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REPORT FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

on the review of Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European cooperative society with regard to the involvement of employees

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1. INTRODUCTION

Council Regulation (EC) No 1435/2003[1] (hereinafter "the Regulation") establishes a Statute for a European Cooperative Society (hereinafter "SCE") with a view to creating a uniform legal framework enabling cooperatives from different Member States to plan and carry out the reorganisation of their business on a Community scale. Council Directive 2003/72/EC[2] (hereinafter "the Directive") supplements the Regulation as far as the involvement of employees[3] is concerned, with the aim of providing for arrangements for the involvement of employees in every SCE, thereby ensuring that the establishment of an SCE does not entail the disappearance or reduction of practices of employee involvement that exist within the entities participating in its creation.

As required by Article 17 of the Directive, in this Report the Commission is reviewing the application of the Directive with a view to proposing suitable amendments, where necessary.

In preparation for this review, the Commission commissioned studies by independent experts[4] and consulted with the Member States and the European Social Partners on these studies and the draft report[5].

Given the major similarities between the Directive and Council Directive 2001/86/EC on the involvement of employees in the European Company (SE)[6] (hereinafter the SE Directive) and the fact that certain Member States[7] have

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

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

3 Involvement of employees means any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions taken within an undertaking (Article 2(h) of the Directive).

4 National reports by Labour Asociados (EU25 in 2006-2008) and Milieu (BG, RO) in 2009, Synthesis report on EU25 by Labour Asociados in 2007

5 Responses to consultation received from BG, CY, CZ, DE, EE, EL, ES, FI, FR, HU, IT, LT, LU, LV, PL, PT, SE; BusinessEurope, ETUC, UEAPME

6 Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22

7 BG, EE, ES, FI

transposed the Directive in the same instrument or by amendments to the legislation transposing Directive 2001/86/EC, the Commission refers to its review of the latter[8].

On horizontal issues relating to information and consultation rights, such as protection and guarantees to employee representatives or confidential information, the Commission also refers to its review of Directive 2002/14/EC establishing a general framework for informing and consulting employees[9].

2. TRANSPOSITION OF THE DIRECTIVE COMPLETED IN 2009

The Commission set up an Expert Group composed of government experts from the Member States in order to provide a forum to discuss the arrangements for transposing the Directive into national legislation. The Expert Group held three meetings in 2005 at which the main issues arising from the implementation of the Directive were extensively discussed[10].

Despite this preparatory work, only 12 Member States[11] transposed the Directive within the deadline established in the Directive (namely 18 August 2006), and it took until March 2009 for the last implementing measures to be adopted[12]. Infringement proceedings were launched by the Commission against 16 Member States[13], followed by three referrals to the European Court of Justice. The Court subsequently ruled against one Member State[14].

In almost all Member states, transposition occurred by means of legislation preceded by a consultation of the social partners, via procedures which reflected the particular tradition of each country[15]. Social partners played a decisive role in Belgium, where the Directive was transposed by means of a collective agreement at State level, complemented by legislation, and in Italy, where social partners signed a common opinion which formed the basis for the legislation transposing the Directive. In most Member States, the cooperative movement was associated with the process. The transposition of the Directive has not led to major public debates.

As for the quality of implementation, the abovementioned studies carried out by independent experts conclude that, in general terms, the national implementing

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8 Communication from the Commission on the review of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, COM(2008)591 final of 30.9.2008

9 Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80 of 23.3.2002, p. 29; Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the review of the application of Directive 2002/14/EC in the EU, COM(2008)146final of 17.3.2008

10 The working papers and minutes of the Group can be found at: http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=213

11 AT, BG, CZ, DE, DK, FI, HU, NL, PL, SE, SI, UK

12 Details of National implementing measures can be found at http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=213 .

13 One Member State had taken implementing measures within the deadline but had not notified them to the Commission

14 Cases C-92/08 for BE; C-82/08 for EL; C-70/08 for LU ruled on 9 October 2008

15 In NL: no specific consultation of social partners on Directive 2003/72/EC; in UK: public consultation; in ES: joint consultation on Directives 2003/72/EC and 2001/86/EC

measures closely follow, often literally, the provisions of the Directive and that transposition has not revealed any serious irregularities. However, they note certain difficulties, omissions, deficiencies, variations or supplements[16] which require further examination by the Commission.

3. CONTENT OF THE DIRECTIVE IS OFTEN TRANSPOSED VERBATIM

3.1. Priority to negotiation and alternative route for some "ex novo" SCEs

The fundamental principle and stated aim of the Directive is to secure employees' rights as regards involvement in the decisions that may affect them. Employee rights that were in force before its establishment should provide the basis for employee rights of involvement in the SCE (the 'before and after' principle). The primary means of seeking to achieve this aim is through an agreement negotiated between the management of the legal entities concerned and the employees' representatives. In the absence of agreement within a six-month period (which can be extended to up to 12 months by agreement), the Directive establishes a set of standard rules. Furthermore, employees' representatives may decide not to open negotiations or to terminate negotiations, and rely on the rules on information and consultation of employees in force in the Member States where the SCE has employees.

This priority given to negotiation replicates the system established in the context of the European Company (SE). However, the Directive establishes an alternative mechanism related to the possibility of creating SCEs "ex novo". Article 8 of the Directive provides for specific provisions in the case of SCEs established exclusively by natural persons or by a single legal entity and natural persons, which together employ fewer than 50 employees, or employ 50 or more employees in only one Member State. In such a case, the national provisions on the involvement of employees that are applicable to other entities of the same type situated in the same Member States are to be applied to the SCE, its subsidiaries and establishments (see 3.5).

3.2. Transnational negotiation procedure

The legislation applicable to the negotiation procedure is that of the Member State in which the registered office of the SCE is to be situated. As for the start of negotiations, it is the responsibility of the management or administrative bodies of the legal entities participating in setting up an SCE to take the necessary steps as soon as they have drawn up a plan to establish the SCE. In their implementing measures, many Member States go beyond the general terms of the Directive in this regard[17].

For the purpose of the negotiations, a special negotiating body (hereinafter "SNB") representing the employees has to be created. The SNB's members are to be elected or appointed in proportion to the number of employees employed in each Member

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16 BusinessEurope member organisation CIP considered that the obligations established in national legislation go beyond the Directive in several areas

17 Extent of prior information to provide: CZ, IE, LT, PL, SI; Information to employees where no representation exists CZ, DE, IE, LT, NL, PT, SI, UK; Maximum period to start negotiations: ES, LT; but no reference to "as soon as possible" in PT

State by the participating legal entities and their subsidiaries and establishments[18]. The method to be used for electing or appointing the members to be elected or appointed in their territory is left up to the Member States. Some Member States have not complied with the requirement of the Directive that the methods used should seek to achieve gender balance in the SNB[19]. The Directive addresses the situation at the time when the negotiations start, but does not provide for cases in which this initial situation changes before the end of the negotiations. However, several Member States have adopted provisions to deal with such changes[20].

The role of the SNB is to negotiate the arrangements for employee involvement within the SCE with the competent organs of the participating entities. However, it may also decide not to open negotiations or to terminate negotiations that are already ongoing. While the principle governing the adoption of decisions by the SNB is a double absolute majority (absolute majority of its members representing an absolute majority of the employees), in the latter case a triple qualified majority is needed (i.e. two thirds of the members representing at least two thirds of the employees, including the votes of members representing employees employed in at least two Member States). This triple majority is also needed (with certain additional conditions) when the outcome of the negotiations is a reduction of participation rights.

The expenses relating to the negotiations are borne by the participating legal entities. Several Member States implemented this provision by limiting these expenses to those which were reasonable, essential or necessary in relation to the economic burden imposed on participating entities. In others, an indicative or open list of expenses has been drawn up. Some transposition laws include both models[21]. In addition, three Member States have established a criterion to share these expenses between the participating entities[22].

The SNB may request the assistance of experts of its choice for the purposes of the negotiations. With a few exceptions[23], national laws have limited the number of experts to be funded by the participating companies to one, as allowed by the Directive.

3.3. Autonomy of the parties as to the content of the agreement

One of the main principles of the Directive consists in allowing the parties to define freely the rules which will bind them as far as employees' involvement is concerned.

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18 Additional seats for representation of employees in case of mergers are also provided for by the Directive. This element has not been implemented in RO

19 FR, LU, MT, RO, SK

20 CZ, DE, ES, HU, LV, MT, PL, SI, SK SE, UK.

21 Expenses have to be reasonable (EE, MT, UK), essential (NL), necessary (SE), justified and necessary (HU) or appropriate (AT, DK, FI, SI); List of expenses (BE, CY, ES, IT, LT, LV, PT, SK); Both models (CZ, DE, PL)

22 LV, PL, PT

23 DE, SE; in BE, a more favourable agreement may provide otherwise; in LV, expenses of "at least" one expert to be covered.

The Directive makes it clear that the agreement is not subject to the standard rules unless it provides otherwise. All national implementing measures follow this line[24].

In order to assist the negotiating parties, the Directive contains a list of items to be addressed in the agreement. This list includes the procedures for the renegotiation of the agreement, where appropriate, in the event of structural changes occurring after the creation of the SCE. This is an important addition to similar lists included in the SE Directive and in Directive 94/45/EC on European Works Councils (EWCs)[25].

There are, however, two important limitations to the autonomy of the parties. Where an SCE is established by means of transformation, the agreement has to provide for at least the same level of all elements of employee involvement as those which exist within the cooperative to be transformed into an SCE[26]. In addition, the possibility to provide for employees to be entitled to participate fully in general meetings, which has been added by the Directive to the items which may be agreed upon, is limited by Article 9 of the Directive (see 3.6).

3.4. Standard rules to be applied in the absence of an agreement

3.4.1. Conditions for the application of the standard rules

The standard rules apply only in a subsidiary manner, i.e. (a) if the negotiating parties so agree, or (b) if no agreement has been concluded by the deadline of six months (under certain circumstances one year) and if, on the part of the participating entities, their competent bodies decide to continue with the registration of the SCE and, on the part of the employees, the SNB has not decided either not to open negotiations or to terminate negotiations already opened.

As far as employee participation is concerned, and in cases other than transformation, the Directive establishes a minimum percentage of workers covered by participation (25% in the case of a merger and 50% in all other cases) for the standard rules to apply. However, even if those percentages are not reached, a decision by the SNB to apply the standard rules is sufficient. Almost[27] all Member States followed these rules and none made use of the option offered by the Directive not to apply standard rules on participation in case of merger.

3.4.2. Body representing the employees

In the standard rules, employees exercise their rights to be involved in the SCE through a Representative Body (hereinafter “RB”). The RB is composed of employees of the SCE and its subsidiaries and establishments elected or appointed by the employees’ representatives in proportion to the number of their employees

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24 However with a difference for ES: the standard provisions also apply where the agreement "contains no specific provision therein"

25 MT, RO do not include this adaptation in the list

26 DE adds the same limitation where the cooperative switches from a dualistic to a monistic management structure or vice versa

27 CY applies the 50% percentage also to mergers; UK makes no reference to the transformation (however, as UK has no system of board-level participation, the risk that a cooperative with participation would loose its participation regime under the standard rules while transforming into an SCE is very limited)

employed in each Member State[28]. Its composition needs to be adapted to take account of changes occurring in the SCE and its subsidiaries and establishments. Four years after its establishment it has to decide whether to open negotiations on concluding an agreement or to continue under the standard rules.

While the transposition of these provisions has been ensured in general terms by Member States, some omissions have been detected as regards the select committee to be elected when the size of the RB so warrants, the entitlement of the members of the RB to time off without loss of wages and adaptation to changes[29]. There are variations in the size of the RB required to trigger the establishment of a select committee. As regards the right of the RB to be assisted by experts of its choice, most Member States made use of the possibility to limit the financing by SCE to one expert, in the same way as for the SNB.

3.4.3. Transnational information and consultation

As far as information and consultation are concerned, the competence of the RB is confined to questions of a transnational nature. In order to exercise this competence, the RB has the right to hold a meeting with the competent body of the SCE at least once a year on the basis of regular reports drawn up by the competent body on the development of the business, employment and organisation of the SCE. In addition, the RB is entitled to receive information when there are exceptional circumstances that affect employees' interests to a considerable extent; to request the holding of an extraordinary meeting in order to be informed and consulted; and to express an opinion. A further meeting can be requested if this opinion is not followed by the SCE. National implementing measures do not reveal any specific features in this regard.

3.4.4. Board-level employee participation

As for employee participation, the standard rules provide in the main that the level of participation in the SCE is determined by the level of participation in the participating entities before the SCE was established. Therefore, if none of the participating entities was governed by participation rules before the SCE was registered, the latter does not have to lay down provisions for employee participation.

When there are several forms of participation, the SNB shall decide which of those forms will apply to the SCE. Most Member States make use of the option to adopt rules by default in this regard, mainly by choosing the participation regime which covers the largest number of employees.

3.5. National provisions applicable to SCEs established ex novo and employing fewer than 50 employees or 50 or more employees in only one Member State

Unlike SEs, SCEs can be established "ex novo", by natural persons or by a single legal entity and natural persons. Article 8 of the Directive lays down specific provisions in such a case. When a single SCE employs fewer than 50 employees, or

[28] DE provisions take into account employees of the whole group

[29] No internal meetings of select committee in SK, no time off to training without loss of wages in PT and UK, no adaptation in UK

employs 50 or more employees in only one Member State, there is no compulsory negotiation process and the national provisions on the involvement of employees that apply to other entities of the same type situated in the same Member States are to be applied to the SCE, its subsidiaries and establishments. However, a negotiation procedure will be launched if it were to be required by one third of the employees or if the threshold of 50 employees were to be reached after the registration of the SCE. There is a specific provision to maintain participation where the seat of the SCE is transferred to another Member State. In general, Member States have transposed these new provisions verbatim.

3.6. Limited entitlement to participation in general meetings with a right to vote

Article 9 of the Directive provides for a new method of involvement of employees compared to the other directives in this field: namely the entitlement of employees or their representatives to participate in the general meeting, or in the section or sectoral meeting if it exists, with a right to vote. This occurs in the case of transformation, by applying standard rules where such participation was present in the participating cooperative(s), or by agreement.

However, the entitlement to participate in general meetings is subject to the limitation laid down in Article 59(4) of the Regulation: namely that the possibility of such participation was acknowledged by national provisions prior to August 2003. Only Three Member States are in that situation: Denmark, for which such participation is common practice, Hungary and Luxembourg. All except seven Member States[30] have undertaken to transpose this article verbatim.

3.7. Common provisions of directives dealing with the involvement of employees

The provisions of the Directive do not differ from those of the other directives dealing with involvement of employees as regards definitions, reservation and confidentiality, the spirit of cooperation governing the relationship between the employees' representatives and the competent body of the SCE, and also the protection and guarantees provided for employees' representatives. Member States have also implemented them in the same way. The Commission refers to previous reports in this field (see introduction).

4. ISSUES RAISED BY THE IMPLEMENTATION AND APPLICATION OF THE DIRECTIVE

4.1. Absence of experience

As far as the Commission is aware, only seventeen SCEs had been established by 8 May 2010, none of which had a significant number of employees[31]. Even if, according to organisations representing cooperatives, other SCEs were to be established, experience of both the implementation and the application of the Directive is lacking.

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30 CY, DE, EE, PT, RO, SK, UK which provisions did not acknowledge such participation

31 Preliminary results of a study carried out for the Commission by Cooperatives Europe, EURICSE and EZAI Foundation: 17 SCEs recorded (1 in 2006, 5 in 2008, 7 in 2009 and 4 in early 2010) in 9 Member states (5 in IT, 3 in SK, 2 in HU, 2 in BE, 1 in DE, LIE, NL, ES, SE) with a total of 32 employees..

4.2. Complexity of the provisions

Understanding the national implementing provisions of both the Regulation and the Directive may present a challenge to smaller organisations[32]. As for the Directive, the existence of two different routes governing the involvement of employees in the SCE – negotiation or national rules - as well as the specific provisions on the participation in general assemblies needs to be properly understood. However, as Member States have quite literally transposed the Directive in specific laws, the implementation does not add to complexity. Moreover, social actors involved in the cooperative movement and in the trade union movement stress that the complexity lies instead in the statute, and they have taken actions since 2006, often with the financial support of the Union, designed to prepare the setting up of mechanisms for information, consultation and participation in SCEs.

4.3. Specificities of cooperatives

Cooperatives differ from limited companies in several respects. They have their own legislation, which is different from company law in some Member States,and they may even be qualified as civil associations rather than companies under national law[33], with some specific laws applying to certain types of cooperatives (agricultural, housing, credit or health). As regards individual employment relationships, there are no apparent differences for the most relevant aspects. However, there are some specific features as regards collective relations, to account for the difference between workers who are members of the cooperative and those who are not. While these specificities raise no particular problems as regards information and consultation, they do present a more complex picture with regard to collective agreements or board-level participation[34].

Some concerns have been raised by national cooperative movements that SCE may undermine the cooperative principles, but these concerns focus on the statute itself, not on employee involvement. The independent experts have identified a positive impact of the transposition of the Directive on Labour law and on Cooperative law. The Commission also notes that the implementation of the Directive has acted as an incentive for joint work and developments[35] between trade unions and the organisations representing the cooperatives at national and European levels.

4.4. Common issues on transnational involvement of employees

Some issues are common to the various directives[36] dealing with transnational involvement of employees and in particular to the Directive 2001/86/EC (the SE Directive).

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32 BusinessEurope member organisation SN noted that "though the mechanism can be said to be rather complicated it has become some kind of standard procedure for employee participation", being organised as a whole in the same manner as for the SE.

33 Own legislation in ES, HU, PL, PT, SE; civil associations in NL

34 For example in CY private agreements and not collective ones; in HU no board-level participation

35 Notably through projects financed under budget line 04.03.03.03

36 Directives 94/45/EC recast by Directive 2009/38/EC on European works Councils, SE Directive 2001/86/EC – see above), Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310, 25.11.2005, p. 1.

As to the misuse of procedures, the independent experts[37] point out that several Member States[38] have not transposed Article 13 of the Directive which requires Member States to take appropriate measures with a view to preventing the misuse of an SCE for the purpose of depriving employees of rights to employee involvement or of withholding such rights. As it had been the case for the SE Directive[39], the Commission deems this to be a potential cause of concern.

The protection of participation rights where a European company or Cooperative Society converts into a company or cooperative of national statute has been raised in the context of the review of the SE Directive[40]. To address this issue, Directive 2005/56/EC on cross-border mergers obliges the company to adopt a legal form that allows for the exercise of participation rights[41].

The independent experts point to the absence of provisions in the Directive as regards the enforceability of the agreement on employee involvement[42]. The recast of the Directive on European Works Councils led to fresh approaches in this area, as employee representatives will have the means required to apply the rights arising from the Directive to collectively represent the employees' interests.

Issues relating to the key definitions of the Directive, such as "employees' representatives", "involvement of employees", "information", "consultation", "participation", "participating legal entities" are raised in the same way as for other directives, particularly the SE Directive 2001/86/EC. There is a case for a more coherent approach to these definitions across the directives.

5. CONCLUSIONS

The Directive has been transposed in all Member States only since March 2009. There is therefore a lack of experience in the practical application of the Directive.

Furthermore, the Directive is not a stand-alone piece of legislation. It complements the SCE Regulation and shows striking similarities with other directives governing the involvement of employees, such as the SE Directive. The Commission considers that the outcome of the evaluation of these directives and of the Regulation needs to be taken into account before launching any future revision process.

These conclusions are shared by all Member States[43] and social partners[44] who have expressed their views in the consultation process to draw up this report.

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37 See reference to Studies by Labour Asociados and Milieu in footnote 4

38 EL, HU, IE, NL, SI; needs further investigation for BG, CZ, LV and PT

39 See point 3.6 of report COM(2008)591

40 See point 4.4 of report COM(2008)591

41 SE also noted that fresh ideas on the way to deal with important changes as regard the number of employees after the creation of a company under a European statute have also been raised in the context of the 2009 discussion in Council of Article 35 of the proposal for a Regulation on a European Private Company.

42 National implementing measures of ES and PT however provide for legal efficiency of the agreement.

43 See list of answers in point 1 (introduction); some Member States consider that any future revision process should focus on the Regulation and the concept of European Cooperative Society, rather than on the Directive.

It is necessary to inquire into the reasons for the very low take-up of the EU legal framework for cooperatives, before considering any moves towards a revision of the Directive.

This Report has identified some issues[45] that merit further consideration. The Commission will continue monitoring the correct implementation of the Directive, and promoting capacity-building of stakeholders[46].

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44 ETUC considers that there is no need to simplify the Directive and that, in the event of a revision of the Regulation, there would be a need to consult the social partners. Business Europe member organisation CIP considers that any revision of the legislation should avoid creating additional burdens for business.

45 In particular on transnational negotiation procedure, misuse of procedures and transversal issues across directives on employee involvement.

46 The Commission promotes actions with these aims, in particular under budget heading 04.030303 — Information, consultation and participation of the representatives of undertakings.