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

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

NATIONAL IMPLEMENTATION REPORT

Spain

LABOURasociados
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Content

Executive summary [1]

1. In Spanish regulation, transposition of Directive 2003/72/EC of 8th October, supplementing the Statute for a European Coopeartive Society (SCE) with regard to the involvement of employees (hereinafter, DITSCE), has been undertaken by means of Law 31/2006, of 18th October, regarding the involvement of employees in European Companies and Cooperative Societies (hereinafter, LITSCE). LITSCE entered into force on 20th October 2006. Therefore, the transposition law was passed with a two-month delay with regard to the provision contained in First Final Provision.1 DITSCE (18th August 2006).

Prior to passing this law, the draft law approved by the Government and sent to Parliament had the transposition of Directive 2001/86/EC (hereinafter, DITSE) as its sole objective. The decision to prepare a single regulation to transpose both Directives, DITSE and DITSCE, simultaneously was adopted during Parliamentary proceedings.

For this reason, the transposition of Directive 2003/72/EC was not and could not have been subject to a formal consultation with social partners, more specifically with representatives from organisations in the social economy sector. In any case, this omission had a predominantly formal dimension since the Government, informally, had the opportunity to consult the legal text proposed with the most representative organisations in this sector.

The Second Additional Provision constitutes, with no room for uncertainty, the main precept in LITSCE with regard to the transposition of DITSCE. The first section of this Provision establishes that "the provisions contained in this Law will also be applicable to the involvement of employees' representatives in European Cooperative Societies", with no other particular characteristics than those listed below. Without prejudice to the reasoning of this report, Spanish legislation has not only transposed Directives 2001/86/EC and 2003/72/EC in one single legal text, it has also unified the substantial or material regulation of SE and SCE, an option which is in full accordance with the Community regulation given the extraordinary similarity of the legal provisions contained in both Directives.

2. Directive 2003/72/EC does not establish a single legal scheme with regard to the right to involvement of employees in SCEs. The starting point of the Community regulation is a diversity of schemes constructed, at least formally, pursuant to the subjects who participated in its establishment. In this sense, there are two main legal schemes: on the one hand, applicable to "SCEs established by at least two legal entities or by transformation"[2]; on the other, the scheme regulating "SCEs established exclusively by natural persons or by a single legal entity and natural persons"[3].

This dual scheme is, on the other hand, accompanied by the breaking away from one of the basic legal principles in the regulation of the right to involvement of employees in the

[1] *Report elaborated by Fernando Valdés Dal-Ré. Professor of Labour Law at Universidad Complutense, Madrid.*

[2] As stated literally by the heading to Section II DITSCE

[3] As stated literally by the heading to Section III DITSCE

SE, where collective agreement is the primary path to regulate these rights. In the sphere of the Cooperative Society this principle is only applicable, without prejudice to nuances included later in this report, to SCEs established by at least two legal entities or by transformation. Or, in other words, this is a principle that is not applicable to SCEs established exclusively by natural persons or, with a mixed nature, by a legal entity and natural persons. For this second group of SCEs, or being more technically specific for certain SCEs in this second group, the right to involvement has, initially, a legal origin. Last but not least, DITSCE establishes in Section IV provisions for participation in the general meeting or in section or sectoral meetings that may also be imposed besides, and independent of, the collective agreement; that is, they work *ope legis*.

3. From the perspective of its legal contents, DITSCE establishes, with regard to the regulation of the right to involvement in SCEs established by at least two legal entities or by transformation, a basic distinction between two, main groups of provisions: "main" provisions and "accessory" provisions. The first group, "main provisions", are applicable to any European Cooperative Society with its registered office located in a specific Member State, and these provisions are applicable to all the organisational structure of the SCE and its subsidiaries and establishments, included those outside the territory of this Member State. On the other hand, "accessory" provisions are applicable exclusively to subsidiary companies and establishments situated in the territory of the Member State, of an SCE (or a subsidiary company or, given the case, the companies participating in the establishment of the SCE) with the registered office located in a different Member State.

LITSCE has collected, in exemplary fashion, this differentiation, developed and expressed in the articles of the regulation. In this sense, Title I of the Law is named "Provisions applicable to European Companies located in Spain" whilst Title II is named "Provisions applicable to establishments and subsidiary companies located in Spain of European Companies". With regard to the provisions contained in the first group, Spanish legislation undertakes, in general, an almost literal transcription of the Community regulation. Nevertheless, certain singular provisions can be found in national regulation, adopted in the framework of the compartments established by the Directive and, therefore, fully compatible with it.

4. In general, the differences between the right to involvement of employees in an SE or an SCE are established in arts. 8 and 9 DITSCE. All other articles in this regulation, that is, most of the articles, are a mere copy with slight adaptations of provisions contained in DITSE. Spanish law has undertaken a transposition of the aforementioned DITSCE articles in Second Additional Provision LITSCE, as stated earlier, with an *ad pedem literae* reproduction of the former legal passages. A comparison between arts. 8 and 9 DITSCE and Second Additional Provision LITSCE thus shows it; it shows the existence of a strongly literal, at times even literalist, transposition where the presence of innovations is significantly low. Specifically, the similarity between the Community and national legislations is only broken in a single aspect which, additionally, is at the periphery as it refers to the information that administrative bodies of the SCE have to supply to the employees' body of representation in the annual meeting.

However, we can not ignore that LITSCE introduces several innovations with regard to Directive 2003/72/EC, but these innovations are common to the scheme of the right to involvement of employees in both SE and SCE.

5. The most significant singular provisions are the following:

   I. Art. 5 LITSCE repeats the provision established in art. 3.1 DITSCE, complementing it, nevertheless, in two ways. On the one hand, it limits the maximum time within which to start negotiations, setting it at forty-five days counting from the publication date of the project. On the other, it enlarges the catalogue of issues which must be informed at the start of procedures; besides the identity of the participating companies and the number of employees, the catalogue adds two issues: "the location of the registered office proposed" and, in those cases where a participation system (or systems) are applied in the participating companies, the characteristics of these systems, the number of employees covered by them and the proportion they represent in the total number of employees of the participating companies.

   II. DITSCE does not establish any provision that contemplates the changes arising in the essential elements that are considered and weighted in establishing the Negotiating Body (NB). However, this is not an omission that may be stated of national law, since art. 7.5 establishes a new election or appointment of all members of the NB, or a part of them, under the following two circumstances: i) Change in the size, composition or structure of the organizational units of the SCE that alters "the number of seats" to be covered by the NB, "the distribution criteria" of the seats or "representativity" of the Body itself; and, ii) expiry of the national-scale term of office of a member of the NB.

   III. Spanish legislation also contains certain specific provisions regarding the development of negotiations opened by the NB. Firstly, it establishes that the NB and the competent bodies of the companies participating in the establishment of an SCE may adopt, by mutual agreement, the necessary rules regarding the chair for deliberations "or, given the case, other procedures agreed for the development of joint meeting sessions". Secondly, LITSCE states, with regard to the minutes of the meetings, an imperative mandate, providing that the minutes shall be signed "by a representative on behalf of each of the parties"; in this case, the term "parties", refers to both sides attending negotiations: the social and the managerial, represented by the NB and the competent bodies of the participating companies, respectively.

   IV. LITSCE establishes certain, particular provisions on the functioning of the NB. First of all, LITSCE confers the NB the faculty to approve its internal working regulation as well as appointing a president from one of its members. Secondly, national law grants the NB the right to meet prior to any meeting it must hold with the competent bodies of the participating companies, "without the presence of the latter". This provision is having consequences in the expenses scheme of the NB, as will be shown later. Thirdly, the NB is obliged to provide information "of the process and the results of negotiation" to the trade union organisations that, in each Member State, have participated in the election or appointment of members of the NB.

   V. LITSCE also specifies the minimum expenditure for the running of the NB that must be defrayed by the participating companies. The following expenses are considered: i) those derived from the election or appointment of its members; ii)

those regarding the organisation of NB meetings, including expenses for interpretation, allowance, accommodation and travel for its members; and, iii) expenses derived from, at least, one expert appointed by the NB to assist in the work thereof.

VI. Art. 10.1 LITSCE reproduces the content of art. 6 of the Directive almost literally. Art. 10.2 specifies and develops the establishment of *dies quo* from which the six-month term must be counted, and which is the date of establishment of the NB. Furthermore, Spanish legislation establishes a preliminary meeting between the NB and management to be held at a different date or on the same date of the establishment of the NB. Additionally, national law establishes that, when the NB is not established "due to a cause attributable to employees' representatives" when the employers' side has complied with its "obligations towards the establishment" of the body, the six-month term will start to count "from the date in which the negotiating body would have been able to be constituted validly".

VII. Art. 11.1 LITSCE transposes into national law the mandate established in art. 4.2 DITSCE, proceeding to a literal transcription thereof. However, it introduces two novelties. On the one hand, the catalogue of issues that constitute the "minimum compulsory" content of the agreement, which is enlarged with a new issue regarding "the identification of the parties that subscribe to it". On the other, the scope of implementation of art. 4.2.b) of the Directive is, firstly, clarified syntactically and, secondly, enriched materially.

VIII. Art. 11.1.i) LITSCE transposes art. 4.2.h) DITSCE, ordering that the agreement establishes "a date of entry into force, its length and conditions of its complaint, extension and renegotiation". Therefore, these five issues become part of the compulsory content of the agreement. Nevertheless, national law contemplates the hypothesis where an agreement for involvement does not comply with the regulation due to not including all or some of these issues, establishing a set of additional rules, the application thereof activated exclusively in the absence of agreement.

IX. Art. 12 LITSCE limits the performance of the agreement for involvement and, more generally, defines its position in the system of labour law. The approach and solution to these transcendental issues is undertaken in a meaning that is in full approval with legal regulations that define the position of the typical social agreement in Spanish regulation; that is, the so-called statutory collective agreement. In this sense, firstly, national law endows the agreement for involvement, both the initial agreement and successive agreements reached in the framework of the SCE, with general performance or *erga omnes*. Secondly, national law requires written formalization of the agreement "under penalty of nullity". Thirdly, the agreement for involvement must be presented to the competent labour authority, once it is concluded and signed, for its registration, deposit and publication in the official journal. Lastly, the provisions established in the agreement regarding the involvement of employees are configured as public-order regulations that can not be ignored or upset by SCE statutes.

X. LITSCE establishes two particular provisions with regard to the employees' body of representation (EBR). On the one hand, it acknowledges the right to attend NB

meetings for members of the EBR who, though not members of the NB, have been elected or appointed in representation of employees who are "directly affected by the matters dealt with". On the other, it imposes upon the NB the duty to inform the EBR periodically of its activities and the result of the meetings held.

XI. LITSCE specifies the provisions with regard to the distribution of the members of the administrative or supervisory bodies of the SCE. In short, these provisions are: i) the EBR is in charge of adopting the decision to distribute the seats corresponding to employees in the administrative or supervisory body amongst employee representatives in the different Member States, "depending on the proportion of employees employed by the SCE in each of them"; ii) If the implementation of this criterion of proportionality leads to differences in the presence of its representatives in the bodies mentioned, the EBR must proceed to redistribute existing seats providing one of the seats to the Member States that were not originally represented, in particular to the State where the SCE has its registered office in the case of not being initially represented, or otherwise, to the State employing the largest number of employees out of those not represented initially; iii) The seats distributed in such a way will be taken from the seats appointed originally to the Member State that has obtained most seats or, given the case that several States have the same maximum number of seats, to the State occupying the least number of workers; iv) The EBR must also decide, given the case, the manner in which SCE employees may recommend the appointment of members of the aforementioned administrative or supervisory bodies, or oppose the appointment; v) The EBR shall also determine the manner in which the employees' representatives that shall intervene in these bodies are elected or appointed, respecting in any case the provisions established by national legislations.

XII. LITSCE has specified the content thereof, providing a greater legal clarity in cases of repeal of the general duty of companies to provide information to the bodies that articulate the employees' right to involvement. Spanish law introduces three significant specifications. On the one hand, information subject to the criteria of exceptionality must deal, exclusively, to secrets of an industrial, financial or business nature. However, repeal of this information is not activated with the mere existence of secrets of this nature. Dissemination of these secrets should, following objective criteria, either harm the functioning of the SCE's organisational units or are prejudicial to its financial stability. Lastly, information regarding the "volume of employment in the company" is not susceptible of being included in this exception rule.

2. Art. 10.3 of the national law provides a provision for which a reproach may be raised with regard to compatibility with the Community regulation. This precept states that "in the absence of specific provisions contained in the agreement itself, the provision contained in art. 19 will be applicable to the body of representation", which is, precisely, the article that regulates the body of representation within the standard rules. In this sense, national law turns the regulation establishing the legal scheme of the body of representation into a substitute regulation, not in the absence of agreement, which would not be in any way reprehensible, but, quite differently, in the absence of "specific provisions contained in the agreement itself".

1. INTRODUCTION: LEGAL REGULATION OF THE COOPERATIVE SOCIETY IN SPAIN

1. A long tradition of cooperativism exists in Spain. The first Spanish law on this issue dates from July 1931[4]. Since then, and until now, the cooperative formula has acquired a significant relevance in the economic and business fabric, becoming the main pillar of the so-called social market economy.

Here are some statistical figures. At 31st September 2006, the total number of cooperative societies that were registered was 25,617, amounting to approximately four hundred thousand partners. At the same date, the number of employees, members and non-members, rendering their services to different cooperative societies, was 291,643. The number of workers employed by cooperative societies is equivalent to 2.28 per cent of the working population, a percentage which rises to 4.20 per cent and 3.14 per cent in the agriculture and industry sectors, respectively[5].

2. In Spain, legal competences with regard to cooperative societies lie in both the Central Administration and Autonomous Communities (AA.CC.). The current state law regarding Cooperative societies is Law 27/1999 of 16th July, which has been the object of later, partial amendments. On the other hand, most of the AA.CC. have their own legislation on cooperative societies. In total, thirteen out of the seventeen existing AA.CC. have passed laws on cooperative societies.

Despite the existence of 14 general laws regarding cooperative societies[6], legislation is quite homogenous. The state law is applicable, as a general rule and without going into it in depth, to cooperative societies that carry out their cooperative activity in several Autonomous Communities, regardless of its registered office. This rule, however, is not applicable when this activity is carried out "mainly" in one AA.CC. only, in which case the applicable law is the AA.CC law[7]. On the other hand, the state legislation, by virtue of art. 149.3 of the Spanish Constitution (SC), has a substitution nature, which implies that Law 27/1999 is also applicable in territories of the AA.CC. that do not have their own legislation regarding cooperative societies.

3. The current (state) law 27/1999 on cooperative societies limits members to carry out the cooperative activities and services. However, under exceptional circumstances that endanger economic viability, operations with non-member third parties may be undertaken with prior authorization (art. 4 Law 27/1999). Also, the cooperative society's Statutes may establish setting-up sections that undertake specific economic and social activities with autonomous management, separate assets and differentiated trading accounts. In any case, representation of the section corresponds to the Ruling Council (RC).

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[4] Decree Law of 4th July 1931 on Cooperative Societies

[5] Data obtained from the Monitoring Centre of the Social Market Economy

[6] To this we should add special law regarding certain types of cooperative societies. In this sense, for instance, Catalonia and Extremadura have laws regarding cooperative credit

[7] Vid. art. 2.A) Law 27/1999

In general, the minimum number of members required to establish a first-order cooperative society is three; two, if it is a second-order cooperative society (art. 8 Law 27/1999). The preceptive social bodies are the general meeting (GM), the ruling council (RC) and intervention (IN). In the GM, each member will have one vote (art. 26.1 Law 27/1999). Additionally, in some types of cooperative societies, formulae to modulate the general - "one member, one vote" – rule may be established.

Different types of cooperative societies exist; for instance, for *partnered work*, in which two types of members concur. Firstly, the working member with a corporate working relation. Secondly, the collaborating member who is not involved in producing the asset or rendering the service which is the object of the social activity. This cooperative society may also contract waged employees who are not members. In any case, the number of hours worked/year for these employees can not exceed 30 per cent of the total hours worked/year for the working members.

Other types of cooperative societies that are quite extended in Spain are: of *consumers and users; households; community land exploitation; services; sea; transport; insurance; health; teaching; credit.* Each of them is regulated by their own legislation (art. 104 Law 27/1999).

4. **Right to involvement of waged employees who are not members**. In principle, cooperative societies that have waged staff are subject, without any clarifications or reserve, to common labour legislation regarding employees' participation. From this perspective, the configuration of an undertaking as a cooperative society does not include any novelty in the field of the collective right to involvement; thus, employees may elect either unit (personnel delegates and works councils) or trade union representatives pursuant to common legislation. These representatives may exercise the right to information and consultation in the terms and conditions established by legislation.

Implementation of the common scheme for the rights to representation and participation of the waged employees of cooperative societies, as established by labour legislation, is a general rule that is compatible with certain specialities, listed by the cooperative legislation.

Specifically, Law 27/1999 establishes a special provision: art. 33 regulates the right to participation in the RC in favour of non-member employees of all cooperative societies. This precept provides that when a cooperative society has more than 50 permanent employees and a Works Council has been established, a non-member employee will be a member of the RC with the same rights and obligations as other representatives. Election and demotion of the council member corresponds to the body of representation. However, if several Works Councils exist[8], election is undertaken by all permanent employees of the cooperative society through direct suffrage.

The right of workers in cooperative societies to elect a member of the administrative body is likewise acknowledged in several autonomic laws[9]. Three models exist in autonomic

[8] Since the cooperative society has a number of establishments

[9] Laws in the Basque Country, Catalaonia and the Community of Valencia do not contemplate this right to participation

legislation to establish this right to participation. First, in the minority, the decision to incorporate a member to the RC or not, in representation of non-member employees, is left to the Statutes. In the second model, in the majority, the law establishes this incorporation, setting the conditions for access and election.

The third model is mixed, in such a way that employees' participation is regulated imperatively under certain conditions, establishing that social Statutes may set more favourable access requirements.

The conclusion that may be extracted of the analysis hitherto undertaken, from the perspective of Community law, isn't difficult to state. *For the purposes of art. 59.4 Regulation (EC) 1435/2003 of 22nd July, neither State nor autonomic regulations in Spanish legislation contemplate the possibility of employees' participation in the GM of cooperative societies.*

II. FORMAL ASPECTS

1. Transposition of Directive 2003/72/EC, of 8th October, into Spanish legislation, and by which the Statute of European Cooperative Society is complemented with regard to the involvement of employees (DITSCE), has been undertaken by means of Law 31/2006, of 18th October, regarding the involvement of workers in European Companies and Cooperatives (LITSCE). The Third Final Provision LITSCE so acknowledges it expressly, stating that DITSCE "is incorporated into Spanish legislation by means of this Law". LITSCE entered into force on 20th October 2006[10], a date which clearly shows Spain's significant delay to comply with the transposition mandate established in art. 14.1 DITSCE. LITSCE was passed just over two years after the final date for transposition, set for 8th October 2006.

2. Prior to the law being passed, the draft law approved by the Government and, as such, referred to the Parliament had the sole objective of transposing Directive 2001/86/EC (DITSE). The decision to prepare a single regulation that transposed the two directives, DITSE and DITSCE, simultaneously was adopted during parliamentary proceedings.

For this reason, transposition of Directive 2003/72/EC wasn't and couldn't have been the object of formal consultation with social partners, specifically with the representatives of organisations in the social economy sector. In any case, this omission had an essentially formal nature since the Government, informally, had the opportunity to consult the legal text proposed with the representative organisations in this sector.

The Second Additional Provision constitutes, undoubtedly, LITSCE's flag precept with regard to the transposition of DITSCE. The first section of this Provision establishes that

[10] LITSACE was published in the Official State Journal (BOE, in its Spanish acronym) the day after it was passed and sanctioned (BOE n. 250, of 19-10-2006). Its entry into force took place the day after publication in BOE; that is, 20th October 2006 (cfr., Sixth Final Provision LITSCE)

"what is laid down in this Law will be likewise applicable to the involvement of employees' representatives in European cooperative societies", without further special features following in the Provision. Without prejudice to later reasoning within this report, Spanish legislation has not only transposed Directives 2001/86/EC and 2003/72/EC in a single legal text, it has also unified the substantial and material regulation of SE and SCE; this is in full accordance with Community regulations given the extraordinary similarity of the legal contents of both Directives.

3. Law 31/2006 does not only transpose the most strictly substantial aspects of the right to involvement of employees in the SCE. Moreover, national law has also proceeded with the transposition of the adjectival aspects; those other aspects used to ensure the effective exercise in the sphere of a European company, of the right to information, consultation and participation. To this end, Law 31/2006 has operated in two ways. On the one hand, it has incorporated measures of a procedural nature in its articles[11]. On the other, it has proceeded to modify the Law on Social Order Offences and Sanctions (from now on LISOS, in its Spanish Acronym)[12], with the aim of classifying severe and very severe offences derived from breaches established in LITSCE itself[13].

III. MATERIAL ASPECTS

2. Object and definitions

1. Art. 1 DITSCE, after establishing in the first section that its objective is governing the involvement of employees in the affairs of European Cooperative Societies as referred to in Regulation (EC) 1435/2003, establishes the duty of Member States to establish provisions on "the involvement of employees in each SCE" in the second section thereof. Thus, the community regulation states the application of one of the formulae for involvement specified within the regulation as an indispensable complement in the establishment of any SCE.

As expected, Spanish legislation has adopted this structural principle of the SCE concept. In this sense, article 1.1, paragraph 2 LITSCE states that "provisions for the involvement of employees must be established in every SCE, under the terms established in this Law".

2. Art. 2 DITSCE, with an aim that is not only pedagogical but essentially legal, provides the definition of the most important concepts or institutions that appear therein. Specifically, there are eleven definitions referring to: European company, participating companies, subsidiary, concerned subsidiary or establishment, employees' representatives,

[11] This is the aim of arts. 33-37, grouped under Heading III, named "legal procedures"

[12] Cfr. Royal Legislative Decree 5/2000, of 4th August, by which the rewritten text for LISOS is passed

[13] Vid. First Final Provision LITSCE. Vid. *supra*, 4

representative body, special negotiating body, involvement of employees, information, consultation and participation.

Following this scheme, art. 2 LITSCE draws up a catalogue including twelve definitions: the eleven definitions contained in the Directive, and the definition for Member State. National law defines the latter as "Member States of the European Union, States undersigning the Agreement on European Economic Space that are not Members of the European Union and any other State for which" RSAE and DITSCE "apply"[14].

With regard to the list of definitions transposed, LITSCE proceeds to an almost literal transcription thereof. In this sense, limiting all references to specific SCE concepts, and therefore leaving aside those other concepts that the cooperative society shares with the SE, with a content which is more specifically labour-related[15], the Second Additional Provision.1.2 offers the following definitions: i) *SCE*: "any cooperative society established in accordance with Regulation (EC) No. 1435/2003";.ii) *Participating legal entities*: "companies within the meaning of the second paragraph of Article 48 of the European Community Treaty, including cooperatives, as well as legal bodies formed under and governed by the law of a Member State, directly participating in an SCE", iii) *Subsidiary of a participating legal entity of an SCE*: "an undertaking over which that legal entity or SCE exercises a dominant influence defined pursuant to Article 4 of Law 10/1997, of 24th April, regarding the right to information and consultation of employees in Community-scale undertakings and groups"[16].

3. Legal regulation of SCE employees' right to involvement: a plurality of regulation systems

3. In their own scopes of implementation, Directives 94/45/EC and 2001/86/EC share a number of legal regulation principles; specifically, two in particular which we must highlight. The first principle refers to the substantial unity of the regulation systems that each Directive establishes which are implemented in a uniform manner without distinction; in one case, for *all* Community-scale undertakings or groups of undertakings and, in the other, for *all* European companies. It is true that with regard to the SE, DITCE establishes certain legal differences with regard to the means used to establish the SE itself[17]. However, these are secondary differences that do not affect the core of the rights regulated herein and that are implemented indifferently in any SE regardless of particular circumstances, such as its size.

The second principle that both Community regulations share refers to the connection between the implementation of information and consultation procedures or the procedures to

[14] Cfr. art. 2.a) LITSCE

[15] The definition for "representative body", "negotiating body", "employees' participatio", "information", "consultation" and "participation" constitute an *ad pedem literae* reproduction of the similar definitions contained in the Community regulation.

[16] Art. 4 Law 10/1997 trasposes into Spanish legislation the provision contained in art.3 Directive 94/45/EC, to which art. 2.c. DITSCE makes reference

[17] For instance, art. 3.2.a.ii. establishes special provisions for election or appointment of employees' representatives in SCE established by way of merger.

establish a European Works Council or, given the case, the right to involvement through conventional and legal means. The implementation of the legal system – that is, subsidiary provisions or standard rules – is essentially conditioned, in both Directives, to not being able to reach an agreement; that is, to the non-existence of a conventional system; or, in other words, the existence of a collective agreement acts as a condition for non-application of the substantial provisions stated in the corresponding national laws.

DITSCE has not collected any of these principles; quite on the contrary, the fundamental options thereof point in the opposite direction. Firstly, Directive 2003/72/EC does not establish a single legal scheme with regard to the right to involvement of SCE employees. The Community regulation starts from a diversity of schemes built, at least in its formal formulation, according to the subjects participating in its establishment. In this sense there are two main legal schemes: on the one hand, the scheme applicable to "SCEs established by at least two legal entities or by transformation"[18]; on the other, the scheme ruling "SCEs established exclusively by natural persons or by a single legal entity and natural persons"[19].

This dual system of schemes is accompanied by a breaking-away from the second principle which sets collective agreement as the primary means to regulate the rights dealt with. In the sphere of the cooperative society, this is a principle that only rules, without prejudice to clarifications made below, to SCE established by legal entities or by transformation. Or, in other words, this principle does not stand with regard to SCE established exclusively by natural persons or by a legal entity and natural persons. For this second group of SCE or, to be more technically precise, for certain SCE belonging to the second group, the right to involvement has, initially, a legal origin. Furthermore, and not least, DITSCE establishes, in Section IV, provisions for participation in the general meeting or section or sectoral meeting, which may also be imposed apart and independent from collective agreement; that is, they work *ope legis*.

4. LITSCE has followed these rights' policy options strictly and rigorously, with no further aim than stating the differences between the legal regulation of the right to involvement in SE and in SCE. Thus, the transposition of provisions contained in Section II and III DITSCE, articles 8 and 9, exhaust to a great extent, the special legal characteristics established by LITSCE with regard to the right to involvement of employees in European cooperative societies. In other words, the majority of provisions established in LITSCE are applicable to both SE and SCE indifferently. Or, as established by the First Additional Provision.1 of the national transposition law: "what this law establishes will be likewise applicable to the involvement of employees in European cooperative societies (hereinafter, SCE) under Regulation (EC) No. 1435/2003 of the Council, of 22nd July 2003, regarding the Statute of the European cooperative society, with the following special characteristics (…)".

[18] Tal es la literalidad de la rúbrica de la Sección II de la DITSCE

[19] Tal es la literalidad de la rúbrica de la Sección III de la DITSCE

4. Right to involvement applicable to SCE established by at least two legal entities or by transformation

A. Provisions applicable to SCE located in Spain

a. Scope of implementation

1. From the point of view of its legal content, DITSCE establishes a basic distinction between two large groups or provisions: the "main" provisions and "accessory" provisions. The former group, "main" provisions, are applicable to any European Cooperative Society which has its registered office in a specific Member State and are legally effective in the SCE organisation as a whole, its subsidiaries and establishments, including those outside the territory of the specific Member State. "Accessory" provisions, on the other hand, are applicable exclusively to subsidiaries and establishments of the SCE (or a subsidiary or, given the case, the participating companies that constitute the SCE) which are located in the territory of the Member State, the registered office thereof being located in a different Member State.

   LITSCE has collected, in exemplary fashion, this differentiation which is developed and expressed in its articles. In this sense, whilst Title I of the Law is named "Provisions applicable to European companies registered in Spain", Title II of the Law is name "Provisions applicable to establishments and subsidiaries located in Spain of European companies". Logically, as is to be expected, the scope of implementation of each of these two categories of provisions are different. In this section, I shall proceed to define the scope of implementation of the provisions found under Title I, leaving for later the examination of provisions under Title II[20].

2. Pursuant to art 3.1 LITSCE, the provisions under Title I are applicable to any SCE that has, or will have as laid down in the establishment project, "its registered office in Spain, and all establishments and subsidiary companies, as well as all participating companies that constitute the SCE and the subsidiaries and establishments thereof that are affected, whatever Member State they are located in". On the other hand, Art. 3.2 LITSCE establishes that the implementation of provisions under Title I excludes provisions from any other Member State where the SCE or its participating companies has establishments or subsidiary companies, "except in those cases mentioned expressly".

   Two notes can therefore be made of this group of provisions. Firstly, the *extraterritoriality* thereof, since they are applicable not only in Spain but, more broadly, in all States that make up the European Union[21]. Secondly, the *excluding* nature of their implementation with regard to any other regulation. Except where LITSCE expresses the opposite, the provisions contained in other European legislations, whatever their nature (main or accessory), cede to the provisions stated under Title I of the Spanish law which, therefore, enjoy preferential implementation.

[20] Vid. *supra*, epigraph 3

[21] And, eventually, all countries that make up the European Economic space.

b. Procedure for negotiation of the employee's right to involvement in the SCE

a´. Procedure responsibility

Art. 4 LITSCE establishes the responsibility for the negotiation procedure of the involvement of employees in the SCE on the competent bodies of the companies participating in the establishment of the SCE. In accordance with this legal passage, the "responsibility to establish the conditions and means necessary" for the negotiation of the rights of involvement with employees' representatives, is incumbent upon these bodies.

Non-compliance with this duty on behalf of the competent bodies in the participating companies establishing the SCE, may trigger specific responsibilities of an administrative nature, amongst others. Art. 10 bis.2.a) LISOS[22] qualifies "actions and omissions that prevent the starting and development of negotiation with employees' representatives" as a very severe offence. However, we shall see this later.

b´. Start of the procedure

3. Art. 3.1 DITSCE imposes upon the directing or administrative bodies of the participating companies in the establishment of the SCE, once the merger or holding company establishment project is published, or after adopting a project to create a subsidiary or to become an SCE, the duty to initiate procedures to open negotiations with employees' representatives *as soon as possible* in order to establish the rights to involvement. These procedures include communication of the information regarding the identity of the participating companies, subsidiaries or establishments affected, and the number of employees.

   Art. 5 LITSCE repeats this provision, complementing it, nevertheless, in two ways. On the one hand, it limits the maximum period during which the procedure must be started, setting this period at forty-five days counting from publication of the project. On the other, it enlarges the catalogue of issues which must be communicated at the start of the procedure; this catalogue extends on two issues, besides the identity of participating companies and the number of employees. Firstly, in all cases, information must be provided regarding the "address proposed for the registered office", a provision with the aim of guaranteeing that employees' representatives know, from the start of the procedure, the national law applicable to the main provisions. Secondly, when systems of participation are implemented in the participating companies, the administrative or supervisory body must provide information regarding the nature of these systems, the number of employees covered by them and the proportion that these employees represent with respect to the total number of employees in the participating companies.

c´. Establishment and composition of the Negotiation Body

4. In the legal structure of DITSCE, the Negotiating Body (NB) is an essential piece with regard to the implementation of the employees' right to involvement since this body is appointed with the fundamental task of opening negotiations with the aim of providing a substantial or material content to those rights. Thus, the attention paid to it by the Community Directive, article 3 thereof dealing not only with its creation as would

[22] Art. 10.bis LISOS has been implemented by Final Provision First.3 LITSCE.

appear from the unclear heading to this precept; it also regulates other different issues, such as its roles and its workings. In any case, and currently focussing the analysis on all issues regarding its creation, paragraph 2 of aforementioned article 3 establishes a set of provisions regarding the composition of the NB, with its complexity as its standout feature.

Trying to summarise as much as possible, the scope of implementation of these provisions is not uniform: two provisions with different scope can be identified; the first, of a general nature, and the second, with implementation limited to the NB of the SCE formed by way of merger. Furthermore, provisions in the Community regulation with regard to the establishment of the NB are not homogenous with regard to their nature. Whilst some can be inscribed amongst the "main" provisions, others may, on the other hand, be inscribed within the "accessory" provisions.

The structure of art. 7 LITSCE has not been able to escape the complexity of the Directive precept it transposes. For a more exact understanding of the legal content of this passage, it is advisable to start with a preliminary classification of the provisions that establish the creation of the NB, differentiating between initial creation and modification of its composition. Also, within the first group, it is necessary to distinguish, as mentioned above, between general provisions and specific provisions applicable to the creation of the NB when the SCE is formed by way of merger. Finally, it may also be significant to separate two last groups of provisions due to their nature, differentiating between provisions regarding the manner to elect or appoint employees' representatives in the NB and provisions regarding the manner of distribution of representatives.

5. With regard to the initial creation of the NB, Spanish legislation establishes the provisions regarding the manner of election or appointment of employees' representatives in the NB as *accessory* provisions, that is, submitted to the national legislation of the territory where each of the different organisational units of the SCE (participating companies, subsidiaries and establishments) are located. In the words of paragraph 1 art. 7.1 LITSCE, "members of the negotiating body will be elected or appointed pursuant to national legislations and practices". Befitting these terms established in national legislations and practices, national law allows that, when trade union representatives are appointed, these may or may not be "employees of one of the participating companies or their concerned establishments or subsidiaries" (paragraph 2, art. 7.1)[23].

   However, provisions regarding the manner of distributing employees' representatives in the NB are "main" provisions, showing a diverse legal regulation on this issue. In general, art. 7.1 LITSCE reproduces the provisions contained in art. 3.2.a. i) DITSCE. Consequently, members of the NB are distributed proportionally to the number of employees in each Member State in the participating companies, subsidiary companies and establishments "such that, in each Member State, there is one seat per every 10 per cent of the total number of employees throughout the Member States or fraction thereof". As a special provision, applicable to an SCE formed by way of merger, paragraph 1 art. 7.1 LITSCE repeats the provision in art. 3.2.a. ii) DITSCE, establishing

[23] Vid. Para. 2, art. 3.2.b) DITSCE

that in this hypothesis, there are such further additional members from each Member State as may be necessary in order to ensure that the special negotiating body includes "at least one member representing each participating company which is registered and has employees in that Member State", as long as, in accordance with the project, the company ceases to exist as a separate legal entity following the registration of the SCE.

An exact implementation of this special provision requires taking a number of complementary provisions into account. Firstly, and in the case that amongst the elected or appointed members of a Member State there is a representative who is not an employee of any of the participating companies, Spanish law establishes a presumptive rule according to which all participating companies employing workers in the State in question are represented in the NB through the non-employed representative (second paragraph, art. 7.2). This is, nonetheless, an *iuris tantum* presumption that may be overruled by way of an election or appointment act "that provides otherwise". Secondly, and following the provisions contained in the Directive[24], LITSCE establishes a maximum limit to the additional members of the NB that may be elected or appointed with the aim of guaranteeing, in the case of an SCE formed by way of merger, the presence of a representative of each registered participating company employing workers in the State concerned, in the NB. This maximum limit is equivalent to "20 per cent of the number of ordinary members elected or appointed initially" (para. 1, art. 7.3). Thirdly, in the case that the number of participating companies in the merger is larger than the maximum number of additional members in the NB, the members exceeding this limit will be allocated to companies in different Member States "by decreasing order of the number of employees they employ"[25]. Finally, developing the mandate contained in the Community regulation by which the appointment of additional members does not entail a double representation of employees in the participating companies, art. 7.4 of the Spanish law provides, as a guarantee to avoid this double representation, the duty to subtract the number of employees belonging to these companies "from the number of employees whose representation would have been allocated to ordinary members elected or appointed initially in the Member State in question".

Once the NB is established pursuant to the aforementioned provisions, or simultaneous to its establishment[26], LITSCE entrusts the competent bodies of the participating companies the duty to call the body to a "preliminary meeting" for negotiation. The bodies have to inform the management at their establishments and subsidiary companies in all Member States about this meeting. They must also communicate this to the trade union organisations that, in each Member State, have participated in the election or appointment of NB members.

6. The provisions that have been explained above regulate the composition of the NB in a very specific time sequence, which corresponds to the start of the procedure. Nevertheless, during the course of action of the NB – which as will be reasoned below may continue for a whole year – several, different difficulties may be encountered that

[24] Vid. art. 3.2.d)ii) DITSCE

[25] Cfr. para. 2, art. 7.3 LITSCE, transposing para. 2, art. 3.2.a) DITSCE

[26] Art 6.3 LITSCE considers the possibility of holding the preliminary NB meeting on the date on which the NB is established.

alter some of the essential elements that have been considered and weighed up for the first establishment of the NB. DITSCE does not formulate any provision that contemplates any sudden change to those essential elements. However, the same can not be said about national law since art. 7.5 thereof establishes a new election or appointment of all or part of NB members given two different hypotheses.

The first hypothesis of this new election or appointment is when there is a change in the size, composition or structure of the organisational units of the SCE that affects "the number of seats" to be allocated in the NB, "the distribution criteria" of the seats or "the representativity" of the body itself. In all cases, legislation conditions this new election to the mediation of one of the following two formal requirements: agreement of the NB and a written request or petition signed by at least 10 per cent of the employees of the participating companies and their concerned subsidiaries and establishments, belonging to at least two establishments located in different Member States[27]. National law does not identify the addressee of either the request for a new election or appointment made by the agreement of the NB or the petition made by employees. A systematic interpretation of the provisions that regulate the procedure would entail that the addressee can be no other than those responsible for the negotiation procedure, that is, the competent bodies in the companies participating in the establishment of the SCE. Furthermore, even though LITSCE contains no provision to this regard, holding the new election or appointment, either total or partial, is not at the discretion of those responsible for the negotiation procedure. Modification in the composition of the NB must be considered to be an imperative provision, given the concurrence of conditions for its application in form and content.

The second hypothesis for a new election or appointment, total or partial, of the NB is quite different, affecting the loss of representative mandate at national level of a NB member. As for the case above, the occurrence of this vicissitude is automatically associated to the reestablishment of the NB. Together with this content requirement, a formal requirement has to concur: a request by at least 10 per cent of the employees or representatives of the companies and establishments "for which the member in question was elected or appointed to represent"[28].

d´. Functions of the Negotiating Body

7. The basic and essential role of the NB, which justifies its creation, is no other than negotiating with the competent bodies in the participating companies, responsible for the negotiation procedure, the content of the right to involvement of the employees within the SCE. Paragraph 1, art. 3.3 DITSCE so states it. Likewise, paragraph 1 art 8.1. LITSCE. In logical coherence with its basic role, the negotiation procedure concludes on the agreement on the involvement of employees, as established also by art. 8.5 of the national law.

   Negotiation of the agreement on involvement constitutes the typical role of the NB, but not the only one. Furthermore, the NB may adopt another two decisions that may be qualified as atypical, alternatives to each other and with regard to reaching an agreement.

[27] Vid. art. 7.5.a) LITSCE

[28] Vid. art. 7.5 b) LITSCE

Firstly, the NB may opt for "not opening negotiations with the competent bodies of participating companies" to lay down an agreement on the involvement of employees. Secondly, it may "declare ongoing negotiations closed" and submit to the provisions on information and consultation of employees in force in the Member States where the SCE has employees[29]. Nonetheless, in order to safeguard another of the principles of the legal regulation on the involvement of employees within the SCE, the *"before-after"* principle, the NB is banned from adopting any of these decisions when the SCE is established by means of transformation and as long as a system for the participation of employees is applied in the company which is to be transformed[30].

As occurs when an agreement is reached on the involvement of employees, reaching any of these two decisions ends the negotiation process[31]; however, subsidiary provisions stated in LITSCE are not applicable in these two cases. In any case, the NB can only be re-established when requested by, at least, 10 per cent of the employees or the representatives of the SCE, its subsidiary companies and establishments, and only when, at least, two years have gone by since the decision was adopted. However, this temporal requirement is only a stipulation, not an imperative provision, in such a way that the NB and the competent body may agree to open negotiations prior to this term. Given the case that once negotiations are resumed, before or after the two-year period, an agreement is not reached, national legislation maintains non-application of the accessory provisions.[32]

There are two further observations of interest. Spanish legislation has some provisions of its own that are not derived from the Community regulation, with regard to the development of negotiations started by the NB. Firstly, it establishes the possibility that the NB and competent bodies in the companies participating in the establishment of the SCE adopt, by common agreement, specific provisions regarding the chair of deliberations "or, given the case, other procedures agreed during the development of joint meeting sessions"[33]. Thus, the parties enjoy the freedom to agree what they deem necessary for this issue, with the possibility, for instance, of appointing an external chairman or to establish a rotation system between both parties. Secondly, LITSCE establishes with regard to the minutes of the meetings, an imperative mandate which provides that they will be signed "by a representative on behalf of each of the parties"; in this sense, the expression "parties", designates the two parties attending negotiations: social and employers, represented by the NB and the competent bodies in the participating companies, respectively.[34]

The NB is made up of employees' representatives, elected or appointed in the terms examined above. If the NB considers it suitable towards "the correct performance of its duties", experts chosen by the NB may attend the meetings; these experts may be

[29] Vid. para. 1, art. 8.2 LITSCE and para. 1, art. 3.6 DITSCE

[30] Vid. paras. 1 and 3 DITSCE and para. 3, art. 8.2 LITSCE

[31] As established by art. 8.3 LITSCE and repeated in art. 8.5

[32] Vid. art. 8.3 LITSCE and para. 4, art. 3.6 DITSCE

[33] Vid. Para. 1, art. 8.4 LITSCE

[34] Vid. para. 2, art. 8.4 LITSCE

representatives of the corresponding European trade union organisations[35]. Upon request of this body, the experts may also attend negotiations with the competent bodies in the participating companies, and one of their basic roles will be to "facilitate that the provisions that are negotiated are coherent with the European Community sphere in which the company's activities are developed"[36]

e´. Functioning of the Negotiating Body

8. Both the Community regulation and national law provide certain rules on the functioning of the NB. However, national law is not limited to repeating the provisions found in the Directive; it establishes new provisions, regulating, somewhat more precisely, the scheme under which the NB works. From amongst this set of provisions, undoubtedly the most relevant is the provision regarding how agreements are laid down within the NB, an issue for which the Community regulation, and therefore national law, again establishes a general provision and a specific provision.

   By virtue of the general provision, the NB reaches agreements by an "absolute majority of its members"; this, in turn, must represent "the absolute majority of its employees". Each member has one vote[37]. This general provision is modified in certain cases where the majority required is larger; specifically, a two-thirds majority of NB members, representing in turn two-thirds of employees and including the votes of members representing employees in, at least, two Member States.

   NB decisions for which both the Directive and national law require a larger majority are the following three: i) not opening negotiations in view of reaching an agreement of involvement[38]; ii) terminating ongoing negotiations, agreeing to submit to provisions of information and consultation of employees in force in the Member States where the SCE has employees; and, iii) reduction in the employees' participation rights.

   In this sense, Community legislation has proceeded to limit and provide effective content to the notion of reduction of participation rights, understanding this to be the establishment of a proportion of members of the bodies of the SCE that is lower than "the highest proportion existing within the participating companies"[39]. This definition is contained almost literally in national law[40], which, additionally, includes the two cases in which the reductions of participation rights are specified, in the terms of the Directive[41]. Pursuant to the provision contained in paragraph 2 of art. 9.2., the NB will require a reinforced majority in the following two cases of reduction of participation rights: i) in the case of an SCE established by way of merger, "whenever a system of employee participation is applied in the administrative or supervisory bodies of participating

[35] Vid. Para. 1, art. 9.5 LITSCE

[36] Vid. para. 21, art. 9.5 LITSCE

[37] Vid. art. 9.1 LITSCE and first subsection, para. 1, art. .3.4 DITSCE

[38] Vid. para. 2, art.8.2 LITSCE and para. 1, art. 3.6 DITSCE

[39] Cfr., last paragraph art. 3.4 DITSCE

[40] Vid. First paragraph art. 9.2 LITSCE

[41] Vid. para. 1, art. 3.4 DITSCE

companies, affecting at least 25 per cent of the overall number of employees in the participating companies" and, ii) in the case that an SCE is established by way of creating a holding company or a common subsidiary, "whenever a system of employee participation is applied in the administrative or supervisory bodies of participating companies, affecting at least 50 per cent of the overall number of employees in the participating companies".

9. Besides the provisions on reaching agreements, LITSCE establishes other provisions with regard to the workings of the NB, some of which, as mentioned earlier, correspond to the transposition of mandates contained in the Directive and, others, which go beyond Community law and become a part of a segment of strictly national regulations.

   Firstly, LITSCE confers the NB the capacity to pass internal regulations with regard to its own workings, such as appointing a chairman from amongst its members[42]. Secondly, national law confers the NB the right to meet prior to any meeting with the competent bodies of the participating companies, "without the presence thereof"[43], a provision which has a consequence on the scheme of expenses of the NB, as will be noted later. Thirdly, the NB is obliged to supply information "on the process and the results of negotiation" to the trade unions that, in each Member State, have participated in the election or appointment of the members of the NB[44]. With regard to this duty of the NB, national law does not establish a periodicity for the supply of information. However, a double interpretation, one strictly literal, the other finalist, suggests that the NB must provide this information with a certain periodicity and not consider the end of negotiations as a fulfilment of the duty to supply information. The content of the information will deal with the process and the results; with both issues. And, therefore, the opportune information must be provided on both accounts.

   I have until now referred to the provisions that are particular to internal law. What remains is to analyse the manner in which LITSCE develops and specifies the provisions set in DITSCE with regard to the functioning of the NB; namely, the provision regarding the expenses relating to the functioning of the negotiating body. To this regard, art. 3.7 of the Community regulation establishes two provisions. The first is of a material nature and its legal structure is open. Specifically, the first paragraph of this precept establishes that expenses relating to the functioning of negotiations "shall be borne by the participating companies so as to enable the special negotiating body to carry out its task in an appropriate manner". The second provision, however, has a formal nature as it is a remission provision. Indeed, the second paragraph of the abovementioned article, remits to the national laws of each Member State to lay down "budgetary rules regarding the operation" of the NB, "in compliance with this principle"; that is, the principles of the former provision. The Directive's precept concludes by pointing out that national legislations may also limit funding to cover "one expert only".

   Based on this Community regulation, LITSCE starts by transposing the precepts established by the Directive into national law. Paragraph 1, art. 9.7 reproduces, almost

[42] Vid. art. 9.3 LITSCE

[43] Vid. art.9.4 LITSCE

[44] Vid. art. 9.6 LITSCE

faithfully, the first paragraph in art. 3.7.DITSCE, establishing that expenses derived from "establishment and functioning" of the NB and, "in general, the development of negotiations" will be borne by the participating companies "who must provide sufficient financial and material resources to carry out its task in an appropriate manner". In the style of the Community regulation, national law does not establish a criterion for the distribution of expenses between participating companies, who will be in charge of agreeing the criterion for distribution they deem more suitable, for instance, turnover, profits or number of employees of each.

Nevertheless, the second paragraph of the aforementioned article specifies the minimum expenses that must be borne by the participating companies, as follows: i) expenses derived from the election or appointment of members of the NB; ii) expenses of the organisation of NB meetings, including translation, allowance, accommodation and travel expenses of its members; and, iii) expenses derived from, at least, one expert appointed by the NB to assist in its functioning.

f´. Duration of negotiations

10. The Directive dedicates its fifth article, to the duration of negotiations aimed at reaching an agreement on the involvement of employees. There are two provisions contained in this precept: the first is a general-scope provision, and the second provision allows the parties to repeal the former provision. In general, art 5.1 DITSCE establishes that negotiations "shall commence as soon as the special negotiating body is established and may continue for six months thereafter". Nevertheless, art. 5.2 provides that, by joint agreement, the parties may extend negotiations "up to a total of one year", from the establishment of the NB.

    Art. 10.1, LITSCE reproduces, almost literally, the content of art. 6 of the Directive, as mentioned earlier. Art. 10.2. specifies and develops the establishment of *dies quo* from which the six-month term must be counted, established as a general rule in certain circumstances. Indeed, we have already pointed out that this date is the date in which the NB is established. We have also pointed out that Spanish legislation provides that the first meeting of the NB will be held with the employers' side, and this meeting may be held on a different date or simultaneous to the establishment of the NB.

    Within this legal context, abovementioned art. 10.2 of the national law establishes that, given the case that the NB is not established on "grounds attributable to employees' representatives", having the employers' side complied with "their obligations towards the establishment" of the negotiating body, the six-month term will count "from the date on which the negotiating body could have been validly established".

g´. The agreement on involvement

11. Once the NB is established and within the period established as ordinary duration, the social partners open negotiations aimed towards reaching an agreement regulating the involvement of employees in the SCE. Pursuant to art. 4.1. DITSCE, the parties shall negotiate "in a spirit of cooperation with a view to reaching an agreement on arrangements for the involvement of the employees". Paragraph 2, art 8.1 LITSCE transposes this mandate with regard to negotiating in a sprit of cooperation, adapting it to the legal language of the Spanish system of labour relations. Thus, the parties shall negotiate – as established in this precept – *in good faith*, a definition that meets the requirements of the Community.

Also, art. 4.2. of the Directive states the issues that must be dealt with by the agreement on involvement, constituting what may be qualified as the "minimum content" of the agreement on involvement. A first group of these issues (for instance, scope of implementation of the agreement, the date of entry into force and duration thereof) has no other aim but to ensure the identity of the agreement as a regulating pact regarding the right to involvement. A second, larger group of issues, on the other hand, mentions aspects regarding the content of the agreement, such as the attributions and competences of the bodies of representation, financial and material resources assigned to this body or provisions on participation. In any case, neither group sets substantial provisions, as the Directive's objective is not to set minimum rights but to ensure that the agreement regulates these issues. On the other hand, not all the issues mentioned in art. 4.2 have to be compulsorily included in the agreement. Specifically, it is only compulsory to include a small group of issues, established in sections b) and e). Also, issues established in sections b), c), d) and e) are compulsory mentions, but alternative to the issue appearing in section f), since it corresponds to the agreement itself to decide the manner of involvement chosen, freely: either by the body of representation, in which case the agreement must include the former issues mentioned, or by procedures of information and consultation, in which case the agreement includes only the references of section f). Finally, the obligation to include aspects stated in section g) is only effective in the case that the parties have agreed to establish arrangements for participation.

Art. 11.1 LITSCE transposes into national law the mandate established by art. 4.2. DITSCE in a literal manner. Only two innovations may be highlighted. On the one hand, the catalogue of issues constituting the "minimum compulsory" content is enlarge with a new issue regarding "the identification of the arranging parties". This is a reasonable and plausible requirement, aimed at reinforcing the identification elements of the agreement itself. On the other, the scope of implementation of art. 4.2.b) of the Directive is, firstly, clarified syntactically and, secondly, enriched materially, insofar as art. 11.1.c) LITSCE is written as follows: "the composition, number of members and allocation of seats on the employees' representative body, by which the rights to information and consultation of employees within the SCE and its subsidiaries will be exercised, and which will be the discussing partner in this regard within the competent body of the SCE, *the duration of its mandate and the effects that may be derived from modifications in size, composition or structure of the SCE and its subsidiaries or in the composition of national bodies of employees' representation"*[45]. Thirdly, and given the singularity of the clause established in art. 4.2.h DITSCE, this clause has been the object of a singular transposition. In this sense, the first paragraph of Second Additional Provisions.1.3 establishes that the agreement of involvement of the SCE must include, besides the contents of art. 11 (applicable to both SCE and SE), "the cases of structural changes in the SCE and its subsidiaries and establishments occurred after the establishment of the SCE and which may lead to renegotiation of the agreement and the procedure for renegotiation". Finally, the national law establishes the possibility, which is not expressly contained in the Community

[45] Italics correspond to the innovation introduced legally, which, on the other hand, agrees with the provisions set in art. 7.5 LITSCE

regulation, that the agreement specifies the rules authorising employees to "participate in general meetings or section or sectoral meetings"[46].

12. Regardless of the freedom that the parties have, within a respect for the compulsory content, to negotiate what they deem most suitable to their interests, the Directive and national law add some provisions that complement those mentioned until now. By expressing their scope more rigorously, these new provisions lay out different functions. Specifically, two others: to set limits to the autonomy of the parties' intentions, and to avoid legal loopholes, ensuring the additional implementation of certain provisions. While the first is included in the Community regulation, the second is derived by a specific option of the national legislator's law policy.

    As pointed out earlier, one of the regulation principles of the Community Directive regarding the involvement of employees in the SCE, is the "before-after" principle. Without entering an explanation of the meaning and scope of the principle, what must be highlighted is that art. 4.4 DITSCE provides a manifestation of this principle by establishing a clear limitation in the contractual freedom of the parties. Pursuant to this principle, in the case that the SCE is established by way of transformation, "the agreement shall provide for at least the same level of all elements of employee involvement as the ones existing within the company to be transformed into an SCE". This restriction in negotiations formulated in the Directive is transposed, literally, by art. 10.2 of the national law.

    Art. 11.1.i) LITSCE transposes art. 4.2.h) DITSCE, regulating that the agreement establishes its "date of entry into force, its duration and the conditions for complaint, extension and renegotiation". These five mentions are a part of the compulsory content of the agreement. Nevertheless, national law contemplates the hypothesis for when an agreement of involvement does not include all or some of these mentions, establishing a set of additional provisions which are activated exclusively when a defect in the pact exists. These additional provisions, inspired by national law on collective agreement and contained in art. 13 LITSCE, are the following: 1) *Validity*. The agreement is assumed to be in force indefinitely (art. 13.a); 2) *Complaint*[47]. i) The additional general provision on this issue is the capacity of any of the parties (competent bodies of the SCE, representative body or, given the case, employees' representatives in the framework of information and consultation procedures) to lodge a complaint regarding the agreement six months in advance to its date of expiry. The party lodging the complaint is obliged to faithfully communicate it to the other party (para. 1, art. 13.b). ii) When the agreement is enforced indefinitely, or no duration has been set, the law establishes an additional special provision by which the complaint may be lodged six months in advance to the end date of every four year period following the date on which the agreement enters into

[46] Cfr. Para. 2 Second Additional Provision.1.3 LITSCE

[47] The duty to lodge a complaint constitutes a repeal of the general rule of contracting by which *dies interpellat pro homine.* In the Spanish system, exceeding the duration of the agreement does not, automatically deprive it of its legal performance. The law requires that, additionally, one of the parties establishes its wish that the end of validity leads, indeed, to the end of enforcement of the agreement.

force (para. 2 art. 13.b) 3) *Extension*[48]. Once the duration of the agreement is over, and given the case that no complaint has been lodged against it, the agreement on the involvement of employees is considered to be extended for a new period with the same duration as initially stipulated (art. 13.c). 4) *Ultra-activity.* When a complaint has been lodged against an agreement and once its duration has been exceeded, the agreement is still enforced until a new agreement is reached or until subsidiary provisions are applicable (art. 13.d). 5) *Renegotiation.* Once the duration of the agreement is exceeded, and a complaint lodged against it, legitimization to renegotiate a new, substituting agreement corresponds to the representative body, which may exercise all the competences conferred to the NB. In the case where this agreement had established articulation of the involvement of employees by way of information and consultation procedures instead of creating a representative body, legitimation to renegotiate a new agreement corresponds to the NB, constituted in accordance with provisions established legally (art. 13.e).

13. DITSCE, following the model introduced by Directive 94/45/EC in its day, has articulated two ways by which to set the involvement of employees. On the one hand, the conventional path, represented by the negotiated agreement between the NB and the competent bodies in the participating companies; on the other, the legal path, specified by way of measures of information, consultation and participation established by the national legislations of the Member States developing the standard rules set in the Directive itself. However, these paths are not in a state of parity with regard to implementation. On the contrary, the Community regulation has conferred preference to the implementation of the agreement over the legal system of involvement. This preference is stated in art. 4.3, by which "the agreement shall not, unless provision is made otherwise therein, be subject to the standard rules established in the Annex". Therefore, DITSCE establishes the agreement, and not national law, as the instrument to repeal the general provision that determines non-application of standard rules when an agreement has been reached.

    LITSCE does not establish a similar provision as that contained in art. 4.3 of the Directive. Art. 10.3 of national law states a provision that may be reproached for non-compatibility with the Community regulation. This precept states, indeed, that "when the agreement contains no specific provisions therein, provisions contained in art. 19 will be applicable to the representative body", which is, precisely, the article regulating the representative body within the standard rules. In this sense, national law establishes the provision regulating the legal scheme of the representative body as the additional provision, not only when no agreement has been reached, which would not be reproachable, but, quite differently, when the agreement "contains no specific provisions therein".

14. One of the most relevant issues omitted in DITSCE is with regard to the enforceability of the agreement on involvement. Most probably, this omission is the result of the significant heterogeneity which national legislations in the EU countries offer to tackle and deal with this issue. In this context, DITSCE, as other Community regulations before

[48] In Spanish law, extension of an agreement can follow two paths. On the one hand, by an express agreement of the parties. On the other, by way of legal decision, as is the case when no complaint has been lodged. Omission to lodge a complaint, therefore, determines the extension of an agreement by legal imperative

it, especially Directive 94/45/EC, opts to silence the issue and not resolve it, which is equivalent to leave its treatment to national legislations and practices.

Art. 12 LITSCE limits the enforceability of the agreement on involvement and, more generally, defines its position within the system of labour regulations. As expected, the approach and solution to these transcendental issues is undertaken in a manner that is in full agreement with the legal provisions that, in Spanish legislation, regulate and define the position of the typical agreement in Spain; namely, the statutory collective agreement.

To start with, national law grants general enforceability or *erga omnes* to the agreement on involvement. This is established unequivocally in Art. 12.1 LITSCE, by which agreements on involvement, negotiated by the NB[49] and the competent bodies of the participating companies, oblige "all establishments within the SCE and its subsidiaries that are included in its scope of implementation, as well as their respective employees, during the period in which it is enforced". Secondly, national law requires the written formalization of the agreement "under penalty of nullity". Thirdly, the agreement on involvement, once concluded and signed, must be presented to the competent labour authority for its registry, deposit and publication in the official journal[50]. Lastly, the provisions on the involvement of employees established in the agreement are configured as public order rules that can not be unknown to or contradicted by the statutes of the SCE. And although LITSCE does not specify as much, the sanction for a breach of these rights by statutory regulations is nullity[51].

c. Standard rules

a´. Scope of implementation

15. In accordance with what has been pointed out earlier, DITSCE has transferred the institutional architecture presented in Directive 94/45 to the sphere of the SCE, establishing two axes for regulation, that are related univocally and not reciprocally: the second appears when the first has failed. These axes are collective agreement, analysed above, and accessory provisions that play the role of supplementary rules. The legislation defining the scope of implementation of the standard rules is the national legislation of the country where the registered office of the SCE is located. These provisions are active from the date of registry of this entity, once the circumstances that are expressly foreseen concur. Art. 14 LITSCE, closely following the provisions contained in art. 7 DITSCE, defines the scope of implementation of the standard rules, stating a general rule and several special rules that are applicable to issues of participation.

    Under the general provision, standard rules are applied at the wish of the parties ("*when the parties so agree*")[52] or default on agreement ("*no agreement has been laid down*

[49] Or by the representative body, by virtue of what is established in art. 13.e LITSCE

[50] Vid. para. 1, art. 12.1 LITSCE, that refers this issue to common legislation on collective agreement, established in art. 90 Law on the Statute of Workers' Rights, passed by Royal Legislative Decree 1/1995, of 24th March.

[51] By implementation of art. 6.3 Civil Code

[52] In accordance with arts. 14.1.a) LITSCE and 7.1.a) DITSCE

before the deadline" established legally)[53]. This last cause, however, does not become active automatically. In addition, the simultaneous concurrence of two requirements is necessary. Firstly, the decision of the employers' at the participating companies to continue with the procedure to register the *societas europea* and, hence, accept the implementation of the standard rule. Both the Directive and national law, in this way, confer the managing bodies of these companies the capacity to reconsider the project of creating a transnational body, which is, therefore, established as a reversible project. The second requirement is that the NB has not laid down an agreement with the reinforced majority that is legally established[54], has not started negotiations or terminates ongoing negotiations, submitting the regulation of the rights to information and consultation to the national provisions enforced in the countries where the SCE has employees.

Besides this general provision, DITSCE and LITSCE establish, in similar terms, special provisions for the implementation of standard rules regarding participation. The content of these second provisions is not uniform: they differ with regard to the modality used to establish the SCE. Firstly, when the SCE is established by way of transformation, standard rules are applicable if the company that is to be transformed was subject to a system of employee participation in its administrative or supervisory bodies, prior to registering as an SCE[55]. In the case of an SCE established by way of a merger[56] standard rules will be enforced when participation rights were applied in any of the participating companies prior to registration of the SCE and as long as these rights affected, at least, 25 per cent of the total number of employees in all the participating companies. However, when this threshold is not reached, these standard rules may also be applied "if the special negotiating body so decides"[57]. With regard to the establishment of an SCE by way of setting up a holding company or establishing a subsidiary, the rules that define the implementation or not of standard rules on participation, are similar to the case of a merger, with the sole difference that the threshold for the number of employees affected rises to 50 per cent of the total number of employees in all participating companies. A level that is equal or higher to this threshold activates standard rules on participation automatically; a lower level prevents their implementation, except when a decision is reached by the NB otherwise[58].

The last paragraph in art. 7.2.c of the Directive states a closing clause that is applicable to all modalities in the establishment of the SCE, except for establishment by way of transformation, with the aim of solving possible conflicts arising from preserving participation rights of a different nature. In that case, the special negotiating body shall decide which of the different forms of participation must be established in the SCE. However, the Directive confers national transposition regulations the ability to set, in addition, the modality that is applicable when no negotiation decision is reached.

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[53] As expressed, coincidentally, arts. 14.1.b)LITSCE and 7.1.b) DITSCE

[54] Vid. arts. 6.3 DITSCE and 8.2 LITSCE

[55] Vid. arts. 14.2.a) LITSCE and 7.2.a) DITSCE

[56] Spanish law has not made use of the *opting out* clause established in art. 7.3 DITSCE

[57] Vid. arts. 14.2.b) LITSCE and 7.2.b) DITSCE

[58] Cfr. arts. 14.2.c) LITSCE and 7.2.c) DITSCE

Making use of this authorization, Spanish law establishes the following legal scheme: i) if none of the participating companies applied any form of participation before registration of the SCE, the SCE is not obliged to implement provisions regarding participation; ii) if different forms of participation existed, the NB will decide which one of these must be implemented in the SCE, with the duty to "inform the competent body" of the decision reached to this respect; and iii) if on the date of registration of the SCE, the NB has not provided the corresponding information to the competent body, the form of participation that had formerly "affected the largest number of employees in all the participating companies" will be implemented in the SCE[59].

b´. The representative body

16. In those cases where the causes that determine the implementation of standard rules, analysed in the section above, concur, Spanish law, pursuant to Annex 1 of the Community regulation, has established the legal regulation of the Employees' Body of Representation (EBR), focussing on four aspects.

To start with, art. 15.2 LITSCE provides that, for the establishment of the EBR, the competent body within the SCE must address the competent bodies in the establishments and subsidiaries in the Member States in order that they start, in accordance with "national legislations or practices", the procedure to elect or appoint the members of the aforementioned body[60]. The EBR will be made up of employees within the SCE and its establishments and subsidiaries, "elected and appointed by and amongst employees' representatives or, otherwise, by all the employees, in accordance with national legislations and practices"[61]. Members of the EBR are elected or appointed in proportion to the number of employees within the SCE and its establishments and subsidiaries in each Member State, "with one seat for every 10 per cent or fraction thereof of the number of employees, per Member State" in all Member States[62].

Four years after its establishment, the EBR will have to decide whether or not it starts negotiations in view of reaching an agreement on involvement and must communicate this decision to the competent body in the SCE. In the case that the negotiating process is opened, the role of the negotiating agent falls on the EBR, which takes on the competences conferred by legislation to the NB. During the course of negotiations and until the conclusion thereof, the EBR continues to fulfil its roles. If negotiations are not opened, standard rules will continue to apply during the following four-year period[63]. Nevertheless, the EBR and the competent body of the SCE may agree, by common consent and at any time, to open negotiations with the aim of reaching an agreement on involvement[64].

[59] Cfr. art. 14.3 LITSCE

[60] Cfr. Art. 15.1 LITSCE and Annex, part 1 b) LITSCE

[61] Cfr. art. 16.1 LITSCE and Annex, part 1 a) DITSCE

[62] Cfr. Art. 16.2 LITSCE and Annex, part 1 e) DITSCE

[63] Vid. art. 15.2 LITSCE and Annex, part 1 g) DITSCE

[64] Vid. art. 15.3 LITSCE.

17. From a general perspective, the competences of the EBR are substantiated in the right to information and consultation – as established by art. 17.1 of the national law, which transposes the provision established in the Annex, part 2.a) DITSCE almost literally – "limited to questions which concern the SCE itself and any of its subsidiaries and establishments situated in another Member State or which exceed the competences of the decision-making organs in a single Member State".

    In order to ensure the exercise of this competence, the law grants the EBR 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 organ of the progress of the business of the SCE and its prospects"[65]. The law also imposes a duty to the latter, the competent body of the SCE, to provide the former, the EBR, both the minutes of the meetings of the administrative body, or given the case, the supervisory body, and "copies of all documents submitted to the general meeting of its shareholders"[66] at least one month in advance. LITSCE identifies, by means of an open list technique, and coinciding with the terms of the Community regulation, the issues that must be the object of joint analysis in the annual meeting between both bodies. Indeed, the list is made up of the following issues: "structure, economic and financial situation, the probable development of the business, production and sales, situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, mergers, cut-backs or closures of undertakings, establishment of important parts thereof and collective redundancies"[67]. However, we may add to this catalogue of issues which are subject to information and consultation in the annual meeting between the EBR and the competent body of the SCE, a final issue that is specific to SCEs, and therefore not applicable in the SE, which regards "initiatives referring to the social responsibility of undertakings"[68]

    In addition to the above, LITSCE, in line with the provisions contained in DITSCE, establishes that the EBR must also be informed in advance of those exception circumstances that affect "the interests of employees considerably", especially in cases of transfer, sale or closure of establishments or undertakings, or collective redundancies. With the aim of receiving this information and being consulted on other issues, the EBR has the right to meet, at their request, with the competent body of the SCE or any other, more adequate level of management with decision-making competences[69]. Given the case that the management body decides not to follow the opinion expressed by the EBR, the latter has the right to meet again with the competent body of the SCE in view of reaching an agreement[70]. Furthermore, it corresponds to both bodies, the EBR and the

[65] Such are the terms of para. 1 art. 17.2 LITSCE, which reproduce *verbatim* the terms of Annex, part 2. b), DITSCE

[66] Cfr. para. 2, art. 17.2 LITSCE and para. 2, Annex, part 2, b) DITSCE

[67] Cfr. para. 3, art. L7.2 LITSCE y para. 3, Annex, part 2, b) DITSCE

[68] Cfr. Second Additional Provision.1.4 LITSCE

[69] Vid. para. 1, art. 17.3 LITSCE y para. 1, Annex, part 2, c) DITSCE

[70] Vid. para. 3, art. 17.3 LITSCE y para. 2, Annex, part 2, c) DITSCE

competent body of the SCE, by mutual agreement, to set the formal rules for the development of sessions in their joint meetings[71].

18. The last issue relating to the EBR which is regulated in Spanish law considers the functioning scheme of this body of representation. In short, the aspects regarding the workings of the EBR that are regulated by law are the following: i) reaching agreements; ii) possibility of building a restricted council and the organisation and competences thereof; iii) appointment of experts; and, iv) financing of expenses regarding the workings of the EBR.

    Before examining these aspects, we may highlight the legal symmetry that Spanish law shows in the treatment of the NB and the EBR. To a great extent, LITSCE transfers the provisions established for the workings of the NB to the sphere of the EBR. This is the case for the expenses derived from the constitution and running of the body of representation and its restricted council, established in art. 18.6 in terms that are a literal transcription of the provisions stated in art. 9.7. Due to this, we shall only analyse the first three aspects listed above, and refer to elsewhere in this report as regards to the aspect of expenses[72].

    To start with, the EBR adopts its agreements by the majority of its members, with full competences to prepare its own internal working regulations and with the capacity to elect a chairman[73]. Secondly, and like the open and unspecific criterion of the Community regulation, Spanish law does not specify under what circumstances the number of members of the EBR may justify the election of a restricted council (RC). Indeed, LITSCE establishes the election of an RC, within the EBR, made up of a maximum three members "if the number of members of the body justifies it". However, two provisions established by LITSCE with regard to the RC are a novelty. On the one hand, it acknowledges the right of other members of the EBR to attend RC meetings, even when they are not an integral part of the RC but have been elected or appointed to represent employees who are "directly affected by the measures treated." On the other, it imposes on the RC the duty to regularly inform the EBR of its actions and the result of its meetings[74].

    Thirdly, national law, developing the Community regulation, grants two rights to the EBR and the RC: the right to meet prior to the meetings organised with the competent body of the SCE, and the right to be assisted by experts of their choice[75]. Lastly, LITSCE acknowledges EBR members the right to "time off for training without loss of wages"[76].

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[71] Vid. para. 1, art. 17.4 LITSCE. This passage of the national law develops para. 1, Annex, part 2, d) DITSCE, that refers the legislations of Member States to establish regulations regarding the chairing of information and consultation meetings

[72] Vid. *infra*, 2.B.e, number 15

[73] Vid. art. 18.1 LITSCE and Annex, part 1, d) DITSCE

[74] Vid. art. 18.2 LITSCE

[75] Vid., respectively, art. 18.3 LITSCE and Annex, part 2, para. 2, d) DITSCE and art. 18.3 LITSCE and Annex, part 2, f) DITSCE

[76] Vid. art. 18.5 LITSCE and Annex, part 2, g), DITSCE

National law, in this sense, uses the same language as the Directive. Hence, both regulations fall into the same, double legal uncertainty, which consists of, on the one hand, specifying the supposition of the acknowledged right and, on the other, specifying who (the competent body or the member of the EBR) elucidates the concurrence or not of this supposition.

One last observation is compulsory. DITSCE does not establish any provision with regard to renewal of the EBR. However, the criterion adopted by LITSCE is different: art. 19 establishes a provision that is symmetrical to the provision established in art. 7.5, dealing with the same issue with regard to the RC. With this equal legal treatment, we may conclude the analysis made with regard to the NB[77].

c´. Participation of employees

19. In accordance with the provisions contained in the Directive, the scope of implementation of accessory provisions established by Member States is limited to two of the three possible ways of articulating the right to involvement of employees in the SCE; that is, the establishment of the body of representation and, eventually, to the right to participation, excluding the procedures of information and consultation. Accessory provisions contained in LITSCE with regard to the EBR have been analysed in the previous section; we shall now examine the treatment made by these provisions of the participation of employees.

With regard to this issue, the legal policy option characterizes national law as a whole: a regulation that is very similar to, almost a clone of, the Community text. However, as we shall now see, art. 20 LITSCE is not limited to the reproduction of the contents of part 3 of the Annex of DITSCE literally. Beyond this, it provides further specification to the possible loopholes in the Directive.

In this sense, the system of participation is ruled by the provisions established in art. 20.1, which transcribe the first paragraph, sections a) and b), of the aforementioned part 3. Hence, national law differentiates between the scheme of participation depending on whether the SCE has been established by transformation or otherwise. In the former case, all element of employee participation implemented before registration of the SCE must continue to be implemented in the SCE. In all other cases, employees of the SCE and its establishments and subsidiaries, or their bodies of representation, will have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the SCE “equal to the highest proportion in force (...) before registration of the SCE”.

Secondly, and as established by the second paragraph of part 3 of the Annex in DITSCE, art. 20.2 provides that “if none of the participating companies was governed by participation rules before registration of the SCE, the latter shall not be required to establish provisions for employee participation” unless agreed otherwise.

Thirdly, LITSCE specifies the rules with regard to the distribution of members of the administrative or supervisory body in the SCE; indeed, the Community regulation grants

[77] Vid. epigraph 2. B.c) of this report, number 12

national legislations certain leeway on this issue. In short, these provisions are: i) it corresponds to the EBR to adopt the decision of allocating the seats that correspond to employees in the administrative or supervisory body amongst the employees' representatives in the different Member States, "depending on the proportion of workers employed by the SCE in each of them". ii) If the implementation of this proportional criterion gives rise to differences in the presence of representatives in the aforementioned bodies, the EBR must redistribute the existing seats, providing one of the seats to the Member States that were not initially represented, especially to the State where the SCE has its registered office, if not represented, or, otherwise, to the State employing the largest number of workers within those that were not represented initially[78]. iii) The seats that are reallocated are subtracted from the seats granted to the Member States that obtained most representatives or, given the case of several States with the same maximum number of seats, from the State with less number of employees out of these[79]. iv) The EBR also has the responsibility of deciding, given the case, the manner in which employees of the SCE may recommend the appointment of members of the aforementioned representative or supervisory bodies, or oppose the appointment. v) The EBR also has the responsibility of specifying the manner in which the election or appointment of employees' representatives that must intervene in these bodies must be undertaken, in any case respecting the provisions established by national legislations[80].

Fourthly, art. 20.5 LITSCE repeats the provision established in the final paragraph of part 3 of the Annex in the Community regulation, acknowledging the representatives exercising the right to participation the same rights and obligations as the member representing the shareholders. Finally, art. 20.3 LITSCE refers to art. 15.3 for the regulation of possible non-implementation of the standard rules regarding participation if four years have passed and an agreement on involvement has been reached within the framework of open negotiations[81].

d. Common Provisions

20. Title I of the national law closes with Chapter III, titled "Common provisions to the previous chapters". This title anticipates its legal content, aimed at regulating a group of issues that will be applicable to both the scheme of involvement established through agreement and the scheme of these rights established and exercised through standard rules. This general scope of legal implementation justifies its name, "common provisions". Specifically, these common provisions establish rules on the following six issues: manner of calculating the number of employees, reservation and confidentiality, protection of employees' representatives, legal capacity of the NB and the EBR, spirit of cooperation and the consequence of the establishment of an SCE to the detriment of the involvement of employees. All of these issues shall be examined below, but we may at present point out that

[78] This alternative is a novelty of LITSCE as it is not found in DITSCE.

[79] This is also a provision that is not found in DITSCE and is, therefore, a novelty

[80] Likewise, this is a provision that does not arise from a strict transcription of the Directive

[81] Vid. Epigraph 2. C.b., number 22 of this report

LITSCE opts, once again, for an almost literal transcription of the Directive in the treatment of these issues.

a´. Calculation for the number of employees

21. Throughout its articles, LITSCE, following the guidelines set by the Community regulation, uses the census of workers employed by the participating companies in the establishment of an SCE, and the establishments and subsidiary companies of the SCE, to specify legal implementation. In this sense, and as an example, art. 7.1 establishes that the members of the NB will be elected or appointed in proportion "to the number of employees employed in each Member State". Likewise, and as a further example, art. 16.2 states a similar provision with regard to the election or appointment of the members of the EBR.

Within this legal context, art. 21, which is the first precept included under Chapter III regarding common provisions, deals precisely with establishing common provisions on the method to calculate the number of employees, stating a general rule and two special rules to this aim. Pursuant to the general rule, the calculation of employees will be carried out taking into consideration "all employees employed" by the participating companies, establishments and subsidiary companies, including fixed-term and part-time employees, "at the moment referred by the calculation in question".

The two special rules do not affect the base of calculation, which is always the total number of employees, but the time of calculation. In this sense and firstly, art. 21.1 establishes that the calculation of the number of employees that will be taken into consideration in order to establish the NB is the current number, not at every moment, but during the time during which this body is working, until the end of the agreement. In other words, any increases or decreases that may take place during the period in which the NB is established do not alter the allocation of seats within it.

The second special rule, rather than establishing a singular provision, adapts the previous rule to a situation derived from modification in the composition of the NB under the protection of art. 7.5 LITSCE, which was already explained[82]. In such hypothesis, art. 21.3 established that the relevant sequence will be "the time of the new composition" of the NB.

b´. Reservation and confidentiality

22. Art. 22.1 LITSCE transposes, almost literally, the content of art. 8.1 DITSCE. As established by the latter precept, the article in Spanish law establishes the duty of members of the NB, the EBR, and representatives exercising their tasks in the framework of information and consultation procedures, as well as the experts appointed by them, not to reveal any information to third parties that may have been communicated " in confidence". This duty continues to apply after expiry of their terms of office and regardless of the "location" of the representative. Non-compliance of this provision may carry with it responsibilities pursuant to national legislations and practices.

    Also, art. 22.2 LITSCE establishes that, exceptionally, the administrative or supervisory body of the SCE or a participating company in Spain shall not be obliged to communicate specific information with regard to "industrial, financial or commercial

[82] Vid. Epigraph 2.C.b, number 22, of this report

secrets", when their dissemination may, according to objective criteria, harm the functioning of the SCE or, given the case, of the participating companies, or its establishments or subsidiaries, or be a prejudicial to the economic stability thereof".

A comparison of the legal content of arts. 22.2. LITSCE and 8.2 DITSCE shows that the former has made the content of the latter more specific, providing a greater legal certainty to the cases where the general duty of companies to provide information to the bodies, as articulated by the involvement of employees, is repealed. Spanish law introduces three significant specifications. Firstly, information that is subject to the exception clause have to deal, exclusively, with industrial, financial or commercial secrets. However, activation of the exception clause does not occur only with the existence of these secrets. Secondly, the requirement is that the dissemination of these secrets harms, according to objective criteria, the functioning of the organisational units of the SCE or be prejudicial to the financial stability thereof. Lastly, information related to the "volume of employment in the undertaking" is not susceptible to inclusion in the exception clause.

c´. Protection of employees' representatives

23. Art. 23 LITSCE reproduces the legal content of the first paragraph of art. 10 DITSCE literally, establishing that the members of the NB, the EBR, employees' representatives in the administrative or supervisory bodies of the SCE and, in short, employees' representatives exercising functions in the framework of information and consultation procedures, have the right, during the exercise of their functions, to "the same protection and guarantees provided for employees' representatives by the national legislation and/or practice in force in their country of employment".

d´. Legal capacity of the NB and EBR

24. Directive 2003/72/EC does not expressly establish the legal capacity of the bodies of representation or the employees' representatives who exercise the right to involvement. In order to overcome this loophole in regulation, LITSCE establishes, in art. 24, that the NB, the EBR and representatives exercising functions in the framework of information and consultation procedures "have the legal capacity" for the exercise of the rights derived from national law or the agreement on involvement, with the capacity to take "administrative or juridical actions with regard to the scope of their competences, by the majority decision of its members".

e´. Spirit of Cooperation

25. Art. 25 LITSCE transposes art. 9 DITSCE, adapting the concepts used in the latter to Spanish legal language. In this sense, and despite the title of the former passage being the Community expression, the development of the article refers to "in good faith", which is, as pointed out earlier, a notion equivalent to "spirit of cooperation" and for which a critical mass of case law has served to provide substantial content to it[83].

[83] Vid. *infra*, 2.B.g, number 17

f´. Misuse of the procedures

26. Art. 11 DITSCE orders Member States to adopt the necessary measures to avoid an establishment of an SCE with the aim of depriving employees from the rights to involvement that they were already entitled to, or to withhold those rights that were already acknowledged. Art. 26 LITSCE develops this in the Spanish law, specifying the legal consequences of the wrongful use of the establishment of an SCE to the detriment of the right to involvement.

This supposition is defined through a court ruling declaring that the operation establishing an SCE, or the substantial changes undertaken in the SCE once it is established, had the purpose of either depriving employees of their right to involvement or were detrimental to these rights. In any case, the production of a detrimental or harmful result on the involvement of employees is not enough; *animus nocendi* is required, as inferred by the use of the adverb "intentionally" in the regulation.

Once the legal sentence acknowledging this harmful intention is passed, and when the sentence is final, LITSCE establishes the holding of a new negotiation, as long as the EBR or the employees in the new establishments or subsidiaries of the SCE so request it. Negotiation is subject to the general rules, although with the following three clarifications by which the references to these rules will be: i) participating companies must be understood as the SCE and its establishments and subsidiary companies; ii) the moment prior to establishment of the SCE will be the moment of the end of negotiations without agreement; and iii) NB will be EBR.

B. Provisions applicable to establishments and subsidiaries of the SCE that are located in Spain

A. Scope of implementation

27. As has been pointed out in the first pages of this report, Directive 2003/72/EC and, therefore, transposition laws, define two large types of rules or provisions, depending on the territorial scope of legal implementation. On the one hand are the main provisions, that are applicable to the European Cooperative Society as a whole, where the registered office is located in a specific Member State; their legal effects cover the organisational body of the SCE and its subsidiaries and establishments, including those outside the territory of the specific Member State. On the other are the "accessory" provisions, which are applicable to the subsidiary companies and establishments that are located in the territory of a Member State exclusively, of an SCE (or of a subsidiary or, given the case, of the participating companies of the SCE) which has its registered office in a different Member State.

Each and every one of the main provisions established in LITSCE have been examined elsewhere in this report[84]. We shall now analyse those provisions included in the second group of provisions, the "accessory" provisions contained under Title III of the law; the heading article of this group, art. 27, defines the scope of implementation of these provisions.

[84] Vid. *infra* all of epigraph 2

Pursuant to the legal precept mentioned above, accessory provisions are "exclusively" applicable to establishments located in Spain of the SCE or its subsidiary companies or, given the case, the participating companies of the SCE, located in any Member State.

B. Identification of national employees' representatives

28. There are two paths or ways in national regulation for the representation of employees' interests in undertakings: on the one hand, unit or elected representation, made up of works councils and personnel delegates and, on the other, trade union representations, made up of trade union sections and trade union representatives. Spain answers in this way, paradigmatically, to the *double channel* model of representation. As expected, LITSCE acknowledges the condition of employees' representatives to both representations with regard to the accessory provisions, in the terms in which they are legally regulated[85].

C. Appointment of employees' representatives, holders of the rights to involvement

29. Throughout the articles regarding "main" provisions", DITSCE and LITSCE use, without distinction, the expressions "election" or "appointment" when they refer to the possible procedures by which employees in the SCE (or their representatives) may access the bodies that exert the rights to involvement, both at the time of establishment (NB) or implementation (EBR). In the framework of accessory provisions, LITSCE opts for appointment as the procedure applicable to establishments located in Spain of the SCE, its subsidiaries or participating companies.

a. Appointment of employees' representatives in the NB and the EBR

30. The appointment of employees' representatives to the NB and the EBR is subject to the following provisions:

    a. Representatives that must take part in the NB and the EBR[86] will be appointed either by agreement of trade union representations that, as a whole, add up to a majority of the members in the works council or councils and staff delegates, or by a majority agreement between unit representatives. The same criterion will be used for the substitution of those representatives in the case of resignation and revocation and on expiry of the terms of office of national employees' representatives. The representation of NB members will be as established by each appointment act. Whenever this is not specified, national law assumes that all those appointed in representation of employees in Spain, represent all of these employees[87].

    b. The appointment of NB representatives must fall on a staff delegate, member of the works' council or a worker in any of the participating

[85] Unitary representation (works councils and staff delegates) are regulated in Title II, arts. 62-81 of the Statute of Workers' Rights (ET in its Spanish acronym). Trade union sections and delegates are regulated in art. 8 and 10 of Organic Law 11/1985, of 2nd August, on Freedom of Trade Union (LOLS, in its Spanish acronym), respectively.

[86] Independent of whether it is established by an agreement on involvement or implementation of the accessory provision. Vid. art. 29.5 LITSCE

[87] Vid. art. 29.1 LITSCE

companies and their establishments and subsidiary companies affected, or on a trade union representative who is a member of the most representative trade union at state level[88] or representative in the scope of the participating companies[89]. On the other hand, appointment of the representatives of the EBR must fall on an employee of the SCE or its establishments or subsidiary companies who holds the seat of unit representative (staff delegate or member of the works council) or trade union representative (trade union delegate)[90].

c. When more than one member of the NB has to be appointed in representation of the workers employed in Spain, the law establishes that there is, amongst these members and "to the extent possible, as allowed by the number of members to be appointed", at least one representative of each of the participating companies with employees in Spain[91].

d. The appointment of additional representatives who, given the case, should join the NB[92] will be undertaken pursuant to the provisions established in sections a) and b) above. In any case, the project must refer exclusively to the scope of the participating company that will disappear as a separated legal entity after the establishment of the SCE[93].

e. To the effects of implementation of the provisions stated in sections c) and d) above, workers employed in Spain by a participating company will be represented in the NB when an employee of the company appointed in Spain is a member thereof. When amongst the representatives appointed in Spain there is a trade union representative who is not an employee of any of the participating companies[94], this representative will have the representation specified in the appointment act. If none is specified, the law assumes that all workers employed in Spain by the participating companies are represented in the NB through this trade union representative.[95]

b. Appointment of employees' representatives who must join the administrative or supervisory body of the SCE

31. The provisions regarding appointment that have been examined in the previous section are also applicable, by virtue of art. 30 LITSCE, to the employees'

[88] Art. 6 LOLS defines the requirements for a trade union organisation to achieve the status of most representative at state level. Only the trade unions UGT and CCOO currently have this status

[89] To have the status of representative trade union in an undertaking or company, in general, an election presence in the undertaking or company is required; that is, having representatives in the unit bodies

[90] Vid. art. 29.2 LITSCE

[91] Vid. art. 29.3 LITSCE

[92] With regard to the concept of addition representative of the NB, vid. art. 3.a) ii) DITSCE. In Spanish legislation, vid. *infra*, epigraph 2.B.c, number 11.

[93] Vid. art. 29. 4 LITSCE

[94] As established by para. 2, art. 7.1 LITSCE

[95] Vid. art. 29.5 LITSCE

representatives who must join the administration and supervisory body in the SCE when, by virtue of applicable legislation, it corresponds to each Member State to specify the manner of election or appointment of members of this body.

D. Protection of employees' representatives

32. Employees' representatives who are members of the NB, the EBR[96], employees' representatives who are members of the administrative or supervisory body of the SCE and those who participate in the procedures of information and consultation are entitled, in the exercise of their functions, to the guarantees established in Spanish legislation for elected [97] and trade union[98] representatives.

Nevertheless, LITSCE formulates two specific guarantees. Firstly, these representatives are entitled to paid leaves needed to attend the meetings of the NB, the EBR, the administrative or supervisory body of the SCE, or meetings held in the framework of negotiated procedures of information and consultation[99]. Regardless of this, members of the NB, the EBR and administrative or supervisory body of the SCE are entitled to a sixty-hour paid credit per annum to exercise their functions. This credit is added to the credit that may correspond in the case that these members accumulate, additionally, the condition of unit or trade union representative[100].

E. Legal enforceability of the provisions of other Member States in Spain

33. As has been pointed out earlier, art. 12 LITSCE establishes, within the main provisions, the legal performance of the agreements adopted by the NB and the EBR of the SCE established in Spain. Also, art. 32, which is the precept closing the accessory provisions, establishes the performance of those agreements that have been negotiated pursuant to the main and accessory provisions of the Member States.

In this sense, art. 32 establishes that those agreements "oblige all" establishments of the SCE and its subsidiary companies included in their scope of implementation and located in Spanish territory, as well as its employees, during the time they are enforced. Hence, national law confers the same performance to all the agreements: general or *erga omnes.*

Also, LITSCE establishes a public territorial order clause in view of the agreements we are dealing with here, establishing that the validity and performance thereof must not, in any case, infringe or alter the competence of negotiation, information and consultation that Spanish legislation grants to the works councils, staff delegates and trade union organisations, "as well as any other representative body created for collective negotiation".

[96] Regardless of whether the EBR is established by negotiation or legally

[97] Vid. art. 68 ET

[98] Vid. art. 10.3 LOLS

[99] Vid. art. 31. 2 LITSCE

[100] Vid. art. 31.3 LITSCE

4.Right to involvement applicable to SCEs established exclusively by natural persons or by a single legal entity and natural persons

1. As detailed elsewhere in this report[101], Directive 2003/72/EC, in contrast to Directive 2001/86/CE, does not establish a single scheme for the right to involvement. On the contrary, it establishes a plurality of schemes depending, in principle, to the nature of the subjects that become partners of the SCE.

Specifically, the scheme for the right to involvement applicable to the European cooperative society established by, at least, two legal entities, is regulated in Section II, arts. 3 to 7 inclusive of the DITSCE. This scheme has been studied in the main body of this report. We shall now analyse the legal regulation of the right to involvement applicable in those European cooperative societies established exclusively by natural persons or by a legal entity and natural persons. In these cases, which are regulated by art. 8 DITSCE under Section III, the regulation of the right to involvement is, once again, not uniform and a second differentiation criteria exists.

A. The scheme for the right to involvement in SCEs employing at least 50 employees in total in at least two Member States

2. The first scheme for the right to involvement applicable in an SCE established exclusively by natural persons or by a single legal entity and natural persons is defined, as established by Spanish law in accordance with DITSCE[102], by the concurrence of a double and cumulative criterion: firstly, with regard to the number of employees, which must exceed 50 in the organisation as a whole; secondly, it has a location or topographic scope since the number of employees required must be from at least two Member States.

In these cases, the applicable scheme for the right to involvement is the scheme established for SCEs established by at least two legal entities or by transformation, without any variation or exception. To the extent that this scheme has been analysed in detail earlier, a reference to this analysis suffices at this point[103].

B. The scheme for the right to involvement in SCEs employing less than 50 employees in total, or more than 50 in one Member State only

3. DITSCE establishes a singular scheme for the right to involvement in those cases where the SCE employs less than 50 employees in total or, given the case, 50 or more employees in one Member State only; Spanish legislation reproduces this scheme almost literally. Specifically, in these cases, regulation of this right will be ruled by the following

[101] Vid. i*nfra*, IV.2, section 2

[102] Vid. art. 8.1 DITSCE and Second Additional Provision.2 LITSCE

[103] Vid. *infra*, IV.3.A.

provisions[104]: i) Provisions applicable to the right to involvement of employees in the SCE will govern for the cooperative societies in the Member State where the SCE has its registered office; and, ii) provisions applicable to the right to involvement of employees in subsidiaries or establishments will be applicable to cooperative societies in the Member States where they are located.

The provisions described above constitute the general legal regulation scheme which must be complemented by two additional provisions. Pursuant to the first of these, the objective of which is the conservation of the *before-after* principle in the case of transferring, from one Member State to another, the registered office of an SCE governed by participation, "at least the same level of employee participation rights"[105] shall continue to apply, using the language of the Community regulation. Or, stating the provision in the terms of the Spanish law, in this hypothesis "the employees' right to participation enjoyed prior to the transfer shall continue to apply, at least"[106].

The second of these provisions, rather than complementing the general provisions, is an exception to them. Indeed, art. 8.3 DITSCE establishes, in a wordy manner, – repeated by Second Additional Provision.3 LITSCE making use of clear syntax – that, despite the special scheme for the right to involvement in SCEs with less than 50 employees, or 50 or more employees in one Member State only, these rights may be as those established with general criteria as long as one of the following two circumstances take place, once the SCE is registered: i) it is so requested by "at least one third of the total number of employees in the SCE, its subsidiaries and establishments, in at least two Member States", or ii) the total number of employees reaches or exceeds 50 employees in, at least, two Member States[107].

5.Right to participation of employees in general meeting or section or sectoral meeting of the SCE

1. Art. 59.4 Regulation (EC) No. 1435/2003 establishes the possibility that, if the national legislation of the Member State where the European cooperative society had its registered office prior to the entry into force thereof allows it, the statutes of the SCE establish the participation of employees in general, sectoral or section meetings whenever employees' representatives do not control, in total, more than 15 per cent of all rights to vote.

This statement for the right to participation has been developed further by Directive 2003/72/CE, including its treatment in Section IV, art. 9. Second Additional Provision.4 LITSCE, in transposing the contents of this precept, establishes that, within the aforementioned limits established by art. 59.4 Regulation (EC) 1435/2002, employees of the SCE and their representatives will be able to participate in these meetings, with the right to

[104] Vid. art. 8.2 DITSCE and Second Additional Provision.3 LITSCE

[105] Cfr. Art. 8.2 DITSCE, second section

[106] Cfr. Second Addictional Provision.3 LITSCE, second section

[107] When this happens, the DITSCE and LITSCE provisions mentioned establish that the expressiones "participating legal entities" and "affected subsidiaries and establishements" shall be substituted by "SCE" and "subsidiaries and establishments of the SCE".

vote, under three specific circumstances. Firstly, when the parties so decide it, expressed in the corresponding agreement on involvement and subscribed between the NB and the competent organ of the participating legal entities. Secondly, when a cooperative society governed by participation becomes an SCE. Finally, for any SCE that is not established by transformation, when one of the participating cooperative societies is governed by participation and, additionally, the following three conditions concur: i) no agreement on involvement has been reached in the period established[108]; ii) the standard rules are applicable; and iii) the participating cooperative society governed by a system of this type has the highest percentage of participation among the participating cooperative societies prior to registration of the SCE.

As may be easily deduced, the source providing the right to involvement is not common to the three circumstances. In the first, the source is exquisitely conventional, in such a way that the mention contained in either the Community regulation or in Spanish transposition law does not have a ruling dimension: employees or their representatives will participate in meetings in the terms agreed. In the other two circumstances, however, the source acknowledging the right to participation has a legal origin.

In all other respects and in relation to participation arising conventionally, the question may be raised on whether the limits established in the aforementioned art. 59.4 Regulation (EC) No. 1435/2002 are or not applicable. A strictly literal interpretation may give rise to an affirmative answer. However, this is a thesis that is not reconcilable with the principle that guides the regulation of the right to involvement arising from collective agreement and which is, no other than, the utter respect for the parties' freedom to agree. Hence, in our opinion, there is nothing to prevent that an agreement establishes a level of participation higher than 15 per cent.

6.Administrative sanctions and legal procedures

1. Art. 14 Directive 2003/72/EC sets a double provision for Member States, which are closely linked between them. On the one hand, and generally, it entrusts Member States to ensure that the management of establishments of an SCE and the supervisory or administrative organs of subsidiaries and of participating companies, as well as employees' representatives and employees themselves abide by the obligations laid down by this Directive, "regardless of whether or not the SCE has its registered office within its territory" (art. 12.1). On the other, more specifically, this precept of the Community regulation also orders Member States to establish "appropriate measures in the event of failure to comply" with the Directive, ensuring the existence of "administrative or legal procedures available to enable the obligations deriving from this Directive to be enforced" (art. 12.2).

   To develop these mandates, LITSCE has, on the one hand, amended LISOS and, on the other, has adopted provisions that ensure, within the sphere of the SCE, the right to legal protection. We shall examine both issues below.

[108] Vid. *infra*, IV.3.A.b.f´., point 14

2. Amendments introduced by LITSCE in LISOS have had a three-way reach. Firstly, the First Final Provision.1 has added a new section to art.2 of the latter law, defining the "subjects responsible for the infraction". Pursuant to the new art. 2.12 of LISOS, the following will be responsible subjects of labour infractions: "(…) European Cooperative Societies (...) with registered office in Spain, companies, legal entities and, given the case, natural persons resident in Spain who participate directly in the establishment of a European Cooperative Society (...), as well as natural or legal persons or communities of properties that are holders of establishments located in Spain of European Companies and Cooperative Societies companies (...) and their subsidiaries and legal participating companies, whatever Member State they are established in, with regard to the rights to information, consultation and participation of employees" in the terms that are legally established.

Secondly, First Final Provision.2 LITSCE has added a new section to art. 5 LISOS, which includes the concept of labour infraction. Pursuant to new art. 5.3 of the latter law, "labour infractions with regard to the right of involvement of employees in European Cooperatives Societies companies are the actions or omissions of the different responsible subjects against" provisions in LITSCE, as well as against "its development provisions, the provisions of other Member States enforced in Spain, agreements held pursuant to" LITSCE or these provisions, and against "legal clauses in collective agreements that complement the rights acknowledged in them".

Finally, and thirdly, First Final Provision.3 has introduced a new article in LISOS, art. 10 bis, which classifies failures to comply with the rights to involvement in the SCE as severe or very severe offences. Severe offences are[109]: i) non-provision from employees' representatives of the information required for the establishment of the NB; ii) infringement of the right of the NB, the EBR or employees' representatives to meet in the framework of information and consultation procedures; iii) infringement of financial and material rights for the functioning and development of the activities of the NB, the EBR or employees' representatives in the framework of information and consultation procedures; iv) the lack of notification, in time and form, to the NB and of EBR meetings, ordinary or extraordinary, with the competent body of the SCE; and, v) infringement of the rights and guarantees of members of the NB, EBR and employees' representatives in the framework of information and consultation procedures, as well as employees' representatives in the supervisory or administrative organs of the SCE.

On the other hand, the following are classified as very severe offences[110]: i) actions and omissions that prevent the start and development of negotiations with employees' representatives with regard to provisions regarding the rights to involvement; ii) actions and omissions that prevent the functioning of the NB, the EBR or, given the case, the information and consultation procedures as established in legal terms or by agreement; iii) actions and omissions that prevent the effective exercise of the rights to involvement, including abuse in qualifying the information provided as confidential, and abuse in qualifying information as secret in order to legally withhold information from the representatives; iii) decisions adopted in the framework of LITSCE that involve direct or

[109] Vid. art. 10 bis.1 LISOS

[110] Vid. art. 10.bis.2 LISOS

indirect discrimination due to gender, nationality, origin, race, ethnic group, marital status, religion or beliefs, political ideas, sexual orientation, language and adhesion or not to a trade union, its agreements or the exercise of trade union activities; and iv) wrongful establishment of an SCE with the purpose of depriving employees of the rights to involvement they were already entitled to, or withholding them.

3. Title III LITSCE deals with the right to legal protection in the sphere of the SCE. To start with, art. 33 states the general rule that establishes the functional competences of the different legal authorities existing in Spain. In general, this attribution favours the social jurisdiction, which are in charge of "any litigious issues that appear in the application" of LITSCE. This general attribution has the following two exceptions. Firstly, where there are plans to impugn administrative sanctions, these cases are the competence of the contentious-administrative courts. Secondly, substantiation of lawsuits regarding the position and activities of employees participating in the decision-making and supervisory organs of the SCE, are the competence of the civil courts.

Also, art. 34 LITSCE limits the competences of social judges and courts with regard to the actions abovementioned. In this sense, these bodies will be competent when "the parties have submitted, expressly or tacitly, to them or, otherwise, when the defendants are registered in Spain or when the obligation upon which the lawsuit is based must be complied with in Spanish territory". LITSCE establishes that, when there is no express agreement or determination on this issue, the address of the NB and the EBR will be the registered office of the SCE. Finally, art. 36 establishes the type of labour process for lawsuits arising from implementation of the law.

2. 7.Links between LITSCE and other national or Community provisions

1. The First Additional Provision of LITSCE transposes each and every one of the provisions established in art. 15 DITSCE. In this sense, firstly, it establishes that when an SCE is a Community-scale undertaking or a controlling undertaking of a Community-scale group of undertakings, specific provisions of both national legislation and legislation of the Member States shall not apply to them or their subsidiaries. However, this general rule shall not apply when the NB has decided by agreement not to open negotiations or to terminate ongoing negotiations[111]. Secondly, provisions on the participation of employees established by national legislation and/or practice, other than those implementing DITSCE, shall not apply to the SCE included in the scope of implementation of LITSCE[112]. Thirdly, LITSCE shall not prejudice: i) the existing rights to involvement of employees other than participation in the bodies of the SCE as enjoyed by employees of the SCE and its subsidiaries and establishments, provided by national legislation and practice in the Member States; and ii) the rights to participation of employees in the bodies of subsidiaries of the SCE laid down by national legislation and practice[113]. Finally, Spanish law establishes that, in order to

[111] Vid. First Additional Provision, section 1 LITSCE and art. 13.1 DITSCE

[112] Vid. First Additional Provision, section 2 LITSCE and art. 13.2 DITSCE

[113] Vid. First Additional Provision, section 3 LITSCE and art. 13.3 DITSCE

safeguard the rights of participation mentioned above, registration of the SCE will not expire the terms of office of the legal employees' representatives in the participating companies that cease to exist as separate legal entities, who will exercise their functions in the same terms and under the same conditions as before registration of the SCE.[114]

[114] Vid. First Additional Provision, section 4 LITSCE and art. 13.4 DITSCE

ANNEX: Table of correspondence for the transposition of Directive 2003/72/EC by Law 31/2006, of 18th October

Table of correspondence SPAIN 2003/86		
Content	**Articles in the Directive**	**National implementing provisions**
Objective	1	1
Definitions	2	2
Creation of a special negotiating body	3.1	4;5
	3.2 a	7
	3.2 b	14.2 ; 14.3
	3.3	8.1
	3.4	9.1;9.2
	3.5	9.5; 9.6
	3.6	8.2;8.3
	3.7	9.6
Content of agreement	4	8.1;11.1;11.2; 11.3
Duration of negotiations	5	10.1
Legislation applicable to the negotiation procedure	6	3.1
Standard rules	7	14
	Annex part 1. a)	15.1; 15.2
	Annex part 1. b)	16.1; 19
	Annex part 1. c)	18.2
	Annex part 1. d)	17.4
	Annex part 1. e)	16.2
	Annex part 1. f)	16.3
	Annex part 1. g)	15.3; 15.4
	Annex part 2 a)	17.1
	Annex part 2 b)	17.2
	Annex part 2 c)	17.3
	Annex part 2 d)	17.4; 18.3
	Annex part 2 e)	18.7
	Annex part 2 f)	18.4
	Annex part 2 g)	18.5
	Annex part 2 h)	18.6
	Annex part 3 a)	20.1
	Annex part 3 b)	20.2; 20.4; 20.5
Reservation and confidentiality	10	22; 36.4

Table of correspondence SPAIN 2003/86		
Content	**Articles in the Directive**	**National implementing provisions**
Operation of the representative body and procedure for the information and consolation of employees	11	25
Protection of employees' representatives	12	23
Misuse of procedures	13	20.3; 26
Compliance with this directive	14	2.12; 3.5; 10 bis[115]; 33-38
Link between this Directive and other provisions	15	Add. Prov. 1.1-1.4
Right to involvement applicable in SCES established exclusively by natural persons or by a single legal entity and natural persons	8	Add. Final. Second.2

[115] LISOS