

**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



Poland

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Executive summary¹

Poland has accomplished final transposition of the 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 Act of 22 July 2006 on a European Cooperative Society² in a proper term (i. e. 18. 08. 2006) in the Act of in the Act of 22 July 2006 on a European Cooperative Society³. The Act on so called the Act on SCE was the subject of social consultation in the procedure provided in the provisions implied in the Trade Unions Act and Employers Organs Act. Finally Polish legislator has decided on the rule of the total implementation of the Directive's provisions and only has transformed and specified some of them.

The implementation of the Directive 2003/72/EC carried out within Polish legal order reserves to be assessed positively. The analysis of Polish legal order in force allows to find out that Polish legislator generally has regulated all issues specified in the Directive 2003/72/EC. Polish legislator used the system based on appointment and in case when it is no such a possibility, on election. The right to appoint members of the SNB was conceded establishment-level trade union organizations. It concerned only the representative trade unions organizations. Additionally, there is a possibility to appoint or elect to the SNB as its members, among representatives of trade union organizations recognized as representative in the meaning of the article 6 paragraph 2 of the Act on Tripartite Commission for Social-Economic Affairs and voivodship social dialogue commissions of 6 July 2001, who are not employed workers of given establishment, recommended by mentioned trade unions organizations.

Although the Act on SCE breaks the monopoly of trade union organizations to some extent, it should be emphasized that in some provisions of Polish Act the important role of trade unions organizations was preserved.

However, there are a few discrepancies and separateness in comparison with the leading in this scope Directive. The most significant of the potential collisions between Polish and Community regulations are the following:

- It should be underlined that in the Polish Act, as well as in the Directive there is no provisions that excludes the possibility of appointment or election of the SNB employees occupying manager (supervisory) posts. It may cause a risk that mentioned category of members will be act in employer's interest.
- It should be underlined that Polish Act, as well as the Directive are silent in the matter concerning the way of designation of the members of the select committee.
- Polish Act is silent when we consider the question of cooperation spirit between the supervisory or administrative organ of the SCE and the employees' representatives

¹ Report elaborated by Agata Drabek and Marcin Mielczarek after consultation with Prof. Zbigniew Góral.

² Journal of Laws, No. 149, item 1077, hereinafter referred to as: the Act on SCE or Polish Act.

³ Journal of Laws, No. 149, item 1077, hereinafter referred to as: the Act on SCE or Polish Act.

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in conjunction with a procedure for the information and consultation of employees, as it is provided in the Directive.

When we consider the other questions connected with the differences and the divergences, they were presented in the point 4 concerning assessment of implementation and point 5 relating to the conclusions and recommendations.

If we consider the main purpose and the object of the Directive - employees' involvement rules in the SCE (determined in the article 1 point 1 and 2) - Polish Act fulfills the requirements.

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1. Introduction

The Act of 16 September 1982 – Cooperative Law⁴ is a basic legal act which regulates the activity of cooperative. According to a legal definition contained in the article 1 paragraph 1 of the mentioned Act, cooperative society is a voluntary association with non-limited number of members, changeable personal structure and share capital, carrying on the business activity for the purpose of its members. Moreover, the cooperative society may run the social and educational-cultural activity for the benefit of its members and their environment.

The Act – Cooperative Law, besides the general provisions, contains the special provisions. They concern the following the specific form of the cooperative society:

- farm cooperative society – pursuant to the article 138 of the Act to the scope of its task it can include: running of common agricultural farm, activity for the benefit of individual agricultural farm of its members or the other kind of the activity;
- cooperative society of agricultural set – its activity is aimed at rendering services for agriculture and the other kind of services resulting from the needs of agricultural environment. The other kind of the tasks contain: production of sources and materials for agriculture, agricultural processing and agricultural production (the article 180 of the Act);
- labour cooperative society – the object of this cooperative society is running of the common enterprise on the basis of individual work of members (the article 181 of the Act). It should be emphasized that Polish Labour Code of 26 June 1974⁵ in the article 2 distinguish the following basis of labour relationship: employment contract, appointment, nomination, election and cooperative employment contract.

Moreover, the activity of the other types of cooperative societies was regulated in the separate acts. They are the following:

- the Act of 15 December 2000 on the Building Cooperative Societies⁶ - in the article 1 paragraph 1 of this Act was determined the objective of activity of this kind of society. That is to satisfy housing and other needs of the members and their families by means of providing with independent dwelling quarters, detached houses or the locals with other kind of destination.
- the Act of 7 December of 2000⁷ on functioning and association of Cooperative Banks and the Associating Banks which concern the specific form of the banks being cooperative societies.
- the Act of 14 December 1995 on Savings and Loan Cooperative Bank⁸ whose objective is to accumulate of financial resources of its members only, to grant loans

⁴ Journal of Law from 2003, No. 188, item 1848 with following amendments, referred as to the Act.

⁵ Journal of Laws No. 24, item. 141 with following amendments.

⁶ Journal of Laws from 2003, No. 119, item 1116 with following amendments.

⁷ Journal of Laws from 2000, No. 119, item 1252 with following amendments.

⁸ Journal of Laws from 1996, No. 1, item 2 with following amendments.

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and credits, to make settlement accounts in cash at the request its members and to act as an intermediary by concluding insurance agreements.

- the Act of 27 April 2006 on Social Cooperative Societies⁹ - this type of cooperative society may be established by unemployed persons, homeless persons, addicted to alcohol, drugs and other intoxicants, mental illness persons, released from prisons, refugees and psychically disabled (the article 4). The object of this cooperative society is running of the common enterprise on the basis of individual work of members (the article 2 paragraph 1). According to the article 2 paragraph 2 acts for the benefit of social and vocational reintegration of its members, but these activities are not carried out in the scope of the business activity. Social cooperative society may run the social and educational-cultural activity for the benefit of its members and their environment, as well as the activity for the purpose of the public utility in the filed of tasks determined in the Act of 24 April 2003 on the public utility activity and voluntary activity¹⁰ (the article 2 paragraph 3).

It should be emphasized that the Act of 22 July 2006 on a European Cooperative Society introduces a new kind of cooperation. Such an involvement of employees like provided by the Polish Act on SCE, there was not recognized under provisions in force referring to the cooperative societies. According to the article 18 paragraph 2 point 1 and 2 of the Act of 16 September 1988 – Cooperative Law member of cooperative society is entitled to participate in general meeting or a meeting of the member group, as well as to elect or to be appointed to the organs of cooperative societies. The article 35 of the Cooperative Law states that these are the following organs: the general meeting, a supervisory board, an administrative organ and the meeting of member group (in the cooperative societies where instead of general meeting, the representatives assembly¹¹ is established). The rules mentioned above are applied in general only to the members of cooperative society. Nevertheless, the exceptions can be pointed out. The article 45 paragraph 2 statement 2 of the Cooperative Law states that if a legal person is a member of a cooperative society, the person who is not member of a cooperative society shall be appointed to a supervisory board by the legal person. The same restriction is prescribed in the article 49 paragraph 3 of a cited Act. The article mentioned above states that the cooperative societies, the members of which are legal persons, elect the board among the candidates who are individuals indicated by these legal persons. In the cooperative societies where the members are individuals and legal persons, the members of the board are appointed among the candidates indicated by these legal persons too. The same regulation is stipulated by the case of the general meeting.

It is worth underlining that a member of cooperative society can take part in the general meeting only personally, unless the act stipulates other options (the article 36 paragraph 2). However, the legal persons who are the members of cooperative society can take part in the general meeting by means of proxy appointed to this purpose. The proxy can act only on behalf of one member. Moreover, the right to participate with advisory voice in the general

⁹ Journal of Laws from 2006, No. 94, item 651.

¹⁰ Journal of Laws from 2003, No. 96, item 873 with following amendments.

¹¹ According to the article 37 paragraph 1 the statutes shall provide the possibility to replace the general meeting by the representatives assembly if the number of members will exceed the limit defined in the statutes.

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meeting is vested in representatives of the revision union in which the cooperative society is associated and the representatives of National Cooperative Council.

The labour contract is a base of employment only with regard to members of the supervisory board (the article 45 paragraph 6) and the board (the article 52).

According to the article 52 paragraph 1 the members of the cooperative society are employed under labour contract or appointment which depends on a holding post. This does not concern the labour cooperative society where the members are employed under co-operative employment contract regardless of the holding post (the article 182) or the cooperative society of agricultural set (they perform work under the member relationship). The first case provides a possibility of employment of all or some of the members under homework contract, contract for mandate or contract for services that justifies a kind of such activity. The second case reserves the possibility to employ the member of household¹² and the other persons under the labour contract or the other legal relationship.

There are no provisions connected with participation of these employees in the cooperative society organs.

Poland has become a Member State of the European Union since 1 May 2004. However, the adjustment of Polish law to the standards effective in the European Communities was commenced much earlier. Partially Polish country was obliged to undertake earlier actions by European Agreement of 1991¹³, which article 168 indicated that an approach of existing and future Polish legislation to existing legislation present in Community is a crucial prerequisite of economic integration of Poland with the European Community and that Poland should undertake every actions to ensure compatibility of its future legislation with legislation of Community. In the effect, on the day of the entering Poland into EU the large part of domestic legal solutions from the scope of labour law consider the requirements resulted from European Directives to a great extent.

The objective of the Act on the Social Cooperative Society is to fulfill obligations resulting from two acts of the European law. There are following:

- the Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society (SCE) with regard to the involvement of employees¹⁴,
- the Council Regulation 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)¹⁵.

Poland has accomplished transposition of the mentioned Directive in a proper term (i. e. to 18.08.2006).

¹² This is an each member of the family of the cooperative society member, as well as the other persons who live with him/her and run the common household.

¹³ Journal of Laws No. 24, item. 141 with following amendments.

¹⁴ Official Journal 18/08/2003, L 207.

¹⁵ Official Journal 18/08/2003, L 207.

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According to the article 1 paragraph 3 of the Regulation 1435/2003 an SCE shall have its principal object the satisfaction of its members' needs and /or the development of their economic and social activities, in particular through the conclusion of agreements with them to supply goods or services or to execute work of the kind that the SCE carries out or commissions. An SCE may also have as its object the satisfaction of its members' needs by promoting, in the manner set forth above, their participation in economic activities, in one or more SCEs and/or national cooperatives. An SCE may conduct its activities through a subsidiary.

In consequence of the implementation of the Directive 2003/72 there was introduced to Polish order law a new type of cooperative – the European cooperative society. The role of the report is assessment the way of transposition the Directive into Polish law.

2. Implementation

2.1 Formal aspects

Poland has accomplished transposition of the 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 Act of 22 July 2006 on a European Cooperative Society¹⁶ in a proper term (i. e. 18. 08. 2006). The government draft of the Bill on the European Cooperative Society (SCE), which contained the arrangements relating to the involvement of employees in SCE, was presented on 16 May 2006¹⁷. The Polish Act on SCE came into force on 18 August 2006.

The regulation of employees' involvement rules contained in the Act on SCE is the reflection, in many aspects, of the regulation provided for in the Act of 5 April 2002 on European Works Councils¹⁸ which is the transposition of the Council Directive 94/45/EC of 22 September 1994 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 consultation employees and the Act

Polish Act on the European Economic Interest Grouping (EEIG) and the European company (SE)¹⁹ which is the implementation of the Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees²⁰.

The rules for involvement of employees in SE were provided for in the articles 35 – 101 of the Act on SCE.

¹⁶ Journal of Laws, No. 149, item 1077, hereinafter referred to as: the Act on SCE or Polish Act.

¹⁷ The Parliament of the V cadence; form No. 600: <http://www.sejm.gov.pl>.

¹⁸ This Act came into force on 1 May 2004.

¹⁹ Journal of Laws No. 62, item. 551 with following amendments, hereinafter referred to as: the Act on EEIG and SE or Polish Act.

²⁰ Official Journal 10/11/2001, L 294.

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The draft version was the subject of social consultation in the procedure provided in the provisions implied in the Trade Unions Act²¹ and Employers Organs Act²². These were the following organizations: NSZZ “Solidarność”, OPZZ, Trade Unions Forum, Business Center Club – Employers’ Union, Polish Private Employers’ Confederation and Consumers’ Federation.

The draft version was delivered to organizations concentrating the entities carrying out economic activity, i. e. National Chamber of Commerce and Polish Banks Union.

Moreover, the bill of the Act on SCE was the subject of consultation with entities associating the cooperative entities. There were the following: Domestic Council of Cooperation and Domestic Savings and Loan Cooperative Bank.

The draft was recorded on the websites of the Ministry of Justice. The changes postulated during consultations were in general accepted.

NSZZ “Solidarność” and Domestic Council of Cooperation informed in written form on the lack of postulates. Trade Unions Forum, Business Center Club – Employers’ Union, Polish Private Employers’ Confederation and Consumers’ Federation did not send their opinions. The representatives of Domestic Savings and Loan Cooperative Bank did not present their opinion during conference for the purpose of concerting of the Act.

The opinions and changes were postulated only by National Chamber of Commerce, Bank Guarantee Fund and Polish Banks Union. National Chamber of Commerce accepted in general the draft. The only reservation concerned the issue of the paid time off for training for the members representative body. They postulated for shortening the period of mentioned leave, but their change did not be considered. The changes of Bank Guarantee Fund and Polish Banks Union were examined during mentioned conference. The changes OPZZ had in general the legislative character.

On 22 May 2006 the draft version was referred to the Development of Entrepreneurship Commission which was authorized to present a report to 20 August 2006. The legislation procedure lasted from 6 June 2006 to day of act’s enactment by Parliament on 23 June 2006. The next, the Act was directed to the Senate. By means of the enactment of 22 July 2006, the Parliament introduced the changes proposed by the Senate. On 10 August 2006, the President of the Republic of Poland put a signature on the Act. On 22 August 2006 was published in Journal of Law. The Act on SCE came into force on 18 August 2006.

It should be emphasized that the date of coming the Act into effect corresponded with a deadline of implementation’s duty. However, the Act was published in the Journal of Law issued a few days later (i. e. on 22 August 2006) than the mentioned date i. e. 18 August 2006. As a result of Directive’s transposition, Polish legislator violated the rule “Lex retro non agit”.

²¹ The Act of 23 May 1991, Journal of Laws from 2001, No. 79, item 854 with following amendments.

²² The Act of 23 May 1991, Journal of Laws, No. 55, item 235 with following amendments

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2.2 Material aspects

I. The objective and definitions

The object of the Act on SCE was defined in the article 1 point 1 and 2. According to the article 1 point 1 the Act shall regulate establishing, organization and activity of the SCE in the scope not determined in the Regulation on the Statute for a European Cooperative Society (SCE). The article 1 point 2 at employees' involvement rules in the SCE as the object of the regulation contained in Polish Act. In this aspect there is accordance with the article 1 paragraph 1 of the Directive 2003/72.

The article 1 paragraph 2 of the Directive states that the arrangements for the involvement of employees shall be established in every SCE. Polish Act is silent in this matter, but this question results from the provisions of the Act on SCE.

The article 2 point 8 of the Act on SCE provides for the legal definition of “an SCE” which corresponds to the definition contained in the article 2 letter (a) of the Directive. It should be underlined that Polish legislator in lieu of the notion “participating legal entities” (the article 2 letter (b)) introduces the notion “participating entity” which is defined as a cooperative society, a legal entity or natural person participating in the SCE established.

The other definitions were provided in the article 34 of Polish Act, in Section III relating to employees' involvement in the SCE.

The definitions “subsidiary of a participating entity or of an SCE” (the article 34 point 1), “concerned subsidiary or establishment” (the article 34 point 3) and “employees' representative” (the article 34 point 5) are the reflection of the definitions determined in the article 2 letter (c), (d), (e) of the Directive.

It should be underlined that in case of “a dominant influence” Polish Act makes a reference to the article 4 of the Act of 5 April 2002 on European Works Councils. The definition under Polish law contains all of the elements defined in the definition of “a dominant influence” provided for in the article 3 paragraph 2-7 of the Directive 94/45/EC of 22 September 1994 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 consultation employees.

It should be emphasized that the Act on SCE, contrary to the Directive introduces the definition of establishment in the article 34 point 2. According to mentioned article an establishment an organizational unit without legal liability running the activity by means of separated group of persons and the materials sources.

Moreover, the definitions of “representative body”, “special negotiating body”, “the involvement of employees”, “information”, “consultation” and “participation” contained in the article 34 point 6-11, in general, are the repetitions of the definitions provided in the article 2 letter (f) – (k) of the Directive. It should be underlined one separation between Polish Act and the Directive in this scope. Polish definition of “representative body” does not indicate the purpose of setting up of representative body contrary to as it is provided in the Directive which determines the purpose in the following way: “with the purpose of informing and consulting the employees of an SCE and its subsidiaries and establishments

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situated in the Community and, where applicable, of exercising participation rights in relation to the SCE”.

Polish Act introduces, contrary to the Directive the following definitions:

- “employee” – the person recognized as an employee under domestic law of a given Member State. According to the article 2 of Polish Labour Code this is a person employed under an employment contract, appointment, election, nomination or under co-operative employment contract.
- the article 34 point 12 defines the notion “identification data” as the name or firm of a participating entities, of a subsidiary or of establishment and the register office of them, and if they have an identification number or they are registered in the register additionally the mentioned identification number or the number in the register.

II. Provisions that apply to SE based in Poland

A. Field of implementation (the article 15)

Under the article 57 paragraph 6 of Polish Act where an SCE is a Community-scale undertaking or a controlling undertaking of a Community-scale group of undertakings within the meaning of Directive 94/45/EC the provisions of this Directive and the provisions transposing it into national legislation shall not apply to them or to their subsidiaries. However, where the SNB decides in accordance with the article 57 paragraph 1 not to open negotiations or to terminate negotiations already opened, Directive 94/45/EC and the provisions transposing it into national legislation shall apply.

Pursuant to the article 15 paragraph 3, the Directive shall not prejudice the existing rights to involvements of employees provided for by national legislation and/or practice in Poland as enjoyed by employees of the SCE and its subsidiaries and establishments, other than participation in the bodies SCE. Moreover, the provisions on participation in the bodies laid down by national legislation and/or practice applicable to the subsidiaries of the SCE.

B. Procedure for negotiation of the rights of involvement of workers

a. Responsibility of procedure (the article 3 paragraph 1 of Directive)

The competent organs of the participating entities are responsible for initiating process of creating special negotiating body (SNB) and organization of procedure aiming at establishing rules of employees’ involvement in European Cooperative Societies companies (hereinafter referred to as SCEs).

b. Start of procedure (the article 3 paragraph 1 of Directive)

The articles 36 and 37 of the Act on SCE correspond to article 3 paragraph 1 of the Directive. The article 36 states that SNB will appoint immediately after publishing by competent organs of participating entities plan of creating an SCE according to provisions of Regulation 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)²³. According to article 37 the participating entities fix a day of starting proceedings aiming at creating SNB. Polish legislator introduces additional reservation that it supposed to be the same day for all participating entities (art. 61 paragraph 1 in fine). The article 37 paragraph 2 defines the scope of information that the participating companies present (in the

²³ Official Journal 18/08/2003, L 207.

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manner accepted by given entity) to employees' representatives or in the absence thereof – to employees. The condition of starting of the negotiating procedure is to furnish mentioned information. The scope of supplied information included in the Act on SCE corresponds to the scope provided by the article 3 paragraph 1 of the Directive. It contains the following elements:

- identification data of participating entity, concerned subsidiaries and establishments;
- information regarding number of employed workers in each of participating entities, concerned subsidiaries and establishments;

c. Constitution and composition of SNB (the article 3 paragraph 1)

SNB represents workers employed in participating entities, as well as in concerned subsidiaries and establishments of participating entities which are proposed to become a subsidiary or establishments of the SCE upon its formation (the article 35 paragraph 2 of Act on SCE corresponds to the article 3 paragraph 2 of the Directive in this scope).

The allocation of seats on SNB, which is assigned to employees from particular Member State, in this case from Poland, is made by a participating entity, which establishes the number of employees for determination of the base of allocation of seats on the day of beginning of procedure for creating of SNB. This number takes into consideration full and part-time workers. Consequently, the principle of equal treatment in employment of part-time employees, which is provided for in the article 18^{3a} of Labour Code²⁴, is fulfilled. This principle is the reflection of the provisions of the Directive 97/810WE on framework agreement concerning part-time workers. If considerable change of this number will follow in period from day of establishing number of employees until day creating of SNB, it causes change of allocation of seats on SNB (the article 38 paragraph 1-3).

Polish Act in the article 40 paragraph 1-4, similarly as the Directive in the article 3 paragraph 2 letter a (i) and a(ii), provides for the allocation of seats on SNB. The allocation of seats shall be made in proportion to the number of employees employed in given Member State by allocating in respect of a given Member State one seat per portion of employees employed in that Member State which equals 10% of the number of employees employed by the participating entities and concerned subsidiaries or establishments in all the Member States taken together (the article 40 paragraph 1 of the Act SCE).

Moreover, the article 40 paragraph 2 of the Act states that in the case when the number of workers employed in given Member State is smaller than number presenting 10% of the number of employees employed taken together, one seat falls to in this Member State on this smallest number .

In case when the number of workers employed in given Member State is larger than number presenting 10% of the number of employees employed taken together, one seat falls to each

²⁴ Art. 18^{3a} § 1 k. p.: Employees shall be accorded equal treatment as far as the entering into and terminating of an employment relation, terms of employment, promotion and access to training for the improvement of professional qualifications as concerned, in particular regardless of their sex, age, disability, race, religion, nationality, political convictions, union membership, ethnic origin, creed, sexual orientation, as well as regardless of whether they are employed for a fixed or unfixed term or full or part time.

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of the next group of workers beginning of creating the following group of workers presenting 10% of the number of employees employed taken together (the article 40 paragraph 3 of the Act SCE).

However, in case of an SCE formed by merger, there is a possibility vested in workers employed in participating entity or entities (losing as the result of merger its legal personality), to elect or appoint, according to national legal order of given Member State, additionally one member of the SNB, with reservation that the number of members from given Member State does not exceed 20 % of the number of “basic” members” i.e. elected or appointed pursuant to the article 40 paragraph 1-3. The article 40 paragraph 6 stipulates, similarly to the Directive (the article 3 paragraph 2 point a (ii)), that if the number of such companies is higher than the number of available seats, these additional seats shall be allocated to employees of such companies by decreasing order of the number of workers employed in each of such companies.

The article 41 – 44 of the Act on SCE prescribes the method of election or appointment of the SNB members acting on behalf of workers employed in Poland. The article 3 paragraph 2 letter (b) of the Directive 2003/72 sets forth that Member States shall determine the method to be used for election or appointment of the members of the SNB who are to be elected or appointed in their territories. Moreover, according to the directive the method used to nominate, appoint or elect employee representatives should seek to promote gender balance. Polish Act in the article 39 paragraph 1 and 2 is a reflection of the cited article of the Directive in this scope. Polish legislator used the system based on appointment and in the case when it is no such a possibility, on election.

Under Polish labour law right to represent collective rights and interests of employees towards employer vested in establishment-level trade union organizations. Consequently the right to appoint members of the SNB was conceded establishment-level trade union organizations. However, it concerns not all trade union organizations. According to the article 41 paragraph 1-2 of the Act on SCE stipulates that if employees of participating entity, concerned subsidiary or establishment are employed in Poland by one employer²⁵, the appointment of members of the SNB is performed by representative union organization at work establishment in the meaning of the article 241^{25a} paragraph 1 of the Labour Code in date determined by competent organ of participating entity or of concerned subsidiary or of establishment. Pursuant to mentioned article, there is the following organization:

- which is an organizational unit or a member of an upper-level union organization considered to be representative under the article 241¹⁷ paragraph 1 point 1 of the Labour Code, i.e. which is the representative organization in the meaning of the Act on Tripartite Commission for Social-Economic Affairs and voivodship social

²⁵ The article 65 paragraph 1 is incomprehensible because there is no possibility that employees of different companies are employed by one employer in view of that each company is a separate employer. In Polish labour law it was accepted the “administrative conception” of the employer instead of the “proprietary conception” after the example of the western countries. In the light of administrative conception, employer’s entity is acknowledged to the unit that organizes the work, irrespective of whether it possesses the legal entity and the property.

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dialogue commissions of 6 July 2001²⁶ (definition is presented in the further part of this point),

or

- which unites at least 10 % of the employees employed with an employer.

According to the article 41 paragraph 2 of the Act SCE in the case when by one employer function more than one representative union organization, all the organizations shall appoint members of the SNB. If the representative unions organizations will not reach an agreement, members of the SNB are elected by an assembly of staff exclusively from among candidates reported by these organizations, unless they are reported, then members of the SNB are elected by assembly of staff (the article 41 paragraph 2 and 4 of the Act on SCE). It should be underlined that appealing to the position of assembly of staff presents natural manner of solution of lack of correspondence between trade union organizations which have to represent this assembly of staff.

Polish legislator has accepted the rule that in view of the lack of representative union organization at work establishment, assembly of staff elect members of the SNB (the article 41 paragraph 1).

In Polish Act on SCE it was realized precept prescribed by the Directive (point 22 of the Preamble and the article 3 paragraph 2 letter (b) of the Directive) which states that Member State should be able to provide that representatives of trade unions may be members of the SNB regardless of whether they are employees of participating entity, concerned subsidiary or establishment (the article 41 paragraph 5). Consequently, there is a possibility to appoint or elect to the SNB as its members, among representatives of trade union organizations recognized as representative in the meaning of the article 6 paragraph 2 of the Act on Tripartite Commission for Social-Economic Affairs and voivodship social dialogue commissions of 6 July 2001, who are not employed workers of given establishment, recommended by mentioned trade union organizations. According to mentioned article for representative trade union organization it shall mean national trade unions, national association (federations) of trade unions and national inter-union organizations (confederations) which fulfill the following criteria:

1. unite, with reservation of paragraph 3, more than 300.000 members who are employed,
2. function in entities of national economy which basic kind of activity is defined in provisions on public statistic²⁷.

The mentioned organizations may – pursuant to the article 41 paragraph 7 - delegate their representatives to taking part in activities connected with the holding elections of the SNB's members.

²⁶ Journal of Laws, No. 100, item 1080 with amendments.

²⁷ Act on public statistic of 29 June 1995, Journal of Laws No. 88, item 439.

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The considerable meaning has the article 41 paragraph 6 of the Act on SCE. Pursuant to mentioned article the majority in the SNB shall present employees of participating entities, subsidiaries and establishments. It should be underlined that in the Polish Act, as well as in the Directive there is no provisions that excludes the possibility of appointment or election of the SNB employees occupying manager (supervisory) posts. It may cause a risk that mentioned category of members will be act in employer's interest.

The election of the members of the SNB is organized by the competent organs of the participating entities, subsidiaries or management of the establishment. The information concerning term and the manner of performing of the election of the members of the SNB shall be notified by the mentioned competent organs, in the customary manner applicable with a given employer, to the employees, union organization at work establishment, trade union organizations in the meaning of the article 6 paragraph 2 of the Act on Tripartite Commission for Social-Economic Affairs and voivodship social dialogue commissions, no later than 14 days before day of election. The elections are direct and they proceed in secret voting and its validity is depended on participating at least 50 % of employees of a given employer. In the case when such threshold was not reached, the reelections are held after month from day of conducting the elections regardless of the number of participating employees (the article 42 paragraph 1-4 of the Act on SCE). The candidates, who received the majority of votes in turn, enter into the composition of the SNB. However, in the case when they have received equal number of voice in turn, but the number of place for occupation is smaller than the number of these candidates, the assembly of staff shall perform election among them again (the article 43 paragraph 1-2 of the Act on SCE). In the case when Polish employees of participating entity, concerned subsidiary or establishment are employed in Poland by more than one employer, the allocation of seats on the SNB falling to employees employed in Poland between particular employers is made by the participating companies registered in Poland. The distribution of seats shall take into consideration the level of employment so that as far as possible one member of the each company was elected or appointed to the SNB (the article 44 paragraph 1). The rules aforementioned, which are applied to one employer, shall be used during election or appointment by more than one employer. The participating entity, registered in Poland shall make available the list of persons appointed or elected as the members of the SNB to the participating entities from the other Member States (the article 46 of the Act on SCE).

The institution of expiration of a mandate of the member of the SNB (the article 45 paragraph 1-2) and of complementing the composition of the SNB in the manner defined above were introduced in order to assure the continuity of works. According to the article 45 paragraph 1 of the Act on SCE the mandate of the member of the SNB being of employee participating entity, concerned subsidiary or establishment participating in forming SCE shall expire in the case of termination of labour relationship or renouncing a function. The same article in paragraph 2 provides that the mandate of the member of the SNB being of representative trade union organization in the meaning of the article 41 paragraph 5 of the Act on SCE shall expire in the case of the death, renouncing a function or withdrawing recommendation by this organization.

d. The function of the SNB (the article 3 paragraph 3 and paragraph 6)

The article 35 paragraph 1 and the article 48 of the Act on SCE are the repetition of the regulation contained in the article 3 paragraph 3 of the Directive. The article 35 paragraph 1 states that the SNB and the participating entities shall determine agreement concerning

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arrangements for the involvement of employees within the SCE. However, according to the article 48 the participating entities shall inform the SNB of the plan and the current process of establishing the SCE, up to its registration.

The article 57 of the Act is the reflection of the article 3 paragraph 6 of the Directive. Polish Act, similarly to the Directive, assumes that the SNB may decide not to open negotiations or to terminate negotiations already opened. It should be underlined that in Polish legal order there is additionally duty to provide participating entities with information of such content of decision immediately, but in the remaining scope Polish regulation implement the provisions of the Directive. So, the majority required to decide not to open or terminate negotiations already opened shall be the votes of two thirds of the members representing at least two thirds of the employees, including the votes of members representing employees employed in at least two Member States.

Such a decision shall stop the procedure to conclude the agreement on arrangements for the involvement of the employees within the SCE. When such a decision has been taken, none of the provisions of the standards rules of participation shall apply. In this case the rules on information and consultation of employees in force in the Member States where the SE has employees are applied (the article 57 paragraph 1 and 3 of the Act on SCE). Under Polish law there are the provisions of the Act of 5 April 2002 on Europeans Works Councils²⁸, which implement the provisions of the Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings for the purposes of informing and consulting employees. The Act on EWC is applied in case of Community-scale undertakings and Community-scale group of undertakings when the decision not to open negotiations or to terminate negotiations already opened was taken (the article 113 of the Act on SCE²⁹). The same situation takes place in case of SCE being Community-scale undertakings and Community-scale group of undertakings in the meaning of the article 2 paragraph 2 and 4 the Act on Europeans Works Councils (the article 57 paragraph 6 of the Act on SCE).

Similarly, as it is provided for in the article 3 paragraph 6 of the Directive, also Polish Act in the article 57 paragraph 4 states that in case of an SCE established by way of transformation, the possibility of taking decision not to open negotiations or to terminate negotiations already opened is precluded if there is participation in the company to be transformed. Additionally, in the SCE established by way of transformation, the level of involvement defined in the agreement shall not be lower than the level of involvement in the cooperative society to be transformed (the article 59 of the Act on SCE in connection with the point 21 of the preamble of the Directive that provides for “before and after” principle).

Polish legislator prescribes in the article 57 paragraph 5, similarly to the Directive in the article 3 paragraph 6, the possibility of renegotiation, i. e. when the decision not open or terminate negotiations already opened has been taken, the SNB shall be reconvened at the

²⁸ Journal of Laws No. 62, item 556 with amendments.

²⁹ According to the article 113 of the Act on SCE, in the Act on European Works Councils the paragraph 5 was introduced to the article 1. The mentioned article states that provisions of the Act on EWC are not applied in case of Community-scale undertakings and Community-scale group of undertakings having the status of European Cooperative Society in the meaning of Polish Act on SCE. This does not concern the situation when SNB decide not to open negotiations or to terminate negotiations already opened.

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written request of at least 10 % of the employees of the SCE, its subsidiaries and establishments, or their representatives, at the earliest two years after the abovementioned decision, unless the parties agree that the negotiations will be reopened sooner. If the SNB decides to reopen negotiations with the management but no agreement is reached as a result of those negotiations, none of the provisions of the standards rules for participation shall apply.

e. The workings of the SNB (the article 3 paragraph 4, 5 and 7)

The question of taking decisions by the SNB, taking advantage of the experts' advice and covering any expenses relating to the functioning of the SNB and in general to negotiations determined in Polish Act is the reflection of the provisions of the Directive in mentioned scope.

Polish Act additionally stipulates that the participating entities in the SCE establishing convene the first meeting of the SNB within 14 days since the day of its creating. The objective of the meeting mentioned above is to elect the chairman of the SNB among its candidates and to adopt its rules of procedure (the article 47 paragraph 1 and 2 of the Act SCE).

Pursuant to the article 51 paragraph 1 the SNB, in general, takes decision by an absolute majority of its members, provided that such a majority also represents the majority of the employees (in the Directive this kind of majority is determined as absolute, Polish Act is silent in this matter). Each member is granted one vote (the article 51 paragraph 2). The article 51 paragraph 3 determines the method of fixing the number of employees represented by each member of the SNB. The number of employees represented by each member of the SNB, who are elected by the employees of the same participating entity or the same concerned subsidiary or establishment, is fixed by dividing the number employees employed in mentioned units in a given Member State on day of voting by the number of the members of the SNB. In the remaining cases one member represents the employees of participating entity, concerned subsidiary or establishment where he/she was elected.

Polish Act, similarly to the Directive, provides the majority other than absolute. However, if the result of the negotiations lead to a reduction of participation rights, 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,

- in case of an SCE to be established by way of merger, if participation covers at least 25 % of the overall number of employees of the participating entities, or
- in case of an SCE to be established by any other way than merger, if participation covers at least 50 % of the overall number of employees of the participating companies (the article 52 paragraph 1 and 2 of the Act).

Reduction of participation rights means a proportion of members of the cooperative society's supervisory or administrative organ which is lower than the highest proportion existing within the participating entities (the article 52 paragraph 3).

The same majority (two thirds) is required to decide not to open or to terminate negotiations already opened (the article 57 paragraph 1 and 2).

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The article 49 of the Act on SCE states that any expenses relating to the establishing and functioning of the SNB shall be borne by the participating entities what is the reflection of the article 3 paragraph 7 of the Directive in this scope, but the Directive adds that it concerns expenses which enable the SNB to carry out of its tasks in appropriate manner. However, in the case when the agreement on arrangements for the involvement of the employees within the SCE, Polish legislator provides for the following rules:

1. the costs of business trip of the members of the SNB shall be borne by the participating entity; it concerns the members being or not being employees of mentioned entity, its concerned subsidiary or establishment who were appointed or elected by employees of one of these organizational units;
2. the remaining costs are borne by the participating companies in proportion to the number of employed workers, including workers employed by its subsidiaries and establishments (the article 50 paragraph 1 point 1 and 2).

Under the article 47 paragraph 3 and 4 the SNB may request experts of its choice for the purpose of performance of its tasks. The regulation in this scope contained in Polish Act corresponds to the regulation determined in the Directive in the article 3 paragraph 5, but with reference to the object of taking advantage of the experts, the Directive uses a term “for the purpose of negotiations”. The Polish Act does not regulate, contrary to the Directive, the question of giving example who is enable to be appointed as an expert. Polish Act, similarly as the Directive in the article 3 paragraph 7, provides in the article 50 paragraph 2 the possibility to limit the funding to cover one expert only.

f. Duration of negotiations (the article 5)

Similarly, as it is provided for in the article 5 of the Directive, also Polish Act in the article 53 paragraph 1 states that the negotiations aiming at concluding agreement may continue for six months from the day of establishing the SNB. Although there is the possibility to extend the duration of negotiations by virtue of the article 53 paragraph 2 of the Act on SCE, Polish Act does not determine the manner of counting of this period – or with period of six months including or over this period. The Directive is more precise in this scope. In the light of the article 5 paragraph 2 the parties may decide to extend negotiations beyond the period of six months up to a total of one year from the establishment of the SNB.

g. Involvement agreement (the article 4)

The article 58 paragraph 1 of the Act on SCE, that is the reflection of the article 4 paragraph 2 of the Directive, indicates basic and obligatory elements of the content of the agreement. Polish legislator used the open catalogue of elements of the content of the agreement leaving certain autonomy to negotiating parties. It should be underlined that Polish Act determines a minimum of the content of the agreement.

The article 59 (that corresponds to the article 4 paragraph 4 of the Directive) presents the limitation of autonomy to specify the content of the agreement. According to this provision 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 one existing within the company to be transformed into an SCE. This restriction results from the regulation contained in the article 15 paragraph 3 letter (a) of the Directive that states the Directive shall not prejudice the existing rights to involvement of employees provided for by national legislation and/or practice in the Member States as enjoyed by employees of the SCE and its

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subsidiaries and establishments, other than participation in the bodies of the SCE. The important meaning for the question of the agreement plays the regulation contained in the article 11 paragraph 4 of the Council Regulation (EC) 1435/2003 of 22 July 2003 on the Statute for European Cooperative Society (SCE)³⁰. This provision states that the statutes of the SCE must not to conflict at any time with the arrangements for employee involvement which have been so determined. Where new such arrangements determined pursuant to the Directive conflict with the existing statutes, the statutes shall to the extent necessary be amended. It should be emphasized that Polish legislator did not take advantage of the authorization contained in the article 11 paragraph 4 sentence 3 of the Regulation which sets forth that a Member State may provide that the management organ or the administrative organ of the SCE shall be entitled to proceed to amend the statutes without any further decision from the general shareholders meeting.

It should to underlined that Polish legislator introduced in the article 58 paragraph 4 the possibility to enclose to the agreement of employees' involvement in the SCE arrangements relating to voting rights in the general meeting, in the section or sectorial meeting if the requirements determined in the article 59 paragraph 4 of the Regulation 1435/2003 were fulfilled.

According to the article 56 paragraph 1 of Polish Act the agreement is concluded in written form under pain of invalidity. Moreover, the agreement is undersigned by persons entitled to making declaration of will on behalf of the participating entities and a chairperson of the SNB and at least one member of the SNB (the article 56 paragraph 2). Polish Act reserves that all employees are bound by the agreement.

III. Reference provisions (standards rules)

a. Field of implementation (cases in which they are applied) – (art. 7)

The article 60 of the Act on SCE is the repetition of the regulation contained in the article 7 paragraph 1 of the Directive regarding cases in which standards rules on employee involvement are applied. The article 61 of Polish Act, similarly to the article 7 paragraph 2 of the Directive determines the additional cases in which standards rules on employee involvement are applied. However, there is one difference between Polish Act and the Directive. Polish legislator introduces a condition which enables to apply the standards rules in the case of an SCE established by merger if, before registration of the SCE, one or more forms of participation applied in one or more of the participating entities covering less than 25 % of the total number of employees in all the participating entities and if the SNB so decides. The SNB takes a decision in this matter after or before six months are elapsed since day of calling the first meeting of the SNB (or one year in the case of extension the term), if the parties unanimously declare the failure of negotiating procedure aiming at concluding agreement (the article 61 point 1 letter (b)). The same condition is reserved for an SCE established by any other way than transformation or merger if before registration of the SCE, one or more forms of participation applied in one or more of participating entities covering less than 50 % of the total number of employees in all the participating entities and if the SNB so decides (the article 61 point 3 letter (b)).

³⁰ Official Journal 18/08/2003, L 207.

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According to the article 62 of Polish Act that is the reflection of the article 7 paragraph 2 in the Directive if there was more than one form of participation within the various participating entities, the SNB shall decide which of those forms must be established in the SCE. Such a decision is taken after or before six months are elapsed since day of calling the first meeting of the SNB (or one year in the case of extension the term), if the parties unanimously declare the failure of negotiating procedure aiming at concluding agreement. Additionally the SNB shall inform the participating entities of any decisions taken, above mentioned. In case when the SNB does not take such a decision, determined in the article 62 paragraph 1, the representative body shall decide which of those forms must be established in the SCE. The decision shall be taken within 30 day from the day of registration.

It is worth to underline that Poland does not enjoy the right provided for in the article 7 paragraph 3 of the Directive which enable to exempt the application of standards rules on employee involvement in the case of an SCE established by merger (the article 7 paragraph 2 letter (b) of the Directive).

In consequence of the resignation from the option right provided for in the article 7 paragraph 3 of the Directive by Polish legislator, the article 11 paragraph 3 of the Council Regulation (EC) 1435/2003 on the Statute for European Cooperative Society (SCE) is not applied. According to mentioned article, in order for an SCE to be registered in a Member State, the agreements on arrangements for employee involvement shall be concluded, including participation, or none of the participating entities must have been governed by participation rules prior to the registration of the SCE. In Poland, even when the agreement will be not reached, the SCE can be registered. The resignation from the option right by Polish legislator increases the capability of “export” to Polish law order the broadest rights to co-deciding of employees. It cannot meet expectations of the cooperative societies’ authorities.

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

The articles 63 – 82 of the Act on SCE determine the rules regarding composition of the body representative of the employees (art. 63 – 71) and standards rules for information and consultation (art. 72 – 82). Polish Act is the reflection of the provisions in this scope contained in the Directive. However, the Act on SCE details some of the issues left to discretion of legislator. The detailed analysis there will be presented below.

The article 63 which provides the composition of the body representative of the employees is the repetition of the letter (a) of Part 1 of the Annex (Annex 1) of the Directive.

Similarly, as it is provided for in the case of establishing of the SNB, members of the body representative of the employees shall be made in proportion to the number of employees employed in given Member State (the article 64 paragraph 1 of the Act on SCE in connection with the article 40 paragraph 1 – 3 of the mentioned Act)³¹. The provisions of the Act determine the term of office (four years) and the situations in which a mandate expires, i. e. in the case of termination of labour relationship or renouncing a function (the article 64 paragraph 2 – 3).

³¹ This issue was presented in point II letter (c) of the report (Constitution and composition of the SNB).

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According to the article 65 paragraph 1 – 3 of the Act on SCE the number of members of, and allocation of seats on, the body representative of the employees shall be adapted to take account of changes occurring within the SCE and its subsidiaries and establishments. It takes place every two years. If considerable change in the number of employees employed in some of these units will occur, a competent organ of the SCE requests the employees' representatives, and when they do not exist employees employed in particular Member States to appoint or elect the members of the body representative of the employees in the number defined in the cited article 40 paragraph 1 – 3. The Act on SCE in the article 65 paragraph 3 states that the term of office of the members of the body representative of the employees coming from Member State affected by the changes is terminated within day of appointment or election of new members of representative body of employees.

In case of the employees employed in Poland the provisions regarding appointment or election of the SNB members representing Polish workers, defined in the article 41 paragraph 1 – 4 and 7 and the article 42 – 44 of the Act on SCE, are applied³². The activities leading to election of the members of the representative body are undertaken within one month from day of occurring cases in which standards rules (defined in the article 60) on employee involvement are applied.

The article 67 of the Act on SCE, similarly as it is provided in the annex 1 letter (f) states that the competent organ of the SE shall be informed of the composition of the representative body. Polish Act determines additionally the term in which information shall be furnished. According to the article 67 the representative body shall deliver immediately information of its composition to the competent organ of the SCE, of its subsidiaries and management of establishments.

According to the article 68 an organizational meeting shall be called by the competent organ of the SCE immediately after mentioned information is obtained. The following actions are taken during the meeting:

- the representative body is established,
- a chairperson of the representative body is elected,
- the rules of procedure are adopted by the representative body (it corresponds to the letter (d) of the annex 1).

Polish Act in the article 69 paragraph 1, similarly as the Directive in the annex 1 letter (c) states that where the size of the representative body so warrants, it shall elect a select committee from among its members. Additionally, Polish Act in mentioned article sets forth that the select committee is consisted of one chairperson and two members with restriction that these persons shall represent the different Member States (the article 69 paragraph 2). Pursuant to the article 69 paragraph 3 the select committee is obliged to run of current affairs. It should be emphasized that Polish Act, as well as the Directive do not regulate the issue of electing the members of the select committee.

³² The regulation contained in mentioned provisions was presented in point II letter (c) of the report.

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Pursuant to the article 70 the representative body, in general, takes decision by an absolute majority of its members, the majority required for a decision not to open or terminate negotiations already opened shall be the votes of two thirds of the members (the article 57 paragraph 1 of Polish Act) where the rights of the SNB are vested in the representative body according to the article 71 paragraph 2 of the Act on SCE in connection with the letter (g) of annex 1.

The article 71 is the repetition of the regulation contained in the letter (g) of annex 1.

The articles 72 – 82 of the Act on SCE provide for standard rules for information and consultation. This is repetition of the regulation contained in annex 2 letter a – h of the Directive. It should be emphasized that the Act on SCE details some of the issues. The detailed analysis there will be presented below. The article 72 of the Act on SCE is the reflection of the letter (a) of the annex 2 of the Directive and the article 73 of Polish Act is the repetition of the letter (b) of the Directive.

In the scope of information attained by the representative body belongs among others information concerning cut-backs or closures of undertakings, establishments or important parts thereof. The Directive in the letter (b) of the annex 2, as well as Polish Act in the article 73 paragraph 2 point 6, introduce a notion of important parts of undertakings or establishments. There are doubts about the definition of “important part”, in particular there are no criteria in Directive, as well as in Polish Act for recognized the part as important.

The co-operation the representative body with the competent organ beyond ordinary procedure is provided for in the article 74, 75, 76 paragraph 4 and 79 of Polish Act is the repetition of the regulation contained in the letter (c) of the annex 2 of the Directive.

Similarly, as it provided for in the point (c) of the annex 2 of the Directive, also Polish Act in the article 79 states that the rights to be informed and consulted vested in the prerogative organ shall not affect the prerogatives of the competent organ.

The article 76 paragraph 1 sets forth that the meeting defined in the article 75 paragraph 1, above mentioned, shall be called immediately. The article 76 paragraph 2 states that the representative body or the select committee can express their opinion concerning issues being consulted during the meeting or within 14 days after its termination. The article 76 paragraph 3 stipulates that the competent organ before taking decision concerning mentioned opinion, shall examine opinion. The competent organ is obliged to inform an applicant of taking or not taking into account the opinion.

Polish legislator in the article 77 of the Act on SCE prescribes the possibility of laying down rules on the chairing of information and consultations meetings contained in the Directive (the letter d of the annex 2). According to Polish regulation the function of chairing of information and consultations meetings is fulfilled alternately by a chairperson of the representative body or member designated by a chairperson and a person designated by a competent organ of SCE. The article 78 paragraph 1, similarly to the Directive (letter (d) of the annex 2) states that before any meeting with the competent organ of the SCE, the representative body and the select committee shall be entitled to meet without the representatives of the competent organ being present.

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The article 78 paragraph 2 of Polish Act is the reflection of the letter (f) of the Directive of annex 2.

The article 81 of the Act on SCE provides for the right to time off for training without loss of wages. This regulation corresponds with the letter (g) of annex 2 of the Directive. In the light of mentioned article, in so far as this is necessary for the fulfillment of the tasks, the members of the representative body shall be entitled to time off for training without loss of wages. The Polish Act provides for that the length of time off for training shall not extend two months during term of office. The remuneration due for this training shall be calculated as for the time of annual leave.

The article 82 of Polish Act, as it is provided in the Directive (the letter (h) of annex 2) states that the costs of the representative body shall be borne by the SCE, unless the other rules of bearing costs were agreed by the competent organ and the representative body. The Polish legislator states that there is a possibility to limit funding to cover one expert only. In this aspect there is accordance with the Directive. Pursuant to the article 82 paragraph 3 the annual budget is fixed by mutually agreement the representative body and the competent organ. In case the budget is not established by the end of the year preceding the budgetary year, the competent organ of the SCE establish the budget on their own, though, they are supposed to allocate the sum of money which is equal the multiplication result of the number of members of the representative body and the amount of three average remunerations in the business sector within three months preceding particular year, published by the President of Central Statistical Office in Office Journal of the Republic of Poland “Monitor Polski”.

c. Participation of employees (annex 3)

The articles 83 – 87 of the Act on SCE are the reflection of the regulation contained in the annex 3 (letters a – e).

Article 83 of Polish Act, similarly as it is provided for in the letter b of annex 3, states that the employees of the SCE, its subsidiaries and establishments and/or their representative body shall have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the SCE equal to the highest proportion in force in the participating entities concerned before registration of the SCE. Moreover, in the case of an SCE established by transformation, if the rules of a Member State relating to employee participation in the administrative or supervisory body applied before registration, all aspects of employee participation shall continue to apply to the SCE (the article 83 paragraph 2 in connection with the letter (a) of the annex 3). However, if none of the participating entities was governed by participation rules before registration of the SCE, the latter shall not be required to establish provisions for employee participation (the article 87 paragraph 3 in connection with the letter (c) of the annex 3).

The article 84 paragraph 1, similarly to the Directive in the letter (d) of annex 3, states that the representative body shall decide on the allocation of seats within the administrative or supervisory body among the members representing the employees from the various Member States according to the proportion of the number of employees of the SCE's, its subsidiaries or establishments. However, if as a result of mentioned allocation, employees employed in one or more Member States will not have their representative in the administrative or supervisory body, the representative body shall determine the allocation of seats to employees of the Member State of the representation in the following order:

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- firstly, to employees employed in the Member State of the SCE's registered office (it corresponds to the regulation contained in the Directive);
- secondly, to employees employed in the Members State of the highest level of employment (this is the criterion introduced by Polish legislator).

According to the article 85 the representative body shall decide on the way in which the SCE's may recommend or oppose the appointment of the members of abovementioned bodies if these form of participation exist in the SCE.

The article 86 states that the elections of the members representing employees in the SCE's organs in Poland are direct and they proceed in secret voting by the assembly of staff of establishment according to the adopted rules of procedure.

The article 87 of Polish Act, similarly to the directive in the letter (e) of annex 3, states that every member of the SCE's organs representing employees shall be a full member within the same rights and obligations as the members representing the shareholders.

IV. Common provisions

a. Confidentiality of information

According to the article 92 paragraph 1 of the Act members of the SNB, of the representative body and of the employees' representatives in the context of an information and consultation procedure (the representatives designated under agreement concluded with reference to the article 58 paragraph 1 point 6), and experts and translators are not authorized to reveal any information which has been given to them in confidence. This obligation shall continue to apply, wherever the persons referred to may be, even after the expiry of their terms of office, unless the competent organ of the SCE decide the other scope of confidentiality's duty (the Directive is silent when we consider this reservation). The other separateness between the regulation defined in the Directive and the regulation contained in Polish Act is that in the Act on SCE the duty of confidentiality concerns translators too, contrary to the Directive which does not indicate this category (the article 10 paragraph 1 of the Directive).

Pursuant to the article 93 paragraph 1 in specific cases the supervisory or administrative organ of an SCE is not obliged to transmit information where its nature is such that, according to objectives criteria, to do so would seriously harm the functioning of the SCE or its subsidiaries and establishments or would be prejudicial to them. In this aspect there is accordance with the Directive (the article 10 paragraph 2). The Directive in mentioned context indicates the participating entity too contrary to Polish Act. However, it should be emphasized that the duty of confidentiality concerns the members of the SNB and even Polish Act does not directly indicate the participating entity, it can admit that this category is taken into consideration too.

According to the article 10 paragraph 4 Member States shall make provision for administrative or judicial appeal procedures which the employees' representatives may initiate when the supervisory or administrative organ of an SCE demands the confidentiality. If the clause providing not reveal any information which has been given in confidence is contrary to the article 92 or the article 93 paragraph 1, the SNB, the representative body or employees' representatives in the context of an information and consultation procedure have the right to file a motion for exemption from the duty of confidentiality to the district court – court of economic affairs. The capacity to be the party in mentioned cases was be vested in

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the competent organ too pursuant to the article 93 paragraph 3. The provisions of the Code of Civil Procedure³³ (CCP) on trying cases within the scope of provisions relating to provisions on state-owned enterprises and on personnel self-government of state-owned enterprises are applied, excluding two of the provisions, i. e. the article 691¹ § 2 CCP relating to instance court's jurisdiction and the article 691⁷ CCP which states that ruling settling a dispute may be given only after hearing a trial. According to the article 94 of the Act on SCE states that the judge may issue a decision, at the request of the competent organ of the SCE or ex officio, in which the right to inspect evidence entrusted by the competent organ to the court's files in the course proceedings will be limited in the necessary scope. The court will make such a decision if the revelation of this evidence sets in danger any business secret available business secret or the other information enjoying the protection under separate provisions. There is no admissibility to lodge complaint against such a decision.

The article 95 provides for that regulations contained in the articles 92 –94 do not violate the provisions on confidential information's protection and the provisions on the other information enjoying the protection under law.

The Act on Trade Union Organizations of 23 Mai 1991³⁴ and the Act on employees' information and consultation of 7 April 2006³⁵ provide the similar regulations concerning the confidentiality and protection of representatives bodies.

b. Protection of employees' representatives

According to the article 12 of the Directive the members of the SNB, the members of the representative body, any employees' representatives exercising functions under the information and consultation procedure and any employees' representatives in the supervisory or administrative organ of an SCE who are employees of the SCE, its subsidiaries or establishments or of participating entity, shall, in the exercise of their functions, enjoy the same protection and guarantees provided fore employees' representatives by the national legislation and/or practice in force in their country of employment.

Polish legislator in the article 96 –99 of the Act on SCE are pursued objectives contained in cited article of the Directive.

According to the article 96 the employer shall not serve notice, nor terminate employment contract on the members of the SNB, the members of the representative body, and any employees' representatives in the supervisory or administrative organ of an SCE in the course of mandate or within one year period after its expiration without a permission of the trade union organization active at work establishment which represents the employee. If the employee is not represented by the trade union organization active at work establishment, the permission is granted by the regional labour inspector with territorial competence for the employer's registered office.

³³ Journal of Laws from 1964, No. 43, item 296 with amendments.

³⁴ Journal of Laws of 2001, No 79, Item 854 with following amedments.

³⁵ Journal of Laws of 2006, No 79, Item 550 with following amedments.

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The same procedure is applied when the employer serves notice to change terms of work or pay to disadvantage of the employee (the article 97 of the Act on SCE). Moreover, Polish Act in the article 98 states that the employee being member of above mentioned organs is entitled to paid time off from vocational work in accordance with performing tasks in these organs. The conditions of remuneration which is due to employee are defined in the article 31 paragraph 3 of the Act of 23 May 1991 on the trade union organizations³⁶, which the Polish Act refers to.

According to the article 99 the protection's rules presented above, are applied to the any employees' representatives exercising functions under the information and consultation procedure.

c. Spirit of cooperation

Pursuant to the article 11 of the Directive the competent organ of the SCE and the representative body shall work together in a spirit of cooperation with due regard for their reciprocal rights and obligation. Moreover, the same shall apply to cooperation between the supervisory or administrative organ of the SCE and the employees' representatives in conjunction with a procedure for the information and consultation of employees.

Polish Act makes reference to this regulation in the article 54, only in the aspect of the negotiating procedure. According to the mentioned article the SNB and the participating companies conduct the negotiations in a spirit of cooperation in order to conclude an agreement.

It should be underlined that the article 55 provides for that the parties may appoint a mediator where the difficulties in the course of negotiations will appear. The provisions of the Act of 23 May 1991 on settlement of collective disputes³⁷ are applied.

Polish Act does not regulate when we consider the question of cooperation spirit between the supervisory or administrative organ of the SCE and the employees' representatives in conjunction with a procedure for the information and consultation of employees, as it is provided in the Directive.

d. Misuse of procedures

Measures to prevent misuse of procedures are provided for in the article 100 – 101 of Polish Act. The article 100 paragraph 1 states that when in the SCE, its subsidiaries or establishments the considerable changes relating to the structure, number of employees, and in the case of SCE to registered office too, have been taken place after registration of the SCE and the intent of the changes is to deprive of or infringe of the employees rights in the sphere of involvement, the negotiations so as to conclude the agreement on employees' involvement in changed conditions are carried on. The representative body is entitled to demand the undertaking of the negotiations (the article 100 paragraph 2 of the Act on SCE). The provisions contained in the article 47 – 59 of Polish Act relating to the arrangements for the involvement of the employees within the SCE are applied to the negotiations mentioned

³⁶ Journal of Laws from 2001, No. 79, item 854, with amendments.

³⁷ Journal of Laws, No. 55, item 236, with amendments. There are the following provisions: the article 11 and 11¹.

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above. It should be underlined that the rights and obligations of the SNB are vested in the representative body and the rights and obligations of the participating companies are granted to the SCE, its subsidiaries and establishments (the article 100 paragraph 3).

Moreover, in the cases where standards rules are used (the articles 60 – 62), the provisions contained in the articles 63 - 87 (employees' representative bodies: competences, composition and standard rules for information and consultation, participation of employees) are applied to the employees' involvement in the changed conditions in the scope in which the changes may threaten to deprive or limit of the employees' rights.

In aspect that is presented, the important role plays the article 111 of Polish Act. According to the paragraph 1 of the article 111 a person who, while being a member of competent organ of an SCE, its participating company, its subsidiary, establishment or management of the establishment which are situated in the territory of Poland, regardless of the registered office of the SCE:

- prevents or hinders of the SNB's or representative body's establishing, in particular does not fulfill the duty of information on the term and the manner of holding elections of the SNB's members,

- prevents or hinders of the SNB's or representative body's activity,

- discriminates the member of the SNB, of the representative organ or the employees' representative in connection with exercising function,

shall be liable to penalty of restricted freedom or a fine which are imposed in proceedings instituted by labour inspector in public accusation.

The article 111 paragraph 2 states that the provisions of the Act of 24 August 2001- Code of Petty Offences³⁸ are applied in mentioned proceedings. The function of public prosecutor is fulfilled by the labour inspector.

V. Provisions applicable to work centers and subsidiary companies in the territory of the Poland (accessory provisions)

The issues relating to required information were presented in point II ("Provisions that apply to SE based in the Poland") and IV ("Common provisions") of this report.

VI. Rules applicable to SCEs established exclusively by natural persons or by a single legal entity and natural persons.

The articles 88 – 91 of the Act on SCE correspond to the article 8 of the Directive in the presented scope.

According to the article 88 of Polish Act in the case of an SCE established exclusively by natural persons or by a single legal entity and natural persons, which together employ at least 50 employees in at least two Member States, the provisions relating to procedure applicable

³⁸ Journal of Laws No. 106, item 1148, with amendments.

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to SCEs established by at least two legal entities or by transformation, defined in the article 60 – 87 of the Act on SCE, shall apply.

Pursuant to the article 89 paragraph 1, in the case of an SCE established 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 the mentioned provisions shall not apply. However, according to the article 91 in the situation where after the registration of an SCE 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 at least two Member States, the provisions relating to procedure applicable to SCEs established by at least two legal entities or by transformation shall be applied. In mentioned case the rights of participating entities, concerned subsidiaries or establishments are vested in the SCE and its subsidiaries or establishments of SCE.

In the SCE, mentioned in the article 89 paragraph 1 of Polish Act, the provisions concerning information, consultation and participation of employees of the Members State of the SCE's registered office, which are applicable to the other entities of the same type, shall apply (the article 89 paragraph 2). Moreover, pursuant to the article 89 paragraph 3 in subsidiaries and establishments of SCE's, the provisions concerning information, consultation and participation of employees of the Members State where they are situated, and which are applicable to the other entities of the same type, shall apply. The article 90 states that in the case of transfer from one Member State to another of the registered office of an SCE, mentioned in the article 89, governed by participation, at least the same level of employee participation rights shall continue to apply.

VII. Participation in the General Meeting or Section or Sectoral Meeting (art. 9).

It should to underlined that Polish legislator introduced in the article 58 paragraph 2 the possibility to enclose to the agreement of employees' involvement in the SCE arrangements relating to voting rights in the general meeting, in the section or sectorial meeting if the requirements determined in the article 59 paragraph 4 of the Regulation 1435/2003 were fulfilled. According to the article of mentioned Regulation if, on the entry into force of this Regulation, the law of the Member State where an SCE has its registered office so permits, the statutes of that SCE may provide for the participation of employees' representatives in the general meetings or in the section or sectorial meetings, provided that the employees' representatives do not together control more than 15% of total voting rights. Such rights shall cease to apply as soon as the registered office of the SCE is transferred to a Member State whose law does not provide for such participation.

On 21 August 2003, the law of Poland does not permit the statutes of a cooperative to provide for the participation of employees' representatives in the general meetings or in the section or sectoral meetings with voting rights in such form like provided in the Directive (2003/72/EC). However, The Act of 16 September 1982 – Cooperative Law³⁹ states that in the general meeting may participate with voting rights only the members of the cooperative society. As a consequence, the employees may participate with voting rights if they are the members simultaneously.

³⁹ Journal of Law from 2003, No. 188, item 1848 with following amendments, referred as to the Act.

3. Practical implementation

There is the lack of the jurisdiction concerning the Act on SCE on account of a short time of binding of the Act. In consequence, there is no possibility of the illustration of the application of analyzed Directive 2003/72 in practice.

4. Assessment of implementation

The implementation of the Directive 2003/72 carried out within Polish legal order reserves to be assessed positively. There was above all political will (that is at the level of government and parliament) in the matter of the Directive's implementation to adjust the most quickly the national law to the Community law. There was consequently the national consensus for the Directive's implementation. Generally Polish legislator has decided on the rule of the total implementation of the directive's provisions and only has transformed and specified some of them. The essence of the regulations of the Directive supplementing the Statute for a European Cooperative Society with regard to the involvement of employees was in principal included in the contents of Polish Act on European Cooperative Society which only to small extent contains the regulations differing from Community regulations. The legally binding Act on SCE of 22 July 2006 cites almost identical expressions which are used in the Directive. However, there are a few discrepancies and separateness in comparison with the leading in this scope Directive.

Firstly, the analysis of the provisions of the Directive showed that there are some differences in the scope of definitions. Polish definition of "representative body" does not indicate the purpose of setting up of representative body contrary to as it is provided in the Directive which determines the purpose in the following way: "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".

Secondly, the SNB, in general, takes decision by an absolute majority of its members, provided that such a majority also represents majority of the employees (in the Directive this kind of majority is determined as absolute, Polish Act is silent in this matter).

Thirdly, Polish Act does not determine the manner of counting of period in case of exceeding the duration of negotiations– or with period of six months including or over this period. The Directive is more precise in this scope. In the light of the article 5 paragraph 2 the parties may decide to extend negotiations beyond the period of six months up to a total of one year from the establishment of the SNB.

Fourthly, the Directive indicates basic and obligatory elements of the content of the agreement. Polish legislator used the open catalogue of elements of the content of the agreement leaving certain autonomy to negotiating parties. It should be underlined that Polish Act determines a minimum of the content of the agreement.

5. Conclusions and recommendations

Polish Act on the European Cooperative Society plays the important role in the establishing and improving of social dialogue in Poland. In Polish legal order there is no permanent employees' representative existing, except for the representative of employees participation in the administrative organs of companies established as a result of transformation state-owned enterprises and the possibility to call trade union organizations. Under Polish law order the employees' representative involvement in the administrative organs of the companies was limited to the limited liability companies established as a result of commercialization of state-owned enterprises. According to the Act of 30 August 1996⁴⁰ on commercialization and privatization the right to elect some number of the members of the supervisory council is vested in the employees.

Under Polish law the institution of assembly's representative is some kind of permanent employees' representative. The election of employees' representative or representatives is made by the all employees not for the purpose of permanent activity, but only for acting in some defined cases. Some of the acts of Polish labour law provide such kind of election of employees' representative in order to improve the cooperation an employer with the employees. These are the following acts: the article 237⁷ paragraph 2 and the article 237⁸ paragraph 1 Polish Labour Code, the article 8 of the Act of 4 January 1994 on Social Benefits Fund at work establishment⁴¹, the article 15 of the Act of 22 August 1997 on Employees' Retirement Programs⁴², paragraph 1 point 2 of the Minister's of Labour and Social Affairs the Regulation of 31 December 1998 on Disabled Persons Fund at work establishment⁴³. The mentioned legal acts concerned the cases in which the trade union organizations active at work establishment do not function in a given establishment.

The collective bargaining in Poland were dominated by the trade union organizations so far that we can say about some kind of trade union monopoly in the sphere of agreements concluding with an employer. The mentioned thesis is acknowledged by the article 59 of The Republic of Poland Constitution of 2 April 1997⁴⁴ which lays down the scope of trade unions' tasks. Among the rights vested in the trade unions organizations, the Constitution indicates running bargaining, in particular aiming at resolving collective disputes and concluding collective agreements and other agreements. Under Polish Constitution the other entities are entitled to conclude the agreements with an employer. However, only with reference to the trade union organizations the Constitution makes objection that they shall be not excluded in Polish legislation from concluding collective agreements and other agreements. Moreover, the trade union organizations are the only entity entitled to bargain collective agreements and the regulations concerning remuneration.

⁴⁰ Journal of Laws from 2002, No. 171, item. 1397. It is worth to underline that the activity of employees' representative organ acting in the form of a supervisory council is regulated under the Act of 25 September 1981 on assembly of staff of state-owned enterprise (Journal of Laws from 1996, No. 118, item. 561 with following amendments). Moreover, this activity is limited only to the state-owned enterprises.

⁴¹ Journal of Laws No. 55, item 234 with following amendments.

⁴² Journal of Laws No.139, item 932.

⁴³ Journal of Laws No.3, item 22.

⁴⁴ Journal of Laws No. 78, item 483.

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Under the Act on Social Benefits Fund at work establishment, the trade union organizations active at work establishment adopt with an employer the regulation of social benefits fund.

Pursuant to the Act of 13 March 2003 on specific rules governing the terminations of the labour relationships for reasons not related to the individual workers⁴⁵, an employer has a duty to take up the negotiations with trade union organizations so as to conclude the agreement in which the procedure and rules governing the group lays off will be determined.

The co-operation between an employer and a trade union organization active at work establishment in the cases resulting from individual labour relationships is provided for in the Labour Code. These are the following situations: a termination of an unfixed term employment contract with notice (the article 38 paragraph 1 of the Labour Code), a termination an employment contract without notice through employee's own fault (the article 52 paragraph 3 of the labour Code), a termination an employment contract to female during her pregnancy only if bankruptcy or liquidation of the employer's is declared (the article 177 paragraph 4 of the Labour Code).

It should be underlined that the Act on SCE breaks the monopoly of trade union organizations on account of the fact that the organ competent in the information and consultation procedure is elected, among the employees, a special organ representing employees' of the SCE. The trade union organizations play the subsidiary role on the ground of the Act on SCE, in particular during the negotiations between a special negotiating body, representing employees and the organs of the participating entities involved in establishing of the SCE, resulting in establishing of the SCE. Although, it should be emphasized that in some provisions of Polish Act the important role of trade unions organizations was preserved. This will be presented below.

Polish Act on the European Cooperative Society plays the important role in the establishing and improving of social dialogue in Poland. It is hardly to say if the Act play important role in practice on account of a short time of binding of the Act.

As the adoption of the statute in the future is concerned, it is hardly to say.

Recommendations - on a national level and on a Community level

Apart from the questions, that were touched within the assessment of implementation and that indicate some discrepancies in relation to the Directive in force, also other matters deserve to be considered by Polish legislator.

Although the Act on SCE breaks the monopoly of trade union organizations to some extent, the right to appoint members of the SNB and a possibility to appoint or elect to the SNB as its members, among representatives of trade union organizations, presented above, lead to maintain their position. As it is provided for above, the trade unions organizations are entitled to involvement in the matters of establishment under many provisions.

⁴⁵ Journal of Laws 2003, No. 90, item 844.

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The considerable meaning has the article 41 paragraph 6 of the Act on SCE which states that the majority in the SNB shall present employees of participating entities, subsidiaries and establishments.

It should be underlined that in the Polish Act, as well as in the Directive there is no provision that excludes the possibility of appointment or election of the SNB employees occupying manager (supervisory) posts. It may cause a risk that mentioned category of members will be act in employer's interest.

It should be underlined that Polish Act, as well as the Directive are silent in the matter concerning the way of designation of the members of the select committee.

The Directive in the letter (b) of the annex 2, as well as Polish Act in the article 73 paragraph 2 point 6, introduces a notion of important parts of undertakings or establishments. There are doubts about the definition of "important part", in particular there are no criteria in Directive, as well as in Polish Act for recognized the part as important.

Polish Act is silent when we consider the question of cooperation spirit between the supervisory or administrative organ of the SCE and the employees' representatives in conjunction with a procedure for the information and consultation of employees, as it is provided in the Directive.

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Annex I: Correspondence Table - Transposition of the ECS-Directive into the Polish Law

Poland implemented the directive principally by the Act of 22 July 2006 on the European Cooperative Society (SCE). The corresponding sections are following:

Article of the Directive	transposed by the article
1	35
2	2 point 3 and 8; 34
3	36 - 57
4	58; 59
5	53
6	No implementation needed
7	60 - 62
8	88 - 91
9	58§2
10	92 - 95
11	54
12	96 - 99
13	100 – 101; 111
15	57§6
Annex part I	63 – 71
Annex part II	72 - 82
Annex part III	83 - 87