

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

NATIONAL IMPLEMENTATION REPORT



Portugal

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Executive Summary¹

Portugal has transposed the Directive 2003/72/EC through Act 8/2008, of 18 February 2008. The compulsory transposition period established by the Directive was not respected.

In general, it could be considered that the Portuguese law transposes correctly the provisions of the Directive. However, if we go down to details, their accurate implementation was not always achieved; we can find in the national law divergences and omissions that inhibit it to fulfil completely the requirements of the Directive. In some cases, the unfulfilled requirements are obvious after analysing carefully the Directive, but in other ones that conclusion can only be obtained after determining the correct interpretation of the Directive's provisions. All the conflict points and omissions were computed and recommendations were made on a national level in order to correct the contradictions and regulate the missed out points.

We thought advisable to make recommendations on a community level in order to enlighten on doubts that can be, in our opinion, responsible for the incorrect transposition of the Directive's provisions.

¹ Report drafted by Catarina Carvalho. University of Coimbra.

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1. Introduction

A new Portuguese Labour Code, approved by Act 7/2009, of February 12th, has recently entered into force — in 17 February 2009 — revoking the Labour Code of 2003. Nevertheless, a part of the new Code's provisions has not entered into force, because it is still waiting for the complementary legislation. Until that moment occurs, some of the provisions of the Labour Code approved by Act 99/2003, of August 27th, and its regulation (Act 35/2004, of July 29th) remain in force. For that reason, we will be referring to provisions in force from both Labour Codes, identifying them by the year of approval (2003 or 2009).

Portuguese labour law provides for the involvement of employees mostly through their representatives. It establishes a double way on workers' representation with different origins and legitimacy. One of the employees' representative structures is the union representatives² and the other is the works council which is independent from the unions and represents all the workers of the undertaking (unionised and non-unionised). In undertakings with geographically disperse establishments the employees can create sub-councils. It's also possible to create co-ordination councils to improve the intervention in an economic restructuring or to articulate activities of works councils within undertakings in a dominant or group relationship.

In practice, only a small percentage of the Portuguese undertakings have employees' representation structures³. This is partly a consequence of the large number of micro and small undertakings⁴. This situation has not changed since the implementation of Directive 2002/14/CE, according to the empirical data available.

The labour laws can be set aside by a collective agreement, except when stated otherwise. The unions have the exclusive right to sign legally binding collective labour agreements, although they can delegate on works councils whenever the undertaking has 500 or more employees. The collective agreements are only binding to the employers who sign them and to those registered in the signatory employer association, as well as to the employees at their service who are members of the signing unions.

Other specific provisions exist on issues of information and consultation of workers as the health and security councils, which have information and consultation rights restricted to these subjects, the Workers' Council in the European Companies (SE) and the European Works Councils for undertakings or groups of undertakings with community dimension.

Only in the public sector (state-owned companies) can the works council elect employees' representatives to the corporate bodies (article 428 of the Labour Code 2009). This situation

² The unions can carry out their activity within the undertaking, namely through union deputies, committees and inter-union committees which are elected by the unionised workers of the undertaking (undertaking's union section). The union representation is not unitary, but plural.

³ According to data published in 2007, only 26 % of the undertakings have union deputies, only 18.5 % have Workers' Committees and only 26.1 % have health and safety representatives. Cf. *Livro Branco das Relações Laborais*, Ministério do Trabalho e da Solidariedade Social, November 2007, p. 74.

⁴ According to DGEEP (Direcção Geral de Estudos, Estatística e Planeamento) data of 2003, 93.2 % of the establishments had less than 20 employees.

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has theoretically changed after the implementation of the Directive 2001/86/CE, which has, for the first time, introduced legislation on participation in private companies, allowing workers' participation at the level of governing boards.

The cooperative sector is considered by the Portuguese Constitution as a third sector of the economy next to the private and the public sectors (article 82) and it benefits from constitutional preference, which is historically linked to the objective of socialising production.

It is not clear the juridical nature of the cooperatives in Portugal. Some authors consider them companies/societies⁵ while others⁶ deny such qualification and prefer to consider them associations *sui generis*. The main doubt refers to the notion of “lucrative aim” essential to the company/society definition. The first authors mentioned make a *lato sensu* interpretation of that concept including expenses saving, as well as economic advantages affecting directly the patrimony of the members. The second ones defend a concept of “lucrative aim” which coincides with a gain translatable in a patrimonial increase of the society, usually “capital fructification”, meant for being shared by the partners later on. Nevertheless, all agree that many cooperatives can be considered undertakings, as well as traders.

Before the first Cooperative Code⁷, cooperatives were regulated by the Commercial Code as companies/societies, although with a special regime. Nowadays, the cooperative's definition states that they cannot have a lucrative aim (article 2 of the Cooperative Code⁸). Additionally, according to article 80 of the Cooperative Code, the transformation of a cooperative in a commercial society of any kind is considered null and void. These provisions reinforce the authors' opinion that denies its qualification as societies. Still, article 9 of the Cooperative Code declares that the missing points shall be integrated by the commercial law (Commercial Societies Code⁹), especially through the rules concerning *sociedades anónimas*, as long as they respect the cooperative principles.

In Portugal, five is the minimum number of members of a cooperative and the principle «one member one vote» is applicable (article 3 of the Cooperative Code). Non-members are allowed to invest in the cooperative, but they cannot become members of the corporate bodies. All members of the cooperative must be investors.

⁵ Cf. ANTÓNIO MENEZES CORDEIRO, *Direito europeu das sociedades*, Coimbra, 2005, p. 1047; MIGUEL PUPO CORREIA, *Direito Comercial – Direito da empresa*, 9.^a ed., Lisboa, 2005, p. 140; PINTO FURTADO, *Curso de direito das sociedades*, 5.^a ed., Coimbra, 2004, pp. 141-144; DEOLINDA APARÍCIO MEIRA, «A natureza jurídica da cooperativa. Comentário ao acórdão do STJ de 5 de Fevereiro de 2002 (Garcia Marques)», *Revista de Ciências Empresariais e Jurídicas*, 2006, n.º 7, pp. 177-179 and *passim*.

⁶ JORGE COUTINHO DE ABREU, *Da empresarialidade*, Coimbra, 1996, pp. 154-188; *Idem*, *Curso de direito comercial*, vol. I, 4.^a ed., Coimbra, 2003, pp. 100-101, 269-274, and vol. II, pp. 24-29; VASCO LOBO XAVIER, *Sociedades comerciais*, Coimbra, 1987, pp. 24-25, 38-40; BRITO CORREIA, *Direito comercial*, 2.º vol., Lisboa, 1989, pp. 62-63; RUI NAMORADO, *As cooperativas – Empresas que são associações*, 1999, pp. 54-55.

⁷ Approved by Decree-law 454/80, of October 9th.

⁸ Approved by Act 51/1996, of September 7th, modified by Decree-Law 343/98, of November 6th, Decree-Law 131/99, of April 21th, Decree-Law 108/2001, of April 6th, Decree-Law 204/2004, of August 19th, and 76-A/2006, of March 29th.

⁹ *Código das Sociedades Comerciais*.

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No measures were taken until the present moment to adapt or complete the Portuguese laws in order to allow a total and practical application of Regulation (EC) n. 1435/2003, as it was made in relation to the Council Regulation (EC) n. ° 2157/2001, establishing a Statute for the European Company, through Decree-Law 2/2005, of January 4th, which has changed some of the national regulations in order to adapt them to the Council Regulation¹⁰.

The social and economical relevance of the Portuguese cooperative sector is considerable, although cooperatives represent only about 0,4% of the Portuguese enterprises. According to 2008 data¹¹, there are 3288 cooperatives in Portugal, present in all economical areas, and 29 of the 1000 biggest Portuguese enterprises are cooperatives. There are no exact data on the number of workers' cooperatives since the difference between workers' cooperatives and user's cooperatives has no legal base. Nevertheless, it is estimated that more than 40% are workers' cooperatives. The possibility of a co-operator having a labour contract with the cooperative is controversial in Portuguese jurisprudence and juridical literature. While some admit such labour relationship¹², others deny it radically at least when the object of the labour contract coincides with the activity that the co-operator has to develop according to the cooperative institution pact¹³.

There is no special participation system for cooperatives. Consequently, it is applicable to all cooperative workers the general participation system regulated in the Labour Code. The only doubt regards the possibility of members having a labour contract, as explained above.

2. Formal aspects of the transposition

- a. Portugal transposed the Directive through Act 8/2008, of 18 February 2008, and did not entrust management and labour to define by agreement the measures required.
- b. The compulsory transposition period established by the Directive (article 16) – August 18th, 2006 – was not respected because Act 8/2008 only entered into force on the February 23rd, 2008. It contains a reference to this Directive (article 1).
- c. Portugal has a general, permanent and statutory system of employee representation at the workplace through works councils (and sub-councils), union representatives and health and security councils (which have information, and consultation rights restricted to these subjects). Other specific provisions regard the European Works Councils for undertakings or groups of undertakings with community dimension and the involvement

¹⁰ The need to adopt specific legislation to allow a total and practical application of Regulation (EC) n. 1435/2003 is mentioned by Portuguese legal literature. *Vd.* RAUL GUICHARD, «O regime da sociedade cooperativa europeia (SCE). Alguns aspectos», *Revista de Ciências Empresariais e Jurídicas*, 2006, n.º 7, p. 221, and ANTÓNIO MENEZES CORDEIRO, «Evolução do direito europeu das sociedades», in AAVV., *Nos vinte anos do Código das Sociedades Comerciais – Homenagem aos Profs. Doutores A. Ferrer Correia, Orlando de Carvalho e Vasco Lobo Xavier*, vol. I, Coimbra Editora, Coimbra, 2007, p. 80.

¹¹ Data given by Instituto António Sérgio do Sector Cooperativo – www.inscoop.pt

¹² *Vd.* JÚLIO GOMES, *Direito do trabalho*, vol. I, Coimbra Editora, Coimbra, 2007, pp. 173-180.

¹³ *Cf.* JORGE LEITE, «Relação de trabalho cooperativo», *Questões Laborais*, 1994, n.º 2, pp. 89-108.

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of employees applicable to European companies (SE) through Decree-law 215/2005, of December 13th.

- d. Social agents have to participate in the preparation of the labour laws, as Portuguese Constitution (article 54.5.d, and article 56.2.a) and Labour Laws impose that obligation, namely through *Comissão Permanente de Concertação Social* (Standing Committee for Social Conciliation). The bill was published for “public discussion” in 16 January 2006, which is an obligatory part of the labour legislation process, and some social agents have given their opinion, which will be referred to *infra*.

3. Legal contents of national regulation

3.1.1 Object (art. 1 of the Directive)

The *object* of Act 8/2008, as it is referred in article 1, is the implementation, in the Portuguese framework, of the Directive 2003/72/EC supplementing the statute for a European cooperative society with regard to the involvement of employees. The involvement of employees in the affairs of an SCE might be established through a representative body, one or more information and consultation procedures or a participation regime (article 2.1). The representative body or the employees’ representatives exercising functions under the information and consultation procedure embrace the subsidiaries and establishments of the SCE (article 2.2).

3.1.2 Definitions (art. 2)

All the *definitions* are in article 4.

SCE means any cooperative society established in accordance with Council Regulation (EC) n. 1435/2003, of July 22nd, regarding the statute for a European cooperative society, and other applicable legislation.

Participating legal entities means the cooperative or other legal entities of public or private law, which participate in the establishing of an SCE.

Subsidiary of a participating legal entity or of an SCE means an undertaking over which that legal entity or SCE exercises a dominant influence defined in accordance with article 473 of the Labour Code of 2003¹⁴. This article establishes that an undertaking headquartered in national territory and belonging to a group with community scale exercises control of the group if it has a dominant influence over one or more of the undertakings as a result, for example, of ownership, of subscribed capital or of the rules that govern it. This provision is developed by article 366 of Act 35/2004, of July 29th, which presumes the ability to exercise a dominant influence when an undertaking, in relation to another, directly or indirectly: holds the majority of that undertaking’s subscribed capital, or controls more than half of the votes

¹⁴ The Labour Code of 2003 was revoked by the Labour Code of 2009. However, some of the articles of the Labour Code of 2003 and of the Act 35/2004, of July 29th, remained in force until the entry into force of complementary legislation, which has not been approved until the present moment. That was the case of articles 471 to 473 of the Labour Code of 2003 and of articles 365 to 395 of Act 35/2004.

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in the general meeting, or can appoint more than half of the members of that undertaking's management or supervisory body. The subsequent paragraphs of article 366, as well as article 367, implement the other criterion established by article 3(2) to 7 of Directive 94/45/EC.

Concerned subsidiary or establishment means a subsidiary or establishment of a participating legal entity, which is proposed to become a subsidiary or establishment of the SCE, according to its formation project.

*Representative body*¹⁵ means the body representative of the employees of an SCE and its subsidiaries and establishments situated in the European Economic Community, set up by the agreements referred to in the Act, with the purpose of informing and consulting the represented employees and, where applicable, of exercising participation rights in relation to the SCE.

Special negotiating body (SNB) means the body constituted by the employees' representatives of the participating legal entities, concerned subsidiaries and establishments, in accordance to this Act, with the purpose of negotiating with the participating legal entities the arrangements for the involvement of employees within the future SCE.

Involvement of employees means any procedure, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the SCE.

Information means the informing of the representative body or the employees' representatives (exercising functions under an information and consultation procedure) by the SCE on questions which concern both the SCE itself and one or more of its subsidiaries or establishments situated in another Member State¹⁶ or that exceed the powers of the decision-making organs of one or more subsidiaries or establishments, in a timing, a manner and with a content which allows the employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations with the competent organ of the SCE.

Consultation means the procedure that, on the basis of information provided to the representative body or to the employees' representatives (exercising functions under an information and consultation procedure) by the SCE, allows a joined together evaluation of the issues and information given, at a time, in a manner and with a content, which allows the employees' representatives to express an opinion on measures envisaged by the competent organ that may be taken into account in the decision-making process within the SCE.

Participation means the procedure that allows to the employees' representatives elect, appoint, recommend or oppose the appointment of the members of the SCE' management or supervisory organ.

¹⁵ The Portuguese Act has called it *Works Council*.

¹⁶ The Portuguese version of the Directive has mistakenly mentioned "questions which concern the SCE itself or any of its subsidiaries or establishments situated in another Member State". However, the Act refers correctly the Directive's provision referring to "both the SCE itself and one or more of its subsidiaries or establishments situated in another Member State".

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For methodical reasons, the Portuguese Act adds one more definition concerning *quantitative reduction of employees' participation rights*, mentioned in article 3.4 (last paragraph) of the Directive. This means that the proportion of members of the organs of the SCE, within the meaning of participation, is lower than the highest proportion of the members of the organs of the participating legal entities.

Other relevant definitions

Cooperative: cooperatives are autonomous, freely incorporated corporate bodies, with variable capital and composition. These non-profit-making cooperatives, by means of cooperation and mutual aid by their members, and in compliance with the principles of cooperation, aim to meet their members' economic, social or cultural needs and aspirations (article 2 of the Cooperative Code).

As explained above, it is not clear the juridical nature of the cooperatives in Portugal. Some authors consider them societies while others deny such qualification and prefer to consider them associations *sui generis*. The main doubt refers to the notion of “lucrative aim” essential to the company/society definition. Nevertheless, all agree that many cooperatives can be considered undertakings, as well as traders. Article 9 of the Cooperative Code declares that the missing points shall be integrated by the commercial law, especially through the rules concerning *sociedades anónimas*, as long as they respect the cooperative principles.

Employee: natural person who undertakes, in exchange for salary, to render work to one or more persons, under their authority and direction (article 11 of the Labour Code of 2009). It is applicable the general concept of employee. As far as cooperatives are concerned, there is not a particular concept of employee. Consequently, it is applicable the general concept of the Labour Code.

However, the possibility of members having labour contracts with the cooperative is controversial in Portuguese jurisprudence and legal literature. As mentioned above, while some admit such labour relationship, others deny it when the object of the labour contract coincides with the activity that the co-operator has to develop according to the cooperative institution pact, because he would be his own employer. In the last case, it is considered that the member has an associative relation with the cooperative since he merely performs the institution pact.

The workers in cooperatives only have the social security regime and social benefits applicable to **independent** workers (article 10.2 of Decree-Law 328/93).

The articles of the Labour Code which implement Directive 2002/14/CE do not refer to cooperatives; consequently, its application depends on how we qualify the legal relationship between the cooperative and its members: if we consider them real workers those articles are applicable, otherwise they are not (if we consider them independent workers).

Whenever they are considered employees, the general labour law is applicable because there are no specific rules.

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Employees' representatives: works councils and union representatives (article 404 of the Labour Code of 2009). There are no specific rules on this subject applicable to cooperatives.

There are no specific rules regarding "*information*", "*consultation*" and "*participation*" in the context of cooperatives. However, to the part of legal literature and jurisprudence that does not consider cooperative members as employees the general rules are not applicable to them when they merely develop the activity according to the cooperative institution pact. Still, this understanding is controversial.

4. Provisions that apply to SCE based in the Member State

4.1 Field of implementation (art. 15)

Article 3 of Act 8/2008 establishes that where an SCE is a Community-scale undertaking or a controlling undertaking of a Community-scale group of undertakings, within the meaning of articles 472 and 473 of the Labour Code (2003)¹⁷, its provisions shall not apply to them. Nonetheless, this exclusion will not take place if the SNB decides not to open negotiations or to terminate the ones already opened.

Concerning the scope of the provisions and the legislation applicable, article 5.1 establishes that they are applicable when the plan for the establishment of an SCE foresees that its headquarters are going to be situated in national territory. The scope embraces all the participating legal entities, the SCE, its subsidiaries and establishments situated in the European Economic Area. The provisions regarding appointment or election and protection of employee representatives are applicable to all SCE and its subsidiaries and establishments situated in Portuguese territory (article 40 of Act 8/2008).

No reference is made by the Portuguese Act to the issues regulated in article 15.2, 3 and 4 of the Directive. However, that is not crucial, since the Portuguese law only recognizes true participation rights in the public sector (state-owned companies) through works councils and the privatisation of the huge majority of public enterprises during the last 14 years has drastically reduced the group of firms where this right in theory could have some impact. Besides this case, participation rights in private companies are only possible in an SE, after the implementation of the Directive 2001/86/CE.

Furthermore, the general information and consultation rights are applicable to the employees of the SCE, its subsidiaries and establishments.

¹⁷ These articles transposed Directive 94/45/EC.

4.2 Procedure for negotiation of the rights of involvement of workers in the SCE

Responsibility of procedure (art. 3.1)

Article 8.1 establishes that the participating legal entities shall take the initiative to start negotiations with the employees' representatives regarding the arrangements for the involvement of employees in the SCE.

For this purpose, according to article 6.1, the participating legal entities shall take the necessary measures to promote the constitution of a SNB, namely providing for the following information: the identity of the participating legal entities, concerned subsidiaries or establishments, and the number of their employees.

This information should be provided to the employees' representatives participating on the appointment or election of the members of the SNB, according to the legislation of the Member State in which territory the participating companies, concerned subsidiaries and establishments are situated. If the employees' representatives do not participate on the appointment or election of the members of the SNB, according to the legislation of the Member State, than the information should be given directly to the employees of the participating companies, concerned subsidiaries and establishments (article 6.2).

Besides the information referred above, the Portuguese Act imposes some additional obligations only to the participating legal entity with the higher number of employees¹⁸ which headquarters are situated in national territory (article 9). This legal entity shall:

- i) Determine the total numbers of the SNB members, as well as the Member States in which they should be elected or appointed, according to the number of employees of the participating legal entities, concerned subsidiaries and establishments, and the criteria referred below;
- ii) Inform the SNB of the plan and the actual process of establishing the SCE up to its registration;
- iii) Inform the other participating legal entities and the employees' representatives participating on the appointment or election of the SNB members¹⁹ of the total number of SNB members, as well as the Member States in which they should be elected or appointed;

¹⁸ According to article 10, the number of employees of the participating legal entities, concerned subsidiaries and establishments, is determined by reference to the date of the working up of the plan establishing the SCE. The part-time workers should be considered independently from their work period to the determination of the number of employees (article 48).

¹⁹ If, according to the legislation of the Member State, the employees' representatives do not participate on the appointment or election of the members of the SNB, the information should be provided directly to the employees of the participating legal entities, subsidiaries and establishments.

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- iv) Establish a reasonable period, starting from the information previously mentioned (iii), to the election or appointment of SNB members from each Member State, according to the applicable regime.

We can doubt if the restricted scope of point (ii) regarding only the participating legal entity with the higher number of employees, liberating all others from these obligations, is compatible with the Directive's provisions, mostly because article 3.3 (second paragraph)²⁰ refers to the participating legal entities, using the plural form. Furthermore, the ECJ considered, in relation to the similar EWC Directive, that the management of every undertaking belonging to the Community-scale group of undertakings is responsible for obtaining and transmitting to the parties the information required for commencing the negotiations (Case C-440/00, *Gesamtbetriebsrat der Kühne & Nagel v. Kühne & Nagel AG Co KG*, judgment of the Court of Justice of 13 January 2004; Case C-349/01, *Betriebsrat der Firma ADS Anker GmbH v. ADS Anker GmbH*, judgment of the Court of Justice of 15 July 2004). This understanding is currently present in article 4.4 of the recent Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

Start of procedure (art. 3.1)

The referred procedure shall take place after the participating legal entities decide to create an SCE.

The Directive expression “as soon as possible”, regarding the constitution of the SNB, cannot be found in article 6.1. Still, the obligations previously mentioned imposed only to the participating legal entity with the higher number of employees which headquarters are situated in national territory refer to a *reasonable period* to the election or appointment of SNB members from each Member State (article 9.b). The concept of “reasonable period” is not, however, necessarily coincident with the one “as soon as possible”.

Article 8.2 states that the negotiations must be initiated as soon as the SNB is constituted. The SNB has the right to meet immediately before any negotiating meeting.

Constitution and composition of the SNB (art. 3.2)

The SNB is constituted by employees' representatives belonging to the participating legal entities, concerned subsidiaries and establishments.

The SNB members are elected or appointed by allocating in respect of a Member State one seat per portion of employees employed in that Member State which equals 10 %, or a fraction thereof, of the total number of employees employed in all the Member States taken together (article 7.1).

In the case of an SCE formed by way of merger, the SNB will have further additional members from each Member State as may be necessary in order to ensure that it includes, at

²⁰ “To this end, the competent organs of the participating legal entities shall inform the SNB of the plan and the actual process of establishing the SCE, up to its registration”.

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least, one member representing each participating cooperative which has employees in that Member State and that will cease to exist as a separate legal entity with the merger (article 7.2).

Still, there are two limits to the additional number of members²¹: this rule does not apply to participating legal entities to which belong others with members of the SNB (apparently in order to avoid a double representation of the employees concerned) and the additional numbers of members should not exceed 20 % of the number of members designated by virtue of article 7.1.

If the number of participating cooperatives is higher than the total number of additional seats available, these ones should be allocated by decreasing order of the number of employees they employ (article 7.5). It would have been preferable to specify that the additional seats available should be allocated to participating cooperatives “in different members States”; nonetheless, we think that it is implied.

Again, apparently to prevent a double representation, article 7.6 does not allow the employees of the cooperatives that have indicated additional members to be represented by the regular members mentioned in article 7.1.

The election or appointment of the members of the SNB is regulated by the legislation of the Member State in which territory the employees to be represented work (article 7.7).

The criteria applicable when the members of the SNB are to be elected or appointed in Portuguese territory (article 41) are mentioned *infra*, while analysing the accessory provisions of the Directive.

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

The SNB and the participating legal entities shall determine, by written agreement, arrangements for the involvement of employees within the SCE (articles 8.1 and 16.3). To this end, the participating legal entities shall inform the SNB in the terms analysed above. However, the obligation of informing the SNB of the plan and the actual process of establishing the SCE up to its registration is imposed only to the participating legal entity with the higher number of employees, liberating all others. This solution is hardly compatible with article 3.3 (second paragraph) of the Directive which refers to the participating legal entities, using the plural form.

The SNB may decide not to open negotiations or to terminate the ones already opened (article 15). This decision must be adopted by 2/3 of the members representing at least 2/3 of the employees, including the votes of members representing employees employed in at least two Member States. It is not referred that this decision stops the agreement conclusion procedure, but it is obviously implied. This is not applicable in the case of an SCE established by way of transformation, if there is a participation regime in the cooperative to be transformed.

²¹ Article 7.3 and 4.

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Where such a decision has been taken, the provisions concerning the standard rules shall not apply (article 20.1 *in fine*).

The SNB should be reconvened and a new negotiation procedure must occur on the request of at least 10% of the employees of the SCE, its subsidiaries and establishments, or their representatives²², at the earliest two years after the decision mentioned above. Still, the parties may agree to negotiations being reopened sooner (article 39.1 and 3). No express reference is made to the need of a written request as it's imposed by article 3.6 of the Directive.

The rules regarding the creation and composition of the SNB are applicable. If the SNB decides to reopen negotiations but no agreement is reached, the provisions concerning the standard rules shall not apply (article 39.5 and 6).

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

Each member of the SNB has one vote (article 11.1).

The decisions should be taken by an absolute majority of its members, provided that such a majority also represents an absolute majority of the employees (article 11.2).

Nevertheless, there are exceptions when the result of the negotiations leads to a reduction of participation rights. Three conditions are essential in two cases:

- 1) the majority required shall be the votes of 2/3 of the members of the SNB,
- 2) representing at least 2/3 of the employees,
- 3) the votes of members representing employees employed in at least two Member States

The two cases are:

- i) an SCE to be established by way of merger, if participation covers at least 25 % of the overall number of employees of the participating cooperatives, or
- ii) an SCE to be established by any other way, if participation covers at least 50 % of the overall number of employees of the participating legal entities (article 11.3).

For this purpose, each member of the SNB represents the employees of the participating legal entity to which he belongs (article 11.4).

If there is, in a Member State, any participating legal entity, subsidiary or establishment which headquarters are situated in another Member State with no representation in the SNB, the representation of their employees is assigned, in equal terms, to the members from that State (article 11.5). All the members from that State represent in the same way (share and share alike) those employees.

²² The number of employees is determined at the moment of the request (article 39.4).

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If there is, in a Member State, two or more members of the SNB from the same participating legal entity, the representation of their employees is assigned, in equal terms, to these members (article 11.6).). These members represent in the same way (share and share alike) the employees.

The report of the meeting in which is adopted any negotial position by the SNB shall mention namely the elements previously referred (article 11.7). All the elements mentioned in article 11.2, 11.3, 11.4, 11.5 and 11.

For the purpose of the negotiations, the SNB may request experts of its choice. Such experts can be present at negotiation meetings, without voting rights, at the request of the SNB (article 12).

The SNB may decide to inform the workers' collective representation structures of the start, development and results of the negotiations (article 13.3). It goes beyond the Directive's provisions since article 3.5 (last paragraph) only mentions information on the start of the negotiations.

The expenses related to SNB operation²³ shall be borne by the participating legal entities, to enable it to carry out its task in an appropriate manner (article 38.1.a). These legal entities shall also provide for the material means necessary, including premises and an appropriate space to post information (article 38.1.b)).

The participating legal entities have also to pay the expenses related to at least one expert (article 38.1.c). As we can see, Portugal has chosen to limit the mandatory funding to cover one expert only, which is allowed by the Directive (article 3.7).

In compliance with these principles, the Directive allows the Member States to lay down budgetary rules regarding the operation of the SNB. Portuguese legislation develops some budgetary rules in article 38, which are also applicable, as standard rules, to the representative body.

The accommodation and travelling expenses can be paid accordingly to the system applicable in the subsidiaries or establishments where the employees' representatives work. Still, they cannot treat any member of the SNB less favourably (article 38.5 and 6).

The funding to cover the expert can be regulated by the provisions applicable to the members from the same Member State. The participant legal entities support the expenses concerning one expert in proportion of their employees' number (article 35.5 and 8).

The costs referring to each member of the SNB are supported by the participating legal entity he belongs to or from which subsidiary or establishment he comes from. When the member of SNB does not belong to any participating legal entity, subsidiary or establishment, the costs are still supported by them, if he represents the employees, in proportion to the number of their employees (article 38.7 and 9). The SNB-members from trade unions do not need to

²³ The operation' expenses include meetings' organization, translations, accommodation, travelling and one expert salary (article 38.3). The SNB and the participating legal entities can agree otherwise, except in relation to one expert payment (article 38.4).

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be employees of the participating legal entity, subsidiary or establishment. Consequently, there was the need to establish a legal regime regarding their costs

Duration of negotiations (art. 5)

Negotiations must be initiated as soon as the participating legal entities are informed of the SNB creation, and should continue for the maximum period of 6 months thereafter. The parties may decide, by joint agreement, to extend negotiations up to 6 more months – to a total of one year (article 14).

Involvement agreement (art. 4)

In the negotiation procedure, the parties should respect the principle of good-faith, namely by responding as soon as possible to the proposals and counter-proposals and observing the negotiation protocol, when such exists. Each one should, to the extent such does not harm their own interests, allow the other to access the information and data it might request (article 13).

There is no reference to the “view to reaching an agreement”, mentioned in article 4.1 of the Directive.

Without prejudice to the autonomy of the parties, the written agreement between the participating legal entities and the SNB, regarding the involvement of employees, must specify (article 16):

- i) the SCE, concerned subsidiaries and establishments, included in the agreement;
- ii) the date of entry into force of the agreement and its duration;
- iii) the regime of employees’ involvement applicable;
- iv) when the agreement should be renegotiated, namely if the number of employees has changed modifying the number or distribution of the management or supervisory bodies of the SCE which the employees or their representatives will be entitled to elect, appoint, recommend or oppose; the changes in the structure of the SCE are not mentioned; still, article 16 is merely exemplifying some of the situations that should lead to renegotiation;
- v) the procedure for renegotiation.

In the case of an SCE established by means of transformation, the agreement should provide for at least the same level of participation as the one existing within the cooperative to be transformed into an SCE. As we can see, by comparing the text of article 16.2 with article 4.4 of the Directive, the scope of the first one is more restrict than the last because it should apply to all elements of employee involvement and not only to participation.

When the agreement creates a “representative body”, it must also mention (article 17):

- i) its composition, number of members and allocation of seats, as well as the term of office;
- ii) the information and consultation rights and relating procedures;

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- iii) the frequency of meetings;
- iv) the financial and material resources to be allocated to it.

If the parties decide to establish one or more information and consultation procedures instead of a representative body, the agreement shall regulate the arrangements for implementing those procedures (article 17.2).

If the parties decide to establish, in the agreement, arrangements for participation, they shall mention the substance of those arrangements, namely:

- i) the number of members in the SCE's management or supervisory body who the employees or their representatives will be entitled to elect, appoint, recommend or oppose;
- ii) the necessary procedures as to how these members may be elected, appointed, recommended or opposed by the employees or their representatives.

Although this specification is merely exemplifying, it should also include, as it is stated in article 4.2(g) *in fine*, the rights of those members.

The agreement shall not, unless provision is made otherwise therein, be submitted to the standard rules (article 20.1).

The management or supervisory organ of the SCE shall send a copy of the agreement to the relevant service of the ministry responsible for labour issues. The representative body shall inform the ministry responsible for labour issues of the identity of its members and of the Member States they come from (article 19). The same applies to the employees' representatives exercising functions under an information and consultation procedure, as well as when the agreement is renegotiated the members of the representative body or the employees' representatives change.

4.3 Standard rules

4.3.1 Field of implementation

Portuguese Act has laid down standard rules on employees' involvement that satisfy almost all the provisions set out in the Annex of the Directive.

The standard rules will be applicable when either (article 20):

- i) the parties so agree (it is not mentioned expressly, but it is understood); or
- ii) no agreement has been concluded by the end of the negotiations period and the SNB has not taken the decision not to open negotiations or to terminate negotiations already opened.

For this purpose, the participating legal entities, wanting to continue with the registration of the SCE, must declare to accept the application of the standard rules.

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Moreover, the standard rules for participation (articles 29 to 32)²⁴ are applicable in the following cases:

- i) SCE established by transformation, if there were participation rules applicable to the cooperative transformed;
- ii) SCE established by merger, if a participation regime was applicable in one or more of the cooperatives, covering at least 25 % of the total number of employees in all the participating cooperatives, or covering less than 25 % of the total number of employees and the SNB so decides;
- iii) SCE established by any other way, if a participation regime was applicable in one or more of the participating legal entities covering at least 50 % of the total number of employees in all the participating legal entities, or covering less than 50 % of the total number of employees and the SNB so decides.

In the two last cases, if there was more than one form of participation within the various participating legal entities, the SNB should decide which of these forms must be established in the SCE. In the absence of any decision on the matter, it's applicable the form of participation that reaches the higher number of employees of the participating legal entities. The decision of the SNB shall be taken within a 15 days period following the end of the negotiation (article 20.4, 5 and 6). The SNB should inform the participating legal entities of the decisions previous mentioned (article 20.7).

4.3.2 Employees' representative bodies: composition, competences and standard rules (annex 1 and 2)

Composition

A representative body shall be set up in accordance with the following rules (articles 21 to 23):

- i) The number of members of the representative body is determined in proportion to the number of employees employed in each Member State, in relation to all the employees of the SCE, concerned subsidiaries or establishments, by allocating one seat per portion of employees employed in that Member State which equals 10 %, or a fraction thereof, of the total number of employees;
- ii) The number of members of the representative body should be reviewed, according to the previous criteria (i), at the end of their office term to take into account changes occurred within the SCE, its subsidiaries and establishments;
- iii) The members of the representative body shall be employees of the SCE, its subsidiaries and establishments;
- iv) Their election or appointment is regulated in accordance with the legislation of the Member State in which territory the represented employees work;

²⁴ Articles 29 to 32 implement part 3 of the Annex of the Directive.

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- v) The representative body shall inform the competent organ of the SCE of the identity of its members;
- vi) The term of office of the members of the representative body is 4 years;
- vii) A select committee, comprising at most three members, shall be elected by the representative body, from among its members, when it has 12 or more members;
- viii) The representative body adopts its rules of procedure.

For this purpose, the Portuguese Act imposes the SCE the obligations previously mentioned in relation to the SNB (article 21.3 and article 9).

Four years after the representative body is established, according to the standard rules, it can propose renegotiation for the conclusion of an agreement on the involvement of employees in the affairs of the SCE. Still, the parties may agree to negotiations being reopened sooner. To this negotiation are applicable the rules established for the SNB (articles 11 to 19). If the parties reach an agreement, than the standard rules cease their application since they are substituted by the new employees' involvement regime (article 39.2, 3, 7 and 8).

Competences and standard rules for information and consultation

The competence and powers of the representative body set up in an SCE are mentioned in the Portuguese Act, as follows.

Representative body's rights

Regarding the regular competence of the representative body, article 24 establishes its rights as it follows:

- i) The rights of the representative body comprehend issues which concern the SCE itself and any of its subsidiaries or establishments situated in another Member State, or which exceed the powers of decision-making of one or more subsidiaries or establishments;
- ii) The representative body has the right to be informed and consulted by the management or administrative organ of the SCE on the progress of the business and its prospects, as well as of their subsidiaries or establishments indicated in the previous paragraph;
- iii) The management or administrative organ of the SCE must inform the representative body of their meetings' agenda and give them copies of the documents submitted to the general meeting of SCE.

Annual report

Article 25 specifies the SCE's obligations concerning the annual report. Thus, the management or administrative organ of the SCE must present the representative body a detailed annual report, supported by documents, on the progress of the business and prospects, as well as of their subsidiaries or establishments previously indicated. This report must give the following information: the structure of the SCE, its subsidiaries or establishments, the economic and financial situation, the probable development of the business, production and sales, initiatives with regard to corporate social responsibility, the

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situation and probable trend of employment, investments, most relevant changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof and collective redundancies.

Meetings

Article 26 regulates separately the meetings between the management or administrative organ of the SCE and the representative body. On the basis of the annual report drawn up by the management or administrative organ of the SCE, the representative body has the right to meet him for information and consultation purposes. This meeting must take place one month after the annual report presentation, unless the management or administrative organ of the SCE accepts a shorter period.

The local managements shall be informed accordingly.

Other information or consultation rights applicable in exceptional circumstances

Other information or consultation rights of the representative body are foreseen in article 27 to be applicable in exceptional circumstances. Where there are exceptional circumstances affecting the employees' interests to a considerable extent, namely in the event of relocations, transfers, closure of the SCE, its subsidiaries or establishments, or collective redundancies, the representative body has the right to be informed.

The representative body or, where it so decides, in particular for reasons of urgency, the select committee, has the right to meet, at his request, the management or administrative organ of the SCE or any other more appropriate level of management within the SCE having his own powers of decision, so as to be informed and consulted on measures significantly affecting employees' interests. This meeting shall take place as soon as possible.

In the case of a meeting organised with the select committee, those members of the representative body that represent employees who are directly concerned by the measures in question have also the right to participate.

Where the management or administrative organ decides not to act in accordance with the opinion expressed by the representative body, this one has the right to a further meeting with a view to seeking an agreement.

Preparatory meetings

Before any meeting with the management or administrative organ of the SCE, the representative body or the select committee are entitled to meet without the representatives of the management or administrative organ being present. Those members of the representative body, that represent employees who are directly concerned by the measures in question, have the right to participate in the select committee meeting (article 23.3 and 4).

Information duties of the representative body

The members of the representative body must inform the representatives of the employees of the SCE, its subsidiaries and establishments, of the content and outcome of the information and consultation procedures (article 28). In the absence of those representatives, information shall be provided to the employees themselves.

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Experts

The representative body or the select committee can be assisted by experts of its choice (article 23.5).

Financial and material resources

The SCE must provide for the representative body's members the financial resources needed to support their *operation costs*, as well as those of the select committee, where applicable (article 38.2, 3 and 4). The operation costs include the ones of organising meetings, providing interpretation facilities, the accommodation and travelling expenses and one expert funding. A different regime can be agreed by the representative body and the management or administrative organ of the SCE. However, the SCE must always support the costs necessary to pay one expert²⁵.

The SCE shall also provide the representative body's members the material resources needed to enable them to perform their duties in an appropriate manner, including an appropriate space for their activities' development and a notice board for disposing information.

Budgetary rules

In compliance with these principles, the Directive allows the Member States to lay down budgetary rules regarding the operation of the representative body. Portugal has developed some budgetary rules as it is established in article 38.5, 6, 7, 8 and 9. These rules are equal to the ones applicable to the SNB which were already explained above.

Training licence

No reference is made by Portuguese law to the time off for training, when it is necessary for the fulfilment of representative body tasks, that the members of the representative body shall be entitled, without loss of wages, as it is referred in Annex part 2(g) of the Directive.

4.3.3 Participation of employees (annex 3)

Employees' participation in an SCE is governed by articles 29 to 32, which implement the annex part 3 of the Directive.

In the case of an SCE established by transformation, we shall apply the rules of the Member State related to employees' participation in the management or supervisory body which were applicable before registration.

In other cases where an SCE is not established by transformation, it is applicable to the SCE, as well as to its subsidiaries and establishments, the participation regime applicable to a participating legal entity of any Member State in force, before the SCE registration, in a participating legal entity and that allows the employees' representatives or the employees themselves to elect, appoint, recommend or oppose the appointment of members of the management or supervisory body of the SCE equal to the highest proportion.

²⁵ As we can see, also in this context, the Portuguese Act has limited mandatory funding to cover only one expert, which is allowed by the Directive (Annex part 2(h)). Nevertheless, the agreement can impose funding to cover more than one expert.

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The representative body decides on the allocation of seats within the management or supervisory body among the members representing the employees from the various Member States, or on the way in which the SCE's employees may recommend or oppose the appointment of the members of these bodies, according to the proportion of the SCE's employees in each Member State.

If the employees of one or more Member States are not covered by this proportional criterion and, consequently, their employees do not have a representative member in the administrative or supervisory body of the SCE, the representative body shall appoint a member from each one of those Member States.

If the Member State of the SCE's registered office doesn't have a representative member in the administrative or supervisory body, the representative body shall give priority to the appointment of a member from this Member State.

The number of seats given by this criterion shall be deducted from the ones of the Member States with more than one seat, following an inverse order of the total number of employees employed in these States.

Every member of the administrative or supervisory body of the SCE, who represents the employees of each Member State, has the same rights and obligations as the members representing the cooperative, including the right to vote.

The election or appointment of the members who represent the employees, employed in each Member State, in the management or supervisory organ of the SCE is regulated by the national legislation of each Member State. If the Member State has no such legislation, the representative body shall decide the election or appointment procedure applicable to the member of that State.

4.4 Common Provisions

4.4.1 Confidentiality of information (art. 10)

As far as confidential information is concerned, members of the SNB or of the representative body, employees' representatives exercising functions under an information and consultation procedure and experts who assist them are not authorised to reveal any information that has been given to them in confidence. According to article 37, these issues are regulated by reference to the legal provisions of the Labour Code of 2003 applicable to the employees' representatives in general (articles 458 to 460²⁶).

Thus, Portugal legislation has determined, in article 412 of the Labour Code (2009), that members of the collective representation structures cannot disclosure to the employees or third parties any information that was disclosed to them with express reference to its confidential nature in the context of information and consultation rights. The duty of confidentiality survives the term in office.

²⁶ These articles from the 2003' Labour Code correspond to articles 412 and 413 from de 2009' Labour Code.

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The supervisory or administrative organ of an SCE or of a participating legal entity established in its territory is not obliged to communicate information or undertake consultation that by nature may harm or seriously affect the operation of the SCE, the participating legal entity or its subsidiaries and establishments (article 412.3 of the Labour Code 2009). The article 413.1 of the Labour Code (2009) does not define exactly the “objective criteria”, but it demands a written justification.

In case of confidentiality required by the employer or grounded refusal to give information or conduct consultation, the collective representation structures can judicially challenge that decision in the terms supposedly foreseen in the Labour Procedure Code. However, this Code is still waiting to be reformed and no procedure has been foreseen yet. No review is established at an administrative level, but the unjustified failure to provide information or conduct consultation constitutes, in some cases, a serious infraction determining the application of a fine (articles 424.2 and 427.8 of the Labour Code 2009).

4.4.2 Protection of employees’ representatives (art. 12)

The members of the SNB, of the representative body, any employees' representatives exercising functions under the information and consultation procedure and employees' representatives in the supervisory or management organ of an SCE, enjoy the same protection and guarantees provided for employees' representatives by the Portuguese legislation (article 47).

The protection and guarantees are regulated in articles 408 to 411 of the Labour Code (2009) and analysed *infra* while considering the accessory provisions.

4.4.3 Spirit of cooperation (art. 11)

The SCE, the members of the SNB, the representative body and the employees' representatives exercising functions under an information and consultation procedure, shall cooperate and act with good-faith, regarding for their reciprocal rights and obligations (article 36).

4.4.4 Misuse of procedures (art. 13)

No specific measures were taken with a view to preventing the misuse of an SCE for the purpose of depriving employees of involvement rights or withholding such rights.

The only measures conceived correspond to a responsibility of administrative nature (articles 49 and 50), which are explained below regarding the sanction system for non-compliance.

5. Accessory provisions applicable to work centres and subsidiary companies in the territory of Portugal

5.1 Field of implementation

The national provisions are applicable to the SCE, its subsidiaries and establishments situated in Portuguese territory, as well as to the relating employees' representatives (article 40).

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

Employees' representatives according to national law are works councils and sub-councils, unions representatives and members of European Works Councils (article 404 of the Labour Code 2009).

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

5.3.1 Election or appointment of the members of the SNB

When the members of the SNB are to be elected or appointed in Portuguese territory, the following criteria will be applicable (article 42.3):

- a) If there is, in Portuguese territory, only one participating legal entity or subsidiary, the members of SNB are appointed by agreement between its works council and the unions, or by the works council when there are no unions;
- b) If there is, in national territory, two or more participating legal entities or subsidiaries, the members of SNB are appointed by agreement between their works councils and the unions, or by the works councils when there are no unions;
- c) If there is, in national territory, one or more participating legal entities or subsidiaries and one or more establishments of other participating entity or subsidiary, the members of SNB are appointed by agreement between their works councils and the unions, which shall represent at least the employees of the mentioned establishments;
- d) The members of SNB are appointed by agreement between the unions, which represent together, at least, 2/3 of the employees of the participating legal entities, subsidiaries and establishments, situated in national territory;
- e) The members of SNB are appointed by agreement between the unions each one representing 5% of the employees of the participating legal entities, subsidiaries and establishments, situated in national territory, when the previous situation (d) is not applicable.

The Portuguese law does not regulate the problem of the supposed lack of agreement between the unions and the works council. There is no jurisprudence or legal literature concerning this issue.

Although the Labour Code reveals some preference regarding the works council as a negotiating body, since it represents all the workers of the company (and not only the unionised ones), such a preference is not defined in Act 8/2008. Consequently, if there is no agreement the SNB members shall be elected in direct and secret suffrage from the candidatures presented by at least 100 or 10% of the employees of the participating legal entities, subsidiaries and establishments, situated in national territory.

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In general, only the unions, which represent at least 5% of the employees of the participating legal entities, subsidiaries and establishments, situated in national territory, can participate on the appointment of employees' representatives. However, when unions represent altogether 5% of the employees, they can appoint one of them to participate on the election of employees' representatives.

When the previous criterions cannot be applicable, the SNB members are elected in direct and secret suffrage from the candidatures presented by at least 100 or 10% of the employees of the participating legal entities, subsidiaries and establishments, situated in national territory. The same can occur when requested by 1/3 of their employees.

The convening of the elections, the candidatures presentation, the vote, the determination of the results, their publicity and the legality control are regulated by the law applicable to the European Works Council (article 392.5 by reference to articles 333, 340, 341 and 352 of Act 35/2004).

The election or appointment of the SNB members shall indicate the number of employees represented by each one of them.

The entities responsible for the nomination, appointment or election of employees' representatives shall respect the principle of equality and non-discrimination, namely promoting gender balance (article 41.2).

The election or appointment of the SNB members shall include one member representing each participating legal entity which headquarters are situated in national territory or, if that is not possible, of the participating legal entities that have more employees (article 42.1). No express measure is appointed to ensure that the overall number of members is not increased, according to article 3.2.b of the Directive. Still, this national provision allows such interpretation: when the overall number of members is increased, the application of the rule is not possible and consequently we should choose the participating legal entities that have more employees.

Portuguese Act has made use of the prerogative given by the Directive, allowing representatives of trade unions that represent the employees of participating legal entities, subsidiaries and establishments, to become members of the SNB whether or not they are their employees (article 42.2).

These criterions are also applicable to the election or appointment of the members who represent the employees in the management or supervisory organ of the SCE (article 45).

5.3.2 Election or appointment of the representative body

The election or appointment of the representative body is regulated in accordance with national legislation of the Member State in which territory the represented employees work (article 22.2).

When the members of the representative body are to be elected or appointed in Portuguese territory, the following criterions are applicable (article 43):

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- a) If there is, in Portuguese territory, only an SCE, the members of representative body are appointed by agreement between its works council and the unions, or by the works council when there are no unions;
- b) If there is, in national territory, an SCE and one or more subsidiaries, the members of the representative body are appointed by agreement between their works councils and the unions, or by the works councils when there are no unions;
- c) If there is, in national territory, an SCE, one or more subsidiaries and one or more establishments, the members of the representative body are appointed by agreement between their works councils and the unions, which should represent at least the employees of the mentioned establishments;
- d) The members of the representative body are appointed by agreement between the unions, which represent together, at least, 2/3 of the employees of the SCE, its subsidiaries and establishments;
- e) The members of the representative body are appointed by agreement between the unions each one representing 5% of the employees of the SCE, its subsidiaries and establishments, when the previous situation (d) is not applicable.

When the previous criterions cannot be applicable, the members of the representative body are elected in direct and secret suffrage from the candidatures presented by at least 100 or 10% of the employees of the SCE, its subsidiaries and establishments, situated in national territory.

The convening of the elections, the candidatures presentation, the vote, the determination of the results, their publicity and the legality control are regulated by the law applicable to the European Works Council (article 392.5 by reference to articles 333, 340, 341 and 352 of Act 35/2004).

The entities responsible for the nomination, appointment or election of employees' representatives shall respect the principle of equality and non-discrimination, namely promoting gender balance (article 41.2).

Portuguese Act allows representatives of trade unions that represent the employees of participating legal entities, subsidiaries and establishments, to become members of the representative body, whether or not they are their employees (article 43.2 by reference to article 42.2). This contradicts the provision of article 22.1 of the Act that states, "The members of the representative body shall be employees of the SCE, its subsidiaries and establishments".

The same regime is applicable to the election or appointment of employees' representatives when it was established one or more information and consultation procedures instead of a representative body (art. 44).

5.4 Protection of employees' representatives (art. 10)

The members of the SNB, of the representative body, any employees' representatives exercising functions under the information and consultation procedure and employees'

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representatives in the supervisory or management organ of an SCE enjoy the same protection and guarantees provided for employees' representatives by the Portuguese legislation in the Labour Code.

Article 47 of the Act explains the special rights of the employees' representatives in the context of an SCE statute.

These employees benefit from a credit of hours equal to the one given to works councils' members (25 hours per month) to perform properly the duties that have been assigned to them, which counts as time of effective service, including salary (articles 408 and 422 of the Labour Code 2009). However, they cannot accumulate credits of hours when they are members of more than one collective representation structure (article 47.3).

They also benefit from a paid credit of time to attend meetings with the SCE, its management or supervisory organ, as well as preparatory meetings, including travelling time (article 47.1.b).

Other absences to perform their duties that exceed the credit of hours are considered justified absences and count as time of effective service, except for purposes of salary (article 47.1.c of the Act 8/2008 and article 409 of the Labour Code 2009).

Those employees cannot be transferred without their consent, except when such transferral is a result of the total or partial moving of the establishment in which they render service. When that occurs, it's required the prior notification of the structure of which they are members (article 47.1.d of the Act and article 411 of the Labour Code 2009).

Finally, protection is also provided for in cases of disciplinary proceedings and dismissal in several ways (article 47.1.d of the Act and article 410 of the Labour Code 2009).

- a) If the employee is suspended from work that does not bar him from access to the places and activities within the scope of normal performance of such duties. The same solution is established when occurs a reduction of the normal work period or the suspension of the labour contract (article 308 of the Labour Code 2009).
- b) A disciplinary sanction is abusive when it is due to exercising (or being a candidate) functions in worker's representation bodies (article 331.1.c of the Labour Code 2009).
- c) After a dismissal, if a preliminary injunction to suspend it has been filed, the court will only rule unfavourably when it concludes that there is a serious possibility of the invoked just cause exists.
- d) The suits challenging the dismissal of these employees have urgent nature.
- e) If the court concludes that there was no just cause, the employee sacked has the right to choose between reinstatement and an indemnification (higher than the regular one) and never less than six months base salary and seniority payments.

The members of the SNB must be employees of a participating legal entity, its subsidiaries or establishments to benefit from this protection (article 47.2).

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Article 47.4 of Act 8/2008 refers only to the employees' representatives who are members of the supervisory or management organ of an SCE, establishing their right to paid absences necessary to perform their duties. This provision seems to keep the employee's salary in all situations of absences necessary to the performance of his duties with no maximum time limits.

However, one question must be raised in order to allow us to conclude whether the present article of Act 8/2008 implements article 12 of the Directive rightly or wrongly. When article 12 of the Directive establishes that the employees' representatives have the right to the paid absences necessary to the performance of their duties, does it admit the Member State to restrict the number of paid absences to, for instance, 25 hours per month, since they are treated equally to the other employees' representatives? Or, otherwise, must those absences be always paid, depending only on the proof of their necessity to the duties performance? In the first case, the Portuguese Act fulfils completely the Directive's requirements. In the second case, it does it only in relation to employees' representatives who are members of the supervisory or management organ of an SCE; the members of the SNB, of the representative body or any employees' representatives exercising functions under the information and consultation procedure will only receive the salary related to the absences within the credit of hours equal to the one given to works councils' members (25 hours per month). The other absences are justified, but not paid, as referred above.

6. Rules applicable to SCEs established exclusively by natural persons or by a single legal entity and a natural person (art. 8)

In the case of an SCE established by natural persons or by one legal entity and natural persons, which together employ fewer than 50 employees, or employ 50 or more employees in only one Member State, employees' involvement shall be governed by the following rules (article 33.1):

- i) in the SCE by the legislation of the Member State of the SCE's registered office which is applicable to other entities of the same type;
- ii) in its subsidiaries and establishments, by the legislation of the Member State where they are situated, and which is applicable to other entities of the same type.

When an SCE is governed by Portuguese legislation, the Labour Code is applicable because there is no specific labour legislation for cooperatives' employees.

Portuguese labour law provides for the involvement of employees mostly through their representatives. It establishes a double way on workers' representation: the union and the works council. In undertakings with geographically disperse establishments, the employees can create sub-councils. It's also possible to create co-ordination councils to improve the intervention in an economic restructuring or to articulate activities of works councils within undertakings in a dominant or group relationship. The unions carry out their activity within the undertaking, namely through union deputies, committees and inter-union committees which are elected by the unionised workers of the undertaking (undertaking's union section). The union representation is not unitary but plural.

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Concerning the works councils, it's established an indefinite right to receive information necessary to the performance of their activity (art. 423.1.a of the Labour Code 2009). This statute is materialised in article 424 which defines the subjects covered by the information right: general plans of activity and budget, production organization and its implications on employees and equipment, supply situation, forecasts, volume and administration of sales, employees management and its fundamentals criterion, undertakings' accounting situation, financing, taxation, corporate purpose, modification projects of capital stock and production activity. Other additional information rights are foreseen throughout the Labour Code such as information regarding part-time work in the company (article 156.2.b of the Labour Code 2009), term contracts (article 144.1 of the Labour Code 2009) and overtime hours record (article 231.7 of the Labour Code 2009).

The written opinion (not binding) of this entity is necessary before the employers' decision to practise the following actions: modification of the professional qualification criterion and promotions, changing of workplace resulting from the moving of the undertaking or establishment, all measures that reduce substantially the number of employees, aggravate substantially their work conditions or that are likely to lead to substantial changes in work organization or in labour contracts, closing the establishment, bankruptcy ruling petition (art. 425 of the Labour Code 2009).

The works council has also the right to meet regularly the management to discuss and analyse subjects connected with their rights (article 423.1.g of the Labour Code 2009).

As for union representatives' information and consultation rights, article 466 of the Labour Code (2009) is an almost literal translation of article 4.2 of the Directive 2002/14/CE. The right to information and consultation includes: (a) information on the recent progress and probable development of the undertaking's or the establishment's activities and economic situation; (b) information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment; (c) information and consultation on decisions likely to lead to substantial changes in work organisation or in labour contracts.

Both works councils and union representatives have the right to participate in undertaking restructuring processes (article 429 of the Labour Code 2009).

Other specific information and consultation rights are given to both works councils and union representatives in the event of transfer of the undertaking or establishment (article 286 of the Labour Code 2009), collective redundancy (articles 360-463 of the Labour Code), temporary reduction of the normal work period or suspension of the labour contract due to fact concerning the employer (articles 299-301 of the Labour Code 2009).

The works councils have a right to "scrutiny of management" (with exceptions in respect of activities connected with public or military services), which allows them to control the undertaking's management in some ways (art. 426 of the Labour Code 2009):

- evaluate and issue an opinion on the undertaking's budget and keep up with its execution;
- promote the suitable use of technical, human and financial resources;

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- promote measures contributing to the improvement of undertaking's activity;
- present recommendations for or criticisms of the apprenticeship, continuous professional training of workers, on improvements to working environments and health and safety conditions;
- defend the legitimate interests of the employees before the management and supervisory bodies of the enterprise and the competent authorities.

Employees' representation at corporate bodies is only recognized in the **public business sector** (arts. 54.5.f and 89 of the Constitution). According to art. 428 of the Labour Code (2009), the workers' committees can elect employees' representatives to the corporate bodies of public companies. However, the number of employees that can be elected and the determination of the specific corporate body they will incorporate are set by the by-laws/statutes of the public corporate entity, which are defined by decree-law.

In the case of transfer from one Member State to another of the registered office of an SCE mentioned in article 33.1 and governed by participation, at least the same level of employees' participation rights shall continue to apply (article 33.2). There are no further explanations.

In the case of an SCE established by natural persons or by one legal entity and natural persons, which together employ at least 50 employees, in at least two Member States, the provisions of articles 5 to 31, applicable to an SCE established by legal entities and mentioned above (regarding the scope of the provisions and the legislation applicable, the constitution of a SNB, the content of the agreement and standard rules on employee involvement), shall apply (article 34). There are no specific adaptations mentioned.

After the registration of an SCE established by natural persons or by one legal entity and natural persons, which employed initially fewer than 50 employees, or 50 or more employees in only one Member State, the provisions of articles 5 to 31, applicable to an SCE established by legal entities, shall apply in the following situations (article 35.1):

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

In these cases, the words 'participating legal entities' and 'concerned subsidiaries or establishments' shall be replaced by the words 'SCE' and 'subsidiaries or establishments of the SCE' respectively (article 35.2). There are no other specific adaptations mentioned.

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

The Portuguese Act does not implement the rules mentioned in article 9 of the Directive in respect to participation in the general or sectorial meeting.

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Nonetheless, we must point out that this rule starts by subjecting itself “to the limits laid down in article 59(4) of Regulation n. 1435/2003” and according to this article “the statutes of [an] 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”, but only if “on the entry into force of this Regulation, the law of the Member State where an SCE has its registered office so permits”. In addition, the Regulation says “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”.

Subsequently, the absence in the Portuguese law of participation rights in general or sectorial meetings recognized to employees or to their representatives reduces, in our opinion, significantly the practical pertinence of the non-existence in the Act of a provision implementing article 9 when Portugal is the Member State where the SCE has its registered office.

On 21 August 2003, the Portuguese Cooperative Code did not permit the statutes of a cooperative to provide for the participation of employees' representatives in the general meetings or in the section or sectorial meetings with voting rights. According to articles 33 (rights of co-operators) and 44 (definition, composition and deliberations of the general assembly) only members have the right to vote. Even honorary members allowed in social solidarity cooperatives do not have voting rights (article 5.3 of Decree-Law 7/1998, of January 15th).

A Portuguese employee representative participating to a foreign SCE General assembly will be protected by the general rules applicable to all employees' representatives.

Nothing is said in the Portuguese Act about the possibility of a foreign SCE organise section meetings in Portugal.

8. Legal procedures (or, given the case, extrajudicial)

The appropriate measures provided by Portugal for the protection of rights deriving from this Directive correspond to the possibility of using the judicial procedure in terms foreseen in general in the Labour Procedure Code, without any specifications regarding the involvement of employees in the SCE.

7.1 9. Other issues

Juridical efficiency in Portugal of the provisions of other Member States

Article 5.2 of the Act states that the agreement concerning the establishment of a representative body or an information and consultation procedure concluded according to the legislation of another Member State in which territory is situated the headquarters of the SCE oblige the subsidiaries and establishments situated in Portuguese territory, as well as their employees.

Sanction system for non-compliance

In respect to sanctions, Portuguese Act establishes responsibility of administrative nature (articles 49 and 50). In compliance with article 49, the general rules of administrative

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offence laid down in the Labour Code are applicable. Consequently, the provisions provided in the implementation of Directive 2003/72/EC are similar to the usual National ones.

Breach of SNB establishment rules (article 6), of the obligations of the participant legal entity with the higher number of employees situated in national territory (article 9), of the rules of the agreement which established a representative body (or an information and consultation procedure) related with information, consultation and meeting rights, of the standard rules (article 20.1 and 3), of the representative body's rights (article 24), of the annual report presentation and subsequent meeting (articles 25, 26.2 and 3), of the information and consultation rights of the representative body in exceptional circumstances (article 27) and also of the financial and material resources applicable both to SNB and representative body (article 38.1 and 2), constitutes a *very serious infraction*.

Breach of negotiations with a view to determine the involvement of employees (article 8.1 and 2), the opposition to the presence of experts in those negotiations meetings (article 12.2), the disregard of the rules of the agreement which established a representative body (or an information and consultation procedure) related with the financial and material resources, or of the meeting procedures applicable to exceptional circumstances (article 27.3, 4 and 5), constitutes a *serious infraction*.

Breach of the obligation imposed to the management or supervisory organ of the SCE to send to the relevant service of the ministry responsible for labour issues copy of the agreement (article 19.1) constitutes a *minor infraction*.

To each degree of seriousness of labour infractions corresponds a fine which amount varies according to the turnover of the undertaking and the degree of guilt (article 554 of the Labour Code 2009). The maximum amount of the fines imposed as punishment for very serious infractions shall be doubled in case of breach of provisions on the rights of entities representing employees (article 556 of the Labour Code 2009).

Very serious offences are punishable as follows (article 554 of the Labour Code 2009): a) when committed by an employer whose turnover is less than 500,000 € fines can vary from 1780 to 3560 € in the case of negligence and from 4005 to 8455 € in the case of intention (*dolus*); b) when committed by an employer whose turnover is equal to or higher than 500.000 € but less than 2,500,000 € fines can vary from 2848 to 7120 € in the case of negligence and from 7565 to 16910 € in the case of intention (*dolus*); c) when committed by an employer whose turnover is equal to or higher than 2,500,000 € but less than 5,000,000 €, fines can vary from 3738 to 10680 € in the case of negligence and from 10680 to 24920 € in the case of intention (*dolus*); d) when committed by an employer whose turnover is equal to or higher than 5,000,000 € but less than 10,000,000 € fines can vary from 4895 to 12460 € in the case of negligence and from 12950 to 35600 in the case of intention (*dolus*); e) when committed by an employer whose turnover is equal to or higher than 10,000,000 € fines can vary from 8010 to 26700 € in the case of negligence and from 26700 to 53400 € in the case of intention (*dolus*).

Serious offences are punishable as follows: a) when committed by an employer whose turnover is less than 500,000 € fines can vary from 534 to 1068 € in the case of negligence and from 1157 to 2314 € in the case of intention (*dolus*); b) when committed by an employer whose turnover is equal to or higher than 500.000 € but less than 2,500,000 € fines can vary from 623 to 1246 € in the case of negligence and from 1335 to 3560 € in the case of

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intention (*dolus*); c) when committed by an employer whose turnover is equal to or higher than 2,500,000 € but less than 5,000,000 €, fines can vary from 890 to 1780 € in the case of negligence and from 1869 to 4005 € in the case of intention (*dolus*); d) when committed by an employer whose turnover is equal to or higher than 5,000,000 € but less than 10,000,000 €, fines can vary from 1068 to 2225 € in the case of negligence and from 2314 to 4450 in the case of intention (*dolus*); e) when committed by an employer whose turnover is equal to or higher than 10,000,000 €, fines can vary from 1335 € to 3560 € in the case of negligence and from 4895 to 8455 € in the case of intention (*dolus*).

Minor offences are punishable as follows: a) when committed by an employer whose turnover is less than 10,000,000 €, fines can vary from 178 to 445 € in the case of negligence and from 534 to 801 € in the case of intention (*dolus*); b) when committed by an employer whose turnover is equal to or higher than 10,000,000 €, fines can vary from 534 to 801 € in the case of negligence and from 890 to 1335 € in the case of intention (*dolus*).

The general sanctions correspond to the application of fines. Nevertheless, article 562 of the Labour Code (2009) admits ancillary sanctions, in the case of repeated offence of a very serious infraction, by way of wilful conduct or gross negligence and with serious effects upon the employee. In these cases, the following ancillary sanctions can be imposed upon the offender: temporary closure of the business (for a period up to 6 months), disqualification from participation in public tenders (for a period up to 6 months) and publication of the infraction, when foreseen by law.

10. Practical application of the Directive

It is not clear the juridical nature of the cooperatives in Portugal. Some authors consider them as societies while others deny such qualification and prefer to consider them associations *sui generis*. The main doubt refers to the notion of “lucrative aim” essential to the society definition. The first authors mentioned make a *lato sensu* interpretation of that concept including expenses saving, as well as economic advantages affecting directly the patrimony of the members. The second ones defend a concept of “lucrative aim” which coincides with a gain translatable in a patrimonial increase of the society, usually “capital fructification”, meant for being shared by the partners later on. Nevertheless, all agree that many cooperatives can be considered undertakings, as well as traders.

Before the first Cooperative Code, cooperatives were regulated by the Commercial Code as societies, although with a special regime. Nowadays, the cooperative’s definition states that they cannot have a lucrative aim (article 2 of the Cooperative Code). Additionally, according to article 80 of the Cooperative Code, it is considered null and void the transformation of a cooperative in a commercial society of any kind. These provisions reinforce the authors’ opinion that denies its qualification as societies. Still, article 9 of the Cooperative Code declares that the missing points shall be integrated by the Commercial Societies Code, especially through the rules concerning *sociedades anónimas*, as long as they respect the cooperative principles.

The Cooperative Code does not regulate the possibility of cooperatives adopting one of the commercial societies’ types. Nonetheless, it allows cooperative’s members to have their responsibility limited to the amount of the subscribed capital, without making a distinction of different types of cooperatives similar to the one applicable to societies (article 35).

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No measures were taken until the present moment to adapt or complete the Portuguese laws in order to allow a total and practical application of Regulation (EC) n. 1435/2003, as it was made in relation to the Council Regulation (EC) n. ° 2157/2001, establishing a Statute for the European Company, through Decree-Law 2/2005, of January 4th, which has changed some of the national regulations in order to adapt them to the Council Regulation.

The significance of cooperatives among the total number of Portuguese companies and to national economy has been decreasing since the 90s, after the boom that followed the Revolution in 1974.

The cooperatives constituted, in 2004, only 0.4% of the Portuguese companies²⁷. They have about 2.4 million individual members and 51.000 employees²⁸.

The main sectors in which the cooperatives operate are agriculture (approximately 28%), housing (approximately 18%) and services (approximately 16%)²⁹.

According to data from INSCOOP³⁰, the total number of Portuguese cooperatives was 3128 (in 2003), 3144 (in 2004), 3184 (in 2005), and 3260 (in 2006).

The possibility of a cooperative member having a labour contract with the cooperative is controversial in Portuguese jurisprudence and juridical literature. While some admit such labour relationship, others deny it radically, at least when the object of the labour contract coincides with the activity that the co-operator has to develop according to the cooperative institution pact.

There are no measures in force set out by Portuguese law to ensure that the companies covered abide by the obligations laid down by the Directive.

Social agents (unions and employers' associations) have participated on the “public discussion” of the draft bill of Act 8/2008. There were some objections raised by social agents to the transposition of the Directive's content. They consider that some of the Directive's provisions are not correctly transposed and others have gone beyond the Directive's provisions.

Formally, only the trade union confederation CGTP³¹ commented on the draft bill as follows:

- i) The sequence of the definitions present in article 4 is illogical, making it harder to understand;
- ii) The definition of the representative body as a “works council” is abusive, since the parties are free to determine the involvement of employees' regime;

²⁷ According to DGEEP (Direcção Geral de Estudos, Estatística e Planeamento) data (Quadros de Pessoal) of 2004.

²⁸ Data from INSCOOP (*Instituto António Sérgio do Sector Cooperativo*), 2006.

²⁹ Data from INSCOOP (*Instituto António Sérgio do Sector Cooperativo*), 2006.

³⁰ *Instituto António Sérgio do Sector Cooperativo*.

³¹ Confederação Geral dos Trabalhadores Portugueses (General Confederation of Portuguese Workers).

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- iii) Article 9 is not compatible with the Directive, because the special duties mentioned are only applicable to the participating legal entities with the higher number of employees (and its headquarters in Portugal), namely it has the full responsibility of the procedure, determines unilaterally the total numbers of the SNB members and sets a time limit for their election or appointment (decision that belongs to the employees' representatives accordingly to article 42);
- iv) Article 16, regarding the agreements contents, does not fulfil the requirements of the Directive because it goes beyond its provisions in some cases (for instance, stating when the agreement should be renegotiated) and in others it is insufficient (for example, does not refer the need to regulate the material and financial resources);
- v) The standard rules, which regulate the mandatory establishment of a representative body, do not mention the material and financial resources. Their regulation appears in the common provisions of article 38 and consequently are not limited, as they should, to the standard rules.

On the other hand, the Employers Association CIP³² has considered that the national implementation of the Directive's provisions was in some points excessive, inappropriate and unjustifiably burdensome to the companies concerned. Analysing the draft article-for-article, CIP has made the following comments on the implementation of the Directive in Portugal:

- i) The definition of the representative body should refer the body representative of the employees of an SCE and its subsidiaries and establishments situated in the European Union and not in the European Economic Space;
- ii) The necessary steps taken by the management or administrative organs of the participating companies in order to start negotiations with the representatives of the companies' employees on the arrangements for the involvement of employees in the SCE should be limited to providing information about the identity of the participating companies, concerned subsidiaries or establishments, and the number of their employees. The burden of the initiative to negotiate should not be imposed to the management or administrative organs;
- iii) Portuguese law should specify that the experts can be present at the negotiation meetings but only in an advisory capacity;
- iv) The article imposing the management or supervisory organ of the SCE the duty to send copy of the agreement to the relevant service of the ministry responsible for labour issues (article 19) should be eliminated because the Directive's provisions do not mention such obligation;
- v) The standard rules for participation should specify that if none of the participating companies was governed by participating rules before registration of the SCE the latter should not be required to establish provisions on employees' participation;

³² Confederação da Indústria Portuguesa (Portuguese Industry Confederation).

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- vi) Portugal legislation should limit the funding to cover one expert only;
- vii) The budgetary rules laid down by Portuguese legislator regarding the accommodation and travelling expenses should be abolished;
- viii) The part-time workers should not be considered independently from their work period to the determination of the number of employees;
- ix) The time credit of the workers' representatives should be reduced;
- x) The qualifications of the labour offences for the purpose of determining the applicable fine are excessive.

We do not agree with all the observations made by social agents, but only with the ones appointed below while analysing the assessment of the results of implementation.

8. 11. Conclusions

Portugal transposed the Directive through an Act. The compulsory transposition period was not respected.

The main aspects of the Directive were correctly implemented by Act 8/2008. However, taking a closer look, one can find punctual divergences and omissions that inhibit it to fulfil completely the requirements of the Directive:

1. Portuguese Act imposes some additional obligations only to the participating legal entity with the higher number of employees which headquarters are situated in national territory (article 9), namely to inform the SNB of the plan and the actual process of establishing the SCE up to its registration. We can doubt if the restricted scope of this duty, regarding only the participating legal entity with the higher number of employees, liberating all other from these obligations, is compatible with the Directive's provisions, mostly because article 3.3 (second paragraph) refers to the participating legal entities, using the plural form.
2. The Directive expression "as soon as possible", regarding the constitution of the SNB, cannot be found on article 6.1 of the Act.
3. If the number of participating cooperatives is higher than the total number of additional seats available, these ones should be allocated by decreasing order of the number of employees they employ (article 7.5). It would have been preferable to specify that the additional seats available should be allocated to participating cooperatives "in different members States"; still, we think that it may be considered implied.
4. According to article 16.2, in the case of an SCE established by means of transformation, the agreement shall provide for at least the same level of participation as the one existing within the cooperative to be transformed into an SCE. As we can see, by comparing it with article 4.4 of the Directive, the scope of the first one is more restrict than the scope of the last, given that it should be applicable to all elements of employees' involvement and not only to participation.

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5. If the parties decide to establish, in the agreement, arrangements for participation, they shall mention the substance of those arrangements, namely the number of members in the SCE's management or supervisory body who the employees or their representatives will be entitled to elect, appoint, recommend or oppose and the necessary procedures as to how these members may be elected, appointed, recommended or opposed by the employees or their representatives (article 18). Although this specification is merely exemplifying, it should also include, as it is stated in article 4.2(g) *in fine*, the rights of those members.
6. No reference is made by Portuguese Act to the time off for training, when it is necessary for the fulfilment of representative body tasks, that the members of the representative body shall be entitled, without loss of wages, as it is referred in Annex part 2(g) of the Directive.
7. It isn't clear if the provisions of article 47, regarding employees' representatives' protection, fulfil completely the requirements of article 12 of the Directive. When article 12 of the Directive establishes that the employees' representatives have the right to paid absences necessary to the performance of their duties, does it admit the Member State to restrict the number of paid absences to, for instance, 25 hours per month, since they are treated equally to the other employees' representatives? Or, otherwise, must those absences be always paid, depending only on the proof of their necessity to the performance of the duties? In the first case, the Portuguese Act fulfils completely the Directive's requirements. In the second case, it does it only in relation to employees' representatives who are members of the supervisory or management organ of an SCE; the members of the SNB, of the representative body or any employees' representatives exercising functions under the information and consultation procedure will only receive the salary related to the absences within the credit of hours equal to the one given to works council' members (25 hours per month). The other absences are justified, but not paid.
8. Portugal has not provided for administrative or judicial review procedures for the case where the employer requires confidentiality or does not provide the information in question (article 10.4 of the Directive). Although article 413.2 of the Labour Code refers to a procedure foreseen in the Labour Procedure Code, it was not regulated until the present moment.
9. Even though Portuguese Act states that the SNB shall be reconvened and a new negotiation procedure shall occur on the request of at least 10 % of the employees of the SCE, its subsidiaries and establishments, or their representatives (article 39), no express reference is made to the need of a written request as it should accordingly to article 3.6 of the Directive.
10. The rules of article 15.2 and 3 of the Directive are not mentioned in the Portuguese Act, although their relevance is not noteworthy, because authentic participation rights are recognized only to the works councils in the public sector.
11. No specific measures were taken with a view to preventing the misuse of an SCE for the purpose of depriving employees of involvement rights or withholding such rights.

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12. The Portuguese Act does not implement the rules mentioned in article 9 of the Directive in respect to participation in the general or sectorial meeting, though its relevance is not significant, in our opinion, when Portugal is the Member State where an SCE has its registered office for the reasons explained above.
13. Portuguese Act should eliminate the contradiction between article 43.2 (by reference to article 42.2) which allows representatives of trade unions that represent the employees of participating legal entities, subsidiaries and establishments, to become members of the representative body, whether or not they are their employees, and the provision of article 22.1 that denies such possibility when they are not employees of the SCE, its subsidiaries and establishments.
14. As the application is concern, until the present moment there is no SCE registered in Portugal and obviously no case law regarding the involvement of employees in the affairs of SCE.
15. The collective bargaining did not have any role in the development of the Directive's obligations. The collective agreements do not take this subject into account.
16. Labour Inspection has not started to pay attention to the involvement of employees in the affairs of SCE.
17. There were some objections raised by social agents to the transposition of the Directive's content and suggestions were made to enable the Portuguese framework to fulfil their interpretation of the Directive's provisions.

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Annex I: National legislative implementation measures

1. Act 8/2008:

- **Chapter I (General rules):** object (article 1), scope (article 2), community-scale undertaking (article 3), definitions (article 4)
- **Chapter II (Trans-national agreements and rules):** scope (section I), SCE established by legal entities, including merger and transformation (section II)³³, SCE established by natural persons or by one legal entity and natural persons (section III)³⁴, common rules (section IV)³⁵.
- **Chapter III (National rules):** scope (article 40), election or appointment of employees' representatives (article 41), election or appointment of SNB members (article 42), election or appointment of representative body's members (article 43), election or appointment of employees' representatives exercising functions under an information and consultation procedure (article 44), election or appointment of management or advisory organ members (article 45), term of office (article 46), employees' representatives special protection (article 47), number of employees determination (article 48).
- **Chapter IV (Liability for labour infraction of administrative nature):** general rules (article 49), special infractions (article 50).

2. The second *Labour Code*, approved by *Act 7/2009*, of 12 February 2009, came into force on February 17th (2009). Still, the entry into force of many of its provisions and the revoking of prior laws was delayed to the entry into force of the regulatory rules. The relevant articles are:

- Articles 408-411 (special protection of workers' representatives)
- Articles 412-413 (duty of discretion and confidentiality)

³³ SNB constitution (article 6), SNB composition (article 7), negotiations (article 8), obligations of the participating legal entity employing the highest number of employees and situated in national territory (article 9), number of employees determination (article 10), SNB decisions (article 11), experts (article 12), good-faith and information during negotiations (article 13), negotiations duration (article 14), end of negotiations (article 15), written agreement's contents (article 16), setting up an information and consultation procedure (article 17), setting up a participation procedure (article 18), communication duties to competent authorities (article 19), mandatory creation of an employees' involvement regime (article 20), representative body (article 21), representative body's members (article 22), operation (article 23), representative body's rights (article 24), annual report (article 25), meetings with the management or supervisory organ (article 26), information and consultation in exceptional circumstances (article 27), local representatives information (article 28), mandatory regimes of employees' participation (article 29), seats allocation (article 30), members' election or appointment (article 31), statute of employees' representatives' members (article 32).

³⁴ Employees' involvement in small companies (article 33), employees' involvement in bigger companies (article 34), modifications of the employees' involvement regime (article 35).

³⁵ Relationship between the SCE and the employees' representatives (article 36), confidential and discretion duties (article 37), financial and material resources (article 38), new negotiation (article 39).

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- Articles 548-566 (responsibility for infractions of administrative nature)

Annex II: National glossary of terms

- *Collective agreements*: include Collective Contracts, Collective Labour Agreements or Collective Bargaining Agreements
- *Collective Bargaining Agreements*: agreements signed by unions and an employer from one undertaking or establishment.
- *Collective Contracts*: contracts entered into between unions and the employers' associations.
- *Collective Labour Agreements*: agreements entered into between unions and multiple employers for different undertakings.
- *Concerned subsidiary or establishment*: a subsidiary or establishment of a participating legal entity, which is proposed to become a subsidiary or establishment of the SCE, according to its formation project.
- *Consultation*: the procedure that, on the basis of information provided to the representative body or to the employees' representatives (exercising functions under an information and consultation procedure) by the SCE, allows a joined together evaluation of the issues and information given, at a time, in a manner and with a content which allows the employees' representatives to express an opinion on measures envisaged by the competent organ, that may be taken into account in the decision-making process within the SCE.
- *Employee*: natural person who undertakes, in exchange for salary, to render work to one or more persons, under their authority and direction.
- *Employees' representatives*: works councils and sub-councils, unions, European Works Councils,
- *Employer*: natural or legal person(s) party to employment contracts under whose authority and direction employees render their work. The main employer powers' are power of direction, of regulation and disciplinary power.
- *Information*: the informing of the representative body or the employees' representatives (exercising functions under an information and consultation procedure) by the SCE on questions which concern both the SCE itself and one or more of its subsidiaries or establishments situated in another Member State or that exceed the powers of the decision-making organs of one or more subsidiaries or establishments, in a timing, a manner and with a content which allows the employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations with the competent organ of the SCE.
- *Involvement of employees*: any procedure, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the SCE.
- *Large undertaking*: one that employs 250 or more employees.
- *Medium Undertaking*: one that employs 50 or more employees and up to 249 employees.

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- *Micro-undertaking*: one that employs a maximum of 9 employees.
- *Participating legal entities*: the cooperative or other legal entities of public or private law, which participate in the establishing of an SCE.
- *Participation*: the procedure that allows to the employees' representatives elect, appoint, recommend or oppose the appointment of the members of the SCE' management or supervisory organ.
- *Quantitative reduction of employees' participation rights*: the proportion of members of the organs of the SCE, within the meaning of participation, is lower than the highest proportion of the members of the organs of the participating legal entities.
- *Representative body*: the body representative of the employees of an SCE and its subsidiaries and establishments situated in the European Economic Community, set up by the agreements referred to in the Act, with the purpose of informing and consulting the represented employees and, where applicable, of exercising participation rights in relation to the SCE.
- *SCE*: any cooperative society established in accordance with Council Regulation (EC) n. 1435/2003, of July 22nd, regarding the statute for a European cooperative society, and other applicable legislation.
- *Small undertaking*: one that employs more than 10 and up to 49 employees.
- *Special negotiating body (SNB)*: the body constituted by the employees' representatives of the participating legal entities, its concerned subsidiaries and establishments, in accordance to this Act, with the purpose of negotiating with the participating legal entities the arrangements for the involvement of employees within the future SCE.
- *Subsidiary* of a participating legal entity or of an SCE: an undertaking over which that legal entity or SCE exercises a dominant influence defined in accordance with article 473 of the Labour Code (2003). This article establishes that an undertaking headquartered in national territory and belonging to a group with community scale exercises control of the group if it has a dominant influence over one or more of the undertakings as a result of, for example, ownership of subscribed capital or of the rules that govern it.
- *Undertaking*: organised entity pursuing an economic activity.
- *Undertaking's union section*: the group of employees of an undertaking or establishment that are members of the same union.
- *Union committee*: organization of union representatives of the same union in an undertaking or establishment.
- *Union*: a permanent association of employees for defence and promotion of their social- economic interest.
- *Works Council*: organization of employees created in each undertaking to defend the rights of all its employees and exercise the rights foreseen in the Constitution and labour laws. In contrast to trade union representatives, its members are elected by and from among all the employees.

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Annex III: Correspondence Table

Transposition of the ECS-Directive into the Act 8/2008

Content	Articles in the Directive 2003/72/EC	National implementing provisions
Objective	1	Art. 1; art. 2.1
Definitions	2	Art. 4
Creation of a special negotiating body	3.1	Art. 6
	3(2)	Art. 7
	3(2) (a) (i)	Art. 7.1
	3 (2) (a) (ii)	Art. 7.2
	3(2) b	Arts. 41, 42
	3(3)	Arts. 16.3, 9
	3(4)	Arts. 11, 4.i)
	3(5)	Arts. 12, 13.3
	3(6)	Arts. 15; 20.1; 39(1), (3).
3(7)	Art. 38	
Content of agreement	4	Arts. 13; 16; 17; 18; 20(1)
Duration of negotiations	5	Art. 14
Legislation applicable to the negotiation procedure	6	Art. 5
Standard rules	7	Art. 20
	Annex part 1. a)	Art. 22.1
	Annex part 1. b)	Arts. 22.2; 25
	Annex part 1. c)	Art. 23.1
	Annex part 1. d)	Art. 23.2
	Annex part 1. e)	Art. 21
	Annex part 1. f)	Art. 22.3
	Annex part 1. g)	Arts. 39(2), (3), (7), (8); 41; 43
	Annex part 2 a)	Art. 24.1
	Annex part 2 b)	Arts. 24(2), (3); 26
	Annex part 2 c)	Art. 27
	Annex part 2 d)	Art. 23.3
	Annex part 2 e)	Art. 28
	Annex part 2 f)	Art. 23.5
	Annex part 2 g)	No reference
Annex part 2 h)	Art. 38(2) to (9)	
Annex part 3	Arts. 29 ; 30; 31; 32	
Rules applicable to SCEs established exclusively by natural persons or by a single legal entity and natural persons	8	Arts. 33; 34; 35
Participation in the general meeting or section or sectorial meeting	9	No reference
Reservation and confidentiality	10	Art. 37 by reference to arts. 412 to 413 of the Labour Code
Operation of the representative body and procedure for the information and consolation of employees	11	Art. 36
Protection of employees' representatives	12	Art. 47 and arts. 408 to 411 of the Labour Code

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Content	Articles in the Directive 2003/72/EC	National implementing provisions
Misuse of procedures	13	No reference
Compliance with this directive	14	Art. 5.2
Link between this Directive and other provisions	15	Art. 3