of the parent company. This definition is absent in the Directive. A “parent company” is a legal entity which is able to exercise direct or indirect control over another company, and is not itself a legal entity over which another company is able to exercise direct or indirect control. Where no information to the contrary exist, a legal entity shall be assumed to be a parent company where:

- a. It is able to appoint more than half the members of the administrative or supervisory board of the other company;
- b. It is able to exercise more than the half of the voting rights in the General Assembly of Shareholders of the other company;
- c. It supplies more than half of the subscribed capital of the other company.

Article 2:3 contains definitions of employee, employee representatives and SCE-works council. A definition of employee is absent in the Directive. A employee is – as far as the Netherlands is concerned – every person employed in the SCE, a participating legal entity or subsidiary or establishment on basis of an employment contract. Temp workers are not included, because they have an employment contract with the temp agency (where they have co-determination rights). However, when they have been employed in the same undertaking for at least 24 months, they have the same co-determination rights as ordinary employees.

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The definition of co-operative in Dutch law is: “A cooperative is an association established as a cooperative by notarial deed. Under its articles its object must be to provide for certain material needs of its members under agreements, other than insurance agreements, concluded with them in the business it conducts or causes to be conducted to that end for the benefit of its members.”(article 2:53 (1). The definition of mutual society is: “A mutual insurance society is an association established as a mutual insurance society by notarial deed. Under its articles its object must be to conclude insurance agreements with its members or to keep members and, possibly, others insured as regulated by statute, each in the insurance business it conducts to that end for the benefit of its members.

As far it refers to persons working in other Member States, the Dutch law links with the law of the relevant Member State.

The Dutch law appoints the Works councils as representatives of the Dutch employees (2:3 (2)). The body representing the employees of the SCE as established under an agreement or pursuant to the provisions of the Annex is circumscribed as the SE-works council.

### **2.2.2 Provisions that apply to SCE based in the Member State**

Article 2:6 states that structure law (which gives works councils the right to nominate members of the supervisory board in large companies) does not apply in case of the appointment of the administrative or supervisory board of the SCE. Thirdly, this article makes clear that the implementation law does not interfere with national law on information and consultation and participation rights of employees in subsidiaries of the SCE.

The option of article 15(4) of the Directive has not been used.

#### **B) Procedure for negotiation of the rights of involvement of workers in the SCE**

Section 2 covers the involvement of employees in the SCE by virtue of agreement. This section is applicable in case of the creation of an SCE by at least two legal entities or by transposition (2:7 (1). Under legal entity shall be taken to mean the natural person who participates in the creation of an SCE.

In case of the creation of a SCE by only natural persons or one legal entity and natural persons, the section is only applicable if the total numbers of employees in at least two Member States amounts 50.

Dutch law is applicable on SCE's with their statutory seats on the territory of the Netherlands (2:8).

##### a. Responsibility of procedure (art. 3.1)

The participating legal entities are responsible for the establishment of a Special Negotiation Body (SNB). The Special Negotiation Body must be representative for the employees of the participating legal entities, their subsidiaries and establishments (2:9).

##### b. Start of the procedure and information to be provided (art. 3.1)

The participating legal entities shall provide the employees or – when they are absent – the employees themselves information about the participating legal entities, the involved subsidiaries and establishments and the people employed by them as well as of the distribution of these among member states. When changes arise after the establishment of

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the SNB, the participating legal entities shall as soon as possible provide the SNB information about these changes (2:9 (2)).

The procedure starts as soon as possible after the boards of the legal entities agreed about the creation of a SCE (2:9 (3)).

After the establishment the SNB provides information about her members (2:9 (5))

The distribution of information is regulated in article 2:13. The participating legal entities are obliged to supply the SNB with sufficient information. This information shall include at least the proposal to establish a SCE and details of the establishment procedure until the registration of the SCE.

The SNB is not required to receive any information that may reasonably be assumed to seriously hamper or adversely affect the functioning of participating legal entities, their subsidiaries or establishments. The participating legal entities have the right to swear the SNB to secrecy.

c. Constitution and composition of the SNB (3.2)

The composition of the SNB is transposed in article 2:10. The procedure of composition concurs with the procedure described in the Directive (3.2). Each Member State has the right to elect or appoint one member for each 10% of the share of employees in that Member State as a proportion of the total number of persons employed throughout the Member States in the participating legal entities, concerned subsidiaries and establishments. When a SCE is established by merger, each member state shall send as many additional members as is necessary to ensure that each participating cooperation, which has employees in the Member State concerned is represented by at least one additional member in the SNB (2:10 (2)). The maximum number of these additional members is 20% of the total number of members (art. 2:10 (3)).

Article 2:11 contains the provisions about the appointment of the members. The appointment takes place in accordance with the national law and practice of the Member State the member is delegated.

The appointment procedure of the Dutch employee representatives is also regulated in this article. The Dutch members are appointed by the works councils of the participating legal entities. (See more below).

The Dutch law allows the presence of union officials in the SNB. There is no explicit provision on this subject, but nowhere in the law this has been ruled out.

d. The functions of the SNB (3.3 and 6)

Article 2:9 describes the purpose of the SNB. The SNB negotiates with the participating companies about the arrangements of involvement of employees. The SNB and the participating legal entities are supposed to reach an agreement on the involvement of employees, according to article 2:12. The SNB can either approve the agreement reached or decide to refrain from or end the negotiations, in which case the annex does not supply. The provision that the SNB can approve does not seem to make any sense, because approval presupposes that an agreement has been reached before.



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e. The workings of the SNB (3.4,5 and 7)

Article 2:15 contains the decision-making process. Every member of the SNB shall have one vote. Unless otherwise is provided, the SNB takes decisions by absolute majority of its members representing two thirds of the employees from at least two Member States.

A decision which contains a curtailment of the participation rights of the employees, requires a two-thirds majority of the members' votes, representing two thirds of the employees in two member states where:

- the SCE is established by way of merger, and the participation covers at least 25% of the overall number of employees of the participating legal cooperatives; or
- the SCE is established by another way and the participation covers at least 50% of the overall number of employees of the participating legal entities.

The decision not to start negotiations or to end them also needs a two-third majority, representing two thirds of the employees. This decision cannot be made when the creation of the SCE concerns a conversion ad rights of participation exist in this company.

According to article 2:17 (1), the SNB is allowed to inform representatives of external organisations – for example unions – about the start of the negotiations.

The SNB has the right to seek assistance from experts. There is no restriction as to the funding of the (number of) experts. On request of the SNB, the expert is allowed to be present at the negotiation meetings with the participating legal entities.

The costs relating tot the functions of the SNB are taken by the participating legal entities (2:17 (3)). There are no provisions as to the division of costs among those entities. This only applies to the costs of experts when the participating entities have been informed about these costs in advance. One can assume that the information contains all relevant aspects like the number of experts, their activities and the amount of money involved. There are no explicit provisions in the implementation law which give participating entities the right to contest the costs, but the use of the word 'reasonably' implies that the costs can be contested in court. This is the same arrangement as in the implementation law on European works councils.

f. Duration of negotiation (art. 5)

Article 2:18 contains the duration of negotiations. The Dutch legislator fixed the duration on six months with the possibility of extension by another six months. The period of negotiations starts at the date of the first meeting of the SNB.

g. Involvement agreement: content juridical efficiency, and, given the case, supplementary regulations in force regarding validity, extension, report and renegotiation (art. 4)

Article 2:19 pertains to the content of the agreement. On most issues the list given in article 4 of the Directive has been copied. There are some differences however:

- the agreement should mention the location of the meetings of the SCE-works council;

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- the agreement should mention term (duration) of the membership of the SCE-works council;
- the agreement should contain the procedure for adapting the agreement to changes in the structure and size of the SCE and the numbers of employees in the Member States;
- the agreement should be clear about the consequences of not reaching a new agreement;
- when, in stead of a representative body, the participating legal entities decide to introduce one or more information and consultation procedures all the rules that apply to the contents of the agreement on the representative body also apply to these procedures;
- parties are entitled to exclude the renegotiation procedure in the agreement.

Article 4.3 and 4.4 are transposed in article 2:19 (5) and 2:19 (7). The background of this provision is as follows. The agreement is conducted by the participating legal entities and the SNB. This agreement can create rights and obligations for the employees and for (the management of) subsidiaries and establishments, although they were no party to the agreement.

The Dutch rules about renegotiation are rather intricate and complicated. These rules are laid down in article 2:20. When the agreement does not contain a procedure for renegotiations or these procedures do not result in the participation of employees who only became part of the SCE after the agreement was concluded, the SCE should start negotiations with the SCE-works council (or, failing that, a new SNB), if a request for (re)negotiations is put forward by at least 100 ‘new’ employees representing at least 20% of the total number of employees in the SCE and its subsidiaries. This stipulation seems contradictory to the stipulation in art. 2:19 (1) under i and j that the agreement should contain the procedure for adaptation.

If the agreement does not contain provisions on the consequences of not reaching a new agreement and there is no new agreement within one year after starting the (re)negotiation process (with the SCE-works council or the newly created SNB), the Annex applies, unless the SCE works-council or the newly created SNB prefers continuation of the agreement already in existence.

As noted above, the participating legal entities and SNB have the option to exclude the application of the renegotiation procedure in their agreement.

### **2.2.3 Reference provisions (standard rules)**

#### **a. Field of implementation (cases in which they are applied)**

Section 3 transposes the Annex of the Directive. The first paragraph of this section contains general rules, amongst which the field of implementation. The Annex applies when the parties so agree, or when no agreement is reached within the period of the duration of negotiations and the participating companies agree that section three will apply and the SNB has not passed a resolution on either not to open negotiations or to terminate the negotiations.

#### **Field of implementation**

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Article 2:21 describes that the provisions are applicable in case of the establishment of a SCE by at least two legal entities or by conversion. When the SCE is exclusively established by natural persons or one legal entity and natural persons, the provisions are applicable when the total number of employees amounts to more than 50.

### **Moment when applicability starts**

Article 2:22 contains rules on the time of application. The provisions are applicable from the moment of registration in the Netherlands when:

- the participating legal entities and SNB agree about this;
- there's no agreement during the negotiation time of six months and:
  - a) all legal entities agree with the application of the provision so that the SCE can be registered;
  - b) the SNB decides to refrain or end negotiations.

Article 2:23 concerns the application of the participation provisions in case of the establishment of a SCE by conversion, merger or other way of establishment. In case of a conversion, the rules of participation apply when provisions or practices of participation existed in the converted company. When the SCE is established by merger, the provision apply when, prior to the registration, one or more of the participating companies had one or more forms of participation which covered 25% of the total number of employees or covered less than 25% but the SNB to that decides. The percentage is fixed on 50% in case of founding by another way.

Where more than one form of participation existed in the participating companies, the Special Negotiation Body shall decide which of these forms shall be introduced in the SCE. A resolution introducing a form of participation which would result in a reduction in employee – participation requires a two-third majority of the SNB members, representing at least two thirds of the employees from two Member states. Such a reduction means that the number of members of the administrative or supervisory board of the SCE who are elected, appointed or recommended by the employees or their representatives would be lower than the highest number of members with respect to whom such rights could be exercised in one of the participating companies prior to the registration of the European company. Any such decision requires a description of the content of the right of election, or appointment or the right to recommend or oppose such appointments, in the participating legal entity whose participation arrangements are introduced in the SCE and a description of the procedure applying in the participating company with regard to the exercise of such right. The SNB informs the participating legal entities about the decision.

In cases where no decision has been taken on the issue of participation, the standard rule is that the Dutch form of participation applies. This is the so-called structure regime, which gives works-councils the right to nominate members of the supervisory board. In other cases, that is, when there are stronger forms of participation in the participating legal entities, these forms apply. One should note here that in most cases the Dutch system will be considered the strongest form of participation because the general nomination right applies to all members of the supervisory board. The Directive does not take in account that the right itself is rather weak.

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**b. Employee representative bodies: competences, composition and standard rules (annex 1 and 2)**

The SCE establishes a SCE-works council (2:24). The members of this representative body are employees of the SCE, her subsidiaries and establishments. In the Dutch participating legal entities, subsidiaries and establishments, the works councils appoint the members of the SCE – works council. Article 2:25 covers the composition of the SCE – works council. Article 2:10 on the composition of the SNB applies. In cases where the body cannot be considered representative anymore, the representative body should change its composition within one year. As long as this change of composition has not yet been effected, the members from the respective countries are accorded voting rights as if change in composition had already taken place.

The SCE-works council can appoint a select comité (2:26 (2)). There are no provisions on the select committee, with the exception that in case a select comité has been created, the regulations of the SE-works should contain rules on the rights of the select committee.

The SCE – works council informs the SCE about its composition (2:27 (3)).

The Directive requires Member States to promote gender balance in the procedure of composition of the representative board (Annex 1 b). The Dutch law does not contain a provision about gender balance in the SCE works – council.

The competences of the SCE-works council are laid down in article 2:28 (4) ( which refers to information and consultation as described in Annex 2, but is also applicable on the SCE – works council), is slightly broader than the definition in the Directive. The competence is limited to questions which concern the SCE itself, one or more of its subsidiaries or establishments or which exceed the powers of the decision-making organs in a single Member State. The difference with the Directive is that the Directive uses the word *and*: the competence is limited to questions which concern the SCE itself *and* one or more of its subsidiaries of establishments.

The SCE works-council should elect one chairman and one or more substitutes (2:26). The council has the opportunity to elect a committee of at least three members. The SCE works – council shall adopt rules of procedure. The board of the SCE should be consulted on these rules prior to the adoption. There is no equivalent of this requirement in the Annex of the Directive.

Every member of the SCE works-council has one vote, unless the body decides otherwise.

Every year at least one meeting of the SCE and the SCE – works council should be held (2:29). The SCE informs the boards of the local companies and establishments about this meeting. In this meeting the SCE informs the council about the state of affairs in the SCE as well as about the prospects. The SCE and SCE-works council should hold a special meeting in case of special circumstances.

No later than four years after its establishment, the representative body shall decide whether it wants to start renegotiations on to come to an agreement. The relevant articles on this issue 2:17, 2:18, 2:19 en 2:20 apply (where one should read SCE – works council in stead of Special Negotiation Body). If the body decide to approve (after renegotiations) an agreement which no longer states that Section 3 (part one of the Annex) is applicable, or which reduces

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the participation rights of the employees, this decision requires an enhanced majority of two thirds of its members, coming from at least two member states. If no agreement can be reached within the normal or extended period, the Annex will continue to apply.

The articles 2:28-2:32 transpose Annex 2 of the Directive.

Article 2:28 (1) stresses that information should be given at a time, in a manner and with a content which allows the employees' representatives judge the effects thoroughly and prepare with the SCE. This concurs with the definition of information in article 2 of the Directive.

The SCE shall consult the SCE – works council and give him the opportunity to give his opinion on measures envisaged by the European Company. This opinion must be taken in account in the decision-making process.

The SCE is not obliged to inform the SCE-works council when this concerns information that may reasonably be assumed to seriously hamper or adversely affect the functioning of participating legal entities, their subsidiaries or establishments. The SCE can swear the SCE – works council secrecy. The SCE shall notify the SCE works – council about this as soon as possible before the processing of the affair. She informs the SCE – works council in that case about the grounds of the secrecy, on which facts the secrecy applies, the duration of the secrecy and if there are persons who are excluded from the secrecy (2:28 (3)).

Article 2:28 transposes the Annex Part 2 b on the contents of information and consultation in relation to the annual meeting. In this meeting the SCE informs the SCE – works council about the state of affairs in the company as well as the prospects.

Article 2:28 (2) explicitly mentions the following subjects: the structure of the SE, the financial investments, the plausible development of the company, production and turnover, investments, radical changes in the organisations, the introduction of new working and manufacturing methods, mergers, relocation, reduction or closing of companies, and the development of employment and collective dismissals. The SE supplies the works council with the agenda of the meetings of the administrative and supervisory board as well as copies of the documents submitted to the General Assembly of Shareholders.

Article 2:29 regards the information and consultation in cases of exceptional circumstances. The SCE informs the SCE – works council, as quickly as possible, about exceptional circumstances, which have important consequences for the interest of the employees, in particular the relocation or closing of establishment or collective dismissals.

The SCE-works council, or a selected committee, has the right to request a meeting with the SE or another more appropriate level of management, in order to be informed and consulted about the exceptional circumstances. After this meeting or after a reasonable period, the SE works council may give a recommendation (1:28 (2)).

When the SCE decides not to follow the recommendation of the SCE – works council, the council or a selected committee shall be given the opportunity to meet again with the SCE, in order to try to reach an agreement. The meetings shall be held at a time when information and consultation are still useful. The meetings don't affect the powers of the SCE (2:30 (4)).

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### **c. Participation of employees (annex 3)**

Article 2:33, 2:34 and 2:35 transpose Annex 3 of the Directive. Article 2:33 (1) makes clear that in case of a SCE established by transformation all aspects of participation shall continue to apply. On other ways of establishing SCE's: the employees or representatives have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the SCE equal to the highest proportion applicable. If no participation existed before, there is no duty to establish provisions after the registration of the SCE (2:33 (3)).

The SCE – works council shall decide on the allocation of seats within the administrative or supervisory board, according to the proportions of the SCE's employees in each member state (2:34 (1)). Article 2:34 (2) contains a provision in the case that after allocation of the first seat to the employees in a Member State with the largest proportion of employees there is no representation of Dutch employees or employees in one or more other Member States, the second seat will be allocated to the Dutch employees. Third and following seats will be allocated to employees from other member states which are not yet represented. According to article 2:34 (3) rules on the right to appoint, and so on, persons to the administrative or supervisory board are covered by national law. With a view to the execution of these rights, employees shall be informed in due time (article 2:34(4)). In the Netherlands these rights have been allocated to works councils (2:34 (5)).

Article 2:35 concerns the rights and obligations of the employee representatives in the administrative or supervisory board. The members of the board appointed, elected or recommended by the employees have the same rights and obligations as the other members, including the right to vote.

## **2.2.4 Common provisions**

### **a. Confidentiality of information**

The issue of confidentiality of information is transposed in article 2:4 (rights and obligations of Dutch employee representatives. This article is applicable to the members of the Special Negotiation Body, the members of the SE-works council, the employee representatives who are member of the administrative or supervisory board and the persons who act as representatives in any other procedure regarding information or consultation of employees. The employee representatives are obliged to treat confidentially any trade or business secrets in the course of their activities, as well as matters which are designated as being of a sensitive nature or which, in view of their sensitive nature, must be recognised as being sensitive.

Confidentially of information does not apply towards experts, who are consulted by the Special Negotiation Body or the SCE-works council.

The confidentiality of information does not end with the termination of the membership of the SNB, SCE- works council or administrative or supervisory board.

The provisions with regard to confidentiality are the same as is usual in Dutch co-determination legislation. There is no indication of the height of the fines, but one may assume that the same penalties are applicable as in the Law on works councils (a maximum of 6 months in prison or a fine of 16,750 euros in case of a deliberate breach of confidentiality).

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### **b. Protection of employee's representatives**

Article 2.4 contains provisions about the protection of employees' representatives in work centres and subsidiary companies.

There is no indication of the height of the fines, but the same is true for all other legislation on works councils, information and consultation rights etc. on the territory of the Netherlands (see 2.2.5d)

### **c. Spirit of cooperation**

The Dutch law does not contain a provision about the spirit of cooperation. Clearly the Dutch legislator considers this self-evident.

### **d. Misuse of procedure**

The Dutch law does not contain a provision about misuse of procedure.

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

### **a. Field of implementation**

There's no provision on the field of implementation according to the accessory provisions.

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

The Dutch national employees' representatives are the works councils 2:3(2).

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

Article 2:11 contains the rules about the election of Dutch members of the SNB. They are appointed by the works councils in the (Dutch) participating legal entities. If there are umbrella works councils that solely represent participating companies, these umbrella works councils appoint the members of the SNB. In the complete absence of works councils, the SNB will be elected by the employees in the participating legal entities. Lists of candidates for these elections can be proposed by unions and/or one or more individual employees who are not member of a union that has submitted a list of candidates. If only one or a few of the participating legal entities have no works council, while other have, the employees in the companies without works councils have the right to be consulted on the composition of the SNB. This consultation procedure has not elaborated.

This election procedure is also applicable on the appointment of the members of the SCE-works council ( 2:25)

### **d. Protection of employees' representatives (art 10)**

The protection of the Dutch employee representatives is regulated in article 2:4. This article applies to employees' representatives in the SNB, the SCE – works council, the administrative or supervisory board or who act in any other capacity involving information and consultation of employees, who are employed in the Netherlands. The first protection provision is laid down in part 2 of article 2:4. The employees' representatives retain their entitlement for wages in the period they cannot fulfil their agreed work task, because of a meeting of the Special Negotiation Body, the SCE – works council or the administrative or

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supervisory board. Furthermore, they have the right to have discussions with other members of the representative bodies or consult with persons to fulfil their functions during work time and without a loss of income.

The second provision contains protection against disadvantages in the company. The employer has to ensure that persons who apply or have applied for functions of employees' representatives as well as persons who carry out or carried out these functions, are not as a result placed at a disadvantage as regards their position within the company.

The provisions in the Dutch Civil Code on protection of employees' representatives (including protection against dismissal) are extended to members, candidate members and former members of the SNB, the representative body or an information and consultation procedure.

### **2.2.6 Rules applicable to SCE's established exclusively by natural persons or by a single legal entity and natural persons (art. 8)**

Section 4 of the second chapter of the Employee involvement (European legal entities) concerns provisions applicable on SCE's established exclusively by natural persons or by a single legal entity and natural persons. This section transposes article 8 of the Directive.

Article 2:36 concerns the sphere of implementation. This section is applicable on SCE's established exclusively by natural persons or by a single legal entity and natural persons, in case the total number of employees in SCE, subsidiaries and establishments is less than 50 or more than 50 in one Member State.

When this section is applicable, national law of the Member State on which territory the SCE has his statutory seat on employee involvement applies on the SCE. The Works council act, which provides information and consultation rights, and the Structure Law, which provides participation, are applicable on a SCE with statutory seat on the territory of the Netherlands. Subsidiaries and establishments are governed by the law of the Member State on which territory they are seated. For the Netherlands is that the Work Council Act . In case of relocation of the statutory seat of a SCE governed to participation, at least the same level of employee participation shall apply.

Article 2:38 covers the changes of employee involvement after registration. If after the registration 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 of more employees in at least two member states, the provisions of employee involvement by agreement and the reference provisions (section 2 and 3 of the Dutch law) apply. 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.

### **2.2.7 Participation in the General Meeting or Sectoral Meeting (art. 9)**

Section 5 contains provisions on participation of employees (representatives) in the General Meeting or Sectoral- or section meeting.



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On 21 August 2003, there were no provisions in Dutch law on the participation of employees in the general meeting. This means that the statutes could provide for such participation. There are no figures on this issue, but our estimate is that this would be very exceptional.

Article 2:39 contains the sphere of action of section 5. The provisions on participation of employees in the General- sectoral – or section meeting apply in case of the establishment of a SCE by at least two legal entities or by way of transformation. In case of establishment of a SCE by exclusively natural persons or one legal entity and natural persons, this section only applies when the total number of employees reaches or exceeds 50 of more employees in two member states.

Article 2:40 describes that, subject to the limits laid down in article 59(4) of Regulation (EC) No 1435/2003, the employees or the SCE and/or their representatives will be entitled to participate in the general meeting, or if it exists, in the section or sectoral meeting, with the right to vote, in the following circumstances:

- a) when the participating legal entities and the SNB decides so by agreement;
- b) a cooperative which is governed by a system of employee involvement in the General Meeting or sectoral- or section meeting, will be transformed in a SCE;
- c) when in case of a SCE established by means other than transformation, a participating cooperative was governed by a system of employee involvement in the General Meeting or sectoral- or section meeting and:
  1. the parties cannot reach an agreement on employee involvement by the general of extended deadline;
  2. all participating legal entities agree the application of the reference provisions;
  3. the SNB did not decide to refrain or end negotiations;
  4. the reference provisions on participation are applicable;
  5. the participating company governed by a system of employee involvement in the General – sectoral – or section meeting has the highest proportion of participation.

The Directive only mentions numbers 1, 4 and 5 of part c. The directive also uses the word *and* between the different circumstances. So the Dutch law is broader on this point.

### 2.2.8 Legal procedures

Every interested party may apply to the enterprise chamber of the Court of Amsterdam to request that the provisions in the law or the provisions in a agreement on employee involvement must be adhered to. This implies that the court can block a decision in case major provisions of the law (information, consultation) have been breached. With the exception of article 2:4 (2), which concerns the right to receive wage. The Special Negotiation Body, its members or the SCE-works council may not be condemned to bear the costs of the procedure (2:5(1)).

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The Special Negotiation Body, its members or the SCE-works council may request the Enterprise chamber to end their duty of confidentiality, on the ground that, after consideration of the relevant circumstances, this duty is unreasonable.

When information is refused to the SNB, its members or the SCE-works council, these may request the court to oblige the other party to supply the desired information, on the ground that, after consideration of the relevant factors, the refusal to supply the information is unreasonable.

### **2.2.9 Other issues**

Article 2:41 contains rules about the election and appointment of employee representatives in a non-Dutch SE. The Dutch members of the SNB or representative body, and so on, will be appointed in the same way as in the case of a Dutch SE, that is, by works councils. The same principle applies in the case of participation in the board (2:41(2)).

#### **Field of implementation (art 15)**

Article 2:6 concerns the relation between the law implementing the SCE-Directive and other legislation. Firstly, article 2:6 makes clear that Directive 94/95 EC on European Works councils is not applicable, unless the Special Negotiation Body decides not to open negotiations or ends the negotiations.

## **2.3 Practical implementation**

### **a. Overview of the situation regarding cooperatives**

There's no practical experience with this law. No European Cooperatives are created in the Netherlands.

There's also no case law according to the implementation of the SCE – Directive.

With regard to cooperatives in the Netherlands, there are no freely available figures on the total number of employees in cooperatives, or even the exact number. According to the Company register, there are at present 4179 cooperatives, but this figure includes both the cooperatives themselves and all the establishments.

There are a few very large cooperatives in the Netherlands, like the RABO-bank, and in agriculture e.g. Campina, Cehave, Cosun and others. These cooperatives in many cases have established limited companies for their production activities, but the mother company is a cooperative. The employees in many cases are employed by the limited company. An example of a large mutual insurance company is Ohra.

### **b. Measures set out by national law to ensure that companies covered abide by the obligations laid down by the Directive.**

Article 8a of the Royal decree on the Company Register (supplementing the law on the company register, Handelsregisterwet) states that when registering a European Cooperative Society the relevant documents (information and proof thereof) should be given. This had not been further elaborated.

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### **c. Position of employers' and trade union organizations.**

Employers' and employee organizations did not express any opinions about the involvement of employees in the European Cooperative Society. As mentioned before, the Dutch legislator did not consult the Social Economic Council, because the implementation law follows the implementation law of the SE-Directive very closely.

## **3. Effects of implementation**

The involvement of employees (European society) Act has not changed since the law came into force.

There are no experiences with the impact on labour relations, because there is no practical evidence

There's no statistical information available.

## **4. Assessment of the rules of implementation**

Overall, the Dutch legislator closely followed the directive. With regard to the transposition, one could argue that the legislator should have included the duty to consult and negotiate *in good faith* should have been included in the law. However, as stated above, in the Netherlands this is considered self-evident and such a prescription is nowhere to be found in Dutch codetermination law. The same remark can be made with regard to the misuse procedure. Until now however, this has not led to any debate or concerns.

## **5. Conclusions**

The SCE – directive is implemented in the implementation law with regard to the employee involvement in a European company. The law of the European company is amended to include the European Cooperative Society and its name is changed in the employee involvement (European Societies) Act. The first section of this law contains provision of the European company and the second section of the European Cooperative Society. Both sections have the same structure and the content of the provisions is almost identical.

The Dutch legislator closely followed the SCE – directive. On some points there were choices to make and on some points the implementation law differs from the Directive.

The differences and choices concern the following points:

- there are some differences in the definitions. For example the definition of information is different, the Dutch law contains a definition of registration and the definition of consultation is more restricted;
- the competence of the representative body – the SCE – works council is slightly less than the competence in the Directive;
- the works councils appoint the members of the SNB and works council;
- the Dutch law does not contain provisions about spirit of cooperation and misuse of procedure;

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- the Dutch law does not contain a provision about promoting gender balance in the SCE works-council;
- the Dutch rules about renegotiation are rather complicated;
- the circumstances in which cases the employee representatives are entitled to participate in the General – sectoral- or section meeting differ from the circumstances of the directive.

There's no practical experience with the European cooperative society in the Netherlands. The anticipation is that this legal form will not be very popular in the Netherlands.

## 6. Recommendations

### 6.1 On a community level

#### Participation

Dutch employees derive participation rights from the Structure law. Pursuant to this law the works councils are entitled to recommend candidates for the supervisory board. This general recommendation right concerns all members of the supervisory board. However, this right is not very strong. Besides the general recommendation right the works council have an enhanced recommendation right regarding one third of the members of the supervisory board. This right is much stronger. The supervisory board is in principle obliged to accept these nominations.

When more forms of participation exist in the participating companies and the SNB does not decide which form applies, the form which gives the employees the right to appoint, nominate or recommend the highest number of members applies on the SCE (part 3 of the Annex) This means that if a Dutch company is involved, the participation right of that company will almost always be considered the strongest, because the right regards all members of the supervisory board. The Directive does not take into account that this right is not very strong, because members of the supervisory board in Dutch companies are not allowed to represent any partial interest (be it shareholders, employees or others). We recommend that the Directive also takes the quality of the participation rights in account, and not only the number of members.

### 6.2 On a national level

#### 6.2.1 The renegotiation procedure

The Dutch renegotiation procedure is quite complicated. Where the agreement does not contain a procedure for renegotiations or these procedures do not result in the participation of employees who only became part of the agreement was concluded, the SE should start renegotiations with the SCE-works council, or, failing that, with a newly created SNB, if a request for renegotiations is put forward by at least 100 'new' employees, representing at least 20% of the total number of the SCE and its subsidiaries and establishments. The threshold of 100 'new' employees representing at least 20% of the total number of

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employees is quite high. The Special Negotiation Body may skirt this threshold by admitting a procedure of renegotiation in the agreement.<sup>1</sup>

**6.2.2 Gender balance**

The Directive requires Member States to promote gender balance in the procedure of composition of the representative board (Annex 1 b). The Dutch law does not contain a provision about gender balance in the SCE works – council. We want to recommend that the Dutch legislator amends the law on this point.

**6.2.3 Participating legal entities/ participating cooperatives**

In article 2:15 (3) the law uses two different terms. In part a the law uses the term participating cooperative and in part b participating legal entity. The explanatory memorandum of the Act does not explain this difference.

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<sup>1</sup> See also: M.A. Blécourt-Wouterse, *De Europese naamloze vennootschap (SE)*, Deventer: Kluwer 2004, p. 97-98 and R.H. van het Kaar, 'De Nederlandse medezeggenschap in een Europees perspectief', *SMA* 2005-5 p. 241

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## Annex: Correspondence Table - Transposition of the Directive into the SEBG

Table of correspondence		
Content	Articles in the Directive	National implementing provisions
Objective	1.1	Needs no implementation
	1.2	Chapter 2
Definitions	2. a, b, d, g, h, i (1 <sup>st</sup> part), j (1 <sup>st</sup> part), k	2:1
	2. c in conjunction with art. 3.2-7 Directive 94/45/EC	2:1.1; 2:2
	2. c in conjunction with art. 3.6 (2 <sup>nd</sup> par.) Directive 94/45/EC	Not implemented (Directive is not applicable to legal entities not subjected to the law of a member state) art. 2. SCE-Statute)
	2. e	2:3.1-2
	2. f	2:3.3-4
	2. i (2 <sup>nd</sup> part), j (2 <sup>nd</sup> part)	2:28.1-2
	Creation of a special negotiating body	3.1, 3.2 (intro)
3.2 a i		2:10.1
3.2 a ii		2:10.2-5
3.2 b		2 :10; 2:11; 2:41
3.3		2:12; 2:13.1
3.4		2:15.1-4
3.5		2:17.1-2
3.6 (1 <sup>st</sup> par.)		2:14
3.6 (1 <sup>st</sup> par. last sentence)		2:14.2; 2:22
3.6 (2 <sup>nd</sup> par.)		2:15.5
3.6 (3 <sup>rd</sup> par.)		2:15.6
3.6 (4 <sup>th</sup> par)		2:16
3.7		2:17.3

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Table of correspondence		
Content	Articles in the Directive	National implementing provisions
Content of the agreement	4.1	Needs no implementation (contract law is subject to good faith, reasonableness and fairness)
	4.2	2:19.1,3-4
	4.3	2:19.6
	4.4	2:19.4
	4.5	2:19.2
Duration of negotiations	5	2:18
Legislation applicable tot the negotiation procedure	6	2:8
Standard rules	7.1 (1 <sup>st</sup> par.)	Chapter 2, Section 3
	7.1 (2 <sup>nd</sup> par. and part a, b)	2:22
	7.2 a	2:23
	7.2 b	2:23.2
	7.2 c	2:23.3
	7.2 (4 <sup>th</sup> par.)	2:23.4-5
Rules applicable to SCE's established exclusively by natural persons or by a single legal entity and natural persons	7.3	Needs no implementation (not used the option to <i>not</i> implement art. 7.2 b) SCE-Directive)
	8.1	2:7.2: 2:21.2
	8.2 (1 <sup>st</sup> par., intro)	2:36
	8.2 (1 <sup>st</sup> dash)	2:37.1
	8.2 (2 <sup>nd</sup> dash)	2:37.2
	8.2 (2 <sup>nd</sup> par.)	2:37.3
8.3	2:38	
Participation in the general meeting or section or sectorial meeting	9	2:40
Reservation and confidentiality	10.1	2:4.4-6
	10.2	2:13.2; 2:28.3
	10.3	Needs no implementation
	10.4	2:5
Operation of the representative body and procedure for the information and consultation of employers	11	Needs no implementation
Protection of employees' representatives	12 (1 <sup>st</sup> par.)	3 :1

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Table of correspondence		
Content	Articles in the Directive	National implementing provisions
	12 (2 <sup>nd</sup> par.)	2 :4.1-3
Misuse of procedures	13	2 :19.1 j, k ; 2 :20
Compliance with directive	14	2 :5 (civil enforcement)
Link between directive and other provisions	15.1	2:6.1
	15.2	2 :6.2
	15.3	2 :6.3
	15.4	2 :6
Final provisions	16.1	II
	16.2	Preamble ; 2 :1.1 (definition directive)
Review by the commission	17	Needs no implementation
Entry into force	18	Needs no implementation
Standard rules: Composition of the body representative of the employees	Annex part 1. intro	2 :24.1
	Annex part 1. a, b (1 <sup>st</sup> par.)	2 :24.2-4 ; 2 :41
	Annex part 1 b (2 <sup>nd</sup> par.)	2 :25.1 in conjunction with 2 :10.1
	Annex part 1. c	2 :26.2
	Annex part 1. d	2 :26.3
	Annex part 1. e	2 :25 in conjunction with 2:10.1
	Annex part 1. f	2 :25.2
Standard rules : Standard rules for information and consultation	Annex part 2. a	2 :28.4 (1 <sup>st</sup> sentence)
	Annex part 2. b	2 :29
	Annex part 2. c	2 :30
	Annex part 2. d, e	2 :31
	Annex part 2. f, h	2 :32
	Annex part 2. g	2 :4.3
Standard rules : Standard rules for participation	Annex part 3. a, b, c	2 :33
	Annex part 3. d	2 :34
	Annex part 3. e	2 :35



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