

The status of transposition of SE-legislation in Portugal



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The Process of Transposition: Landslide Victory for the Opposition in General Election May Postpone Transposition

European **Council Regulation** (EC) No. 2157/2001 of 8 October 2001 **on the Statute for a European Company (SE) has been transposed** into Portuguese national legislation by Decree-Law n.º 2/2005 (4 January 2005).

Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company **with regard to the involvement of employees** has not been transposed yet. In October 2004 the project for the transposition of this Council Directive was published in the Official Journal of the Labour Ministry, passed through the process of public evaluation and was ready to be promulgated by government decision (Decree-Law voted by the government). However, in November 2004 the President of the Portuguese Republic decreed the dissolution of the Parliament, and at the beginning of December the conservative government stepped down.

Elections on 20 February 2005 brought a landslide victory for the Socialist Party (PS): for the first time in its history the PS won an absolute majority. The new government, led by PM José Sócrates, took office on 12 March 2005.

During the transition period between November 2004 and March 2005 the conservative government did not pass the Decree-Law transposing the Council Directive on workers' involvement. Thus, the new Socialist government will have to decide whether to pass the Decree-Law as it was prepared by its predecessor or to make some amendments.

The Project Prepared by the Conservative Government

The project for the transposition of the Council Directive on workers' involvement (2001/86/EC) has the following structure:

Structure of Council Directive and Portuguese Transposition Project – approximate correspondence	
Project for Transposition into Portuguese Law	Council Directive
Chapter I: General Regulations	Section I
Chapter II: Transnational Regulations and Agreements	
Section I: Scope	
Section II: Procedures in Negotiations	Section II, Article 3
Section III: Agreement on Involvement	Section II, Article 4
Section IV: Obligatory Institution of an Involvement Regime	Article 7 and Annex Parts 1, 2, 3
Subsection I: General Regulations	Section II, Article 7
Subsection II: Workers' Council	Annex Parts 1, 2
Subsection III: Participation	Annex Part 3
Section V: General Regulations	Section III, Articles 8, 9
Chapter III: National Regulations	Section III, Article 10
Chapter IV: Disciplinary Responsibility	Section III, Article 12

Evaluation by Social Partners

In their evaluation the employers and the unions have criticised the fact that the transposition project goes beyond a number of the Directive's provisions. While the employers see this in the first place as a problem of higher 'costs' (time-consuming procedures, financial expenditure, etc.), the trade union camp points to the loss of autonomy of the negotiating parties.

The employers' critique and subsequent demands are clearly directed at limiting costs and the scope and range of involvement. Thus they demand, among other things:

1. limitation of the geographical scope of the workers' council's representativeness (European Economic Space, see project article 4-a) to the European Union;
2. limitation of obligation to cover costs to only one expert;
3. abolition of regulation on payments to experts (project article 35: 3 and 4);
4. limitation of travel expenses;
5. reduction of time credit for workers' representatives (project article 43);
6. reduction of fines (project article 45).

The trade unions, on the other hand, are seeking:

1. effective regulation of the election/appointment of workers' representatives (special negotiating body and representative body);
2. effective rules for workers' involvement in case of a failure to reach agreement;
3. clear rules on confidentiality;
4. protection for workers' representatives;
5. effective regulation against misuse of the SE to reduce or deny workers' participation rights;
6. effective regulation of compliance with the Directive.

From this perspective, the trade union critique pointed out that the project fails to transpose important aspects of the Directive in a complete and correct fashion. Central criticisms include:

1. the definition of 'representative body' (designated in the project as 'Workers' Council'), while the Directive leaves it to the negotiating parties to freely decide on the involvement regime (project article 4-b);
2. the regulation that gives the participating company with the largest proportion of employees and its headquarters in Portugal the right to determine the number of members of the special negotiating body and the countries in which they should be elected or appointed and to set a time limit for their election/appointment (project article 9);

3. the regulation on the agreement on involvement between the SE and the SNB that, on the one hand, limits the autonomy of the negotiating parties (revision of the agreement), and on the other, does not regulate sufficiently the resources to be made available to the representative body (project articles 16 and 18);
4. the omission of a regulation on certain aspects of obligatory involvement (paid free time for workers'-representative training – Directive Annex Part 2-g, and material and financial resources for the representative body – Directive Annex Part 2-h);
5. the exclusion of workers' representatives on SE governing bodies from employment protection (project article 43);
6. the omission of a regulation on administrative or legal procedures to enforce Directive implementation (Directive, Article 12-2).

Notwithstanding their distant, even opposing, positions, the **employers' and the trade unions' criticisms** converged on the **demand for a 'profound revision' of the transposition project**.

At the moment we do not know what new Labour Minister José Vieira da Silva and his team will do regarding transposition.

First Update: January 2005

Tripartite Negotiations on the Transposition Bill Delayed Due to Fall of Government

On 20 October 2004, the Portuguese Labour Ministry published a bill (*projeto de decreto-lei*) for the transposition of [Directive 2001/86/EC](#) of 8 October 2001 supplementing the Statute for a European Company with regard to employee involvement.

The Ministry initiated a process of “public discussion” of the bill, which is an obligatory part of the labour legislation process. The period of public discussion finished at the end of November 2004.

From the legal point of view, the government may now promulgate the law. However, from a political point of view the legitimacy of doing so may be questioned from various angles. First, during the period of public discussion the bill received harsh criticism from the social partners: for a number of different reasons, both employers and trade unions demanded a “profound review” of the bill. Second, the present government itself has only limited legitimacy. In December the President of the Portuguese Republic decided to dissolve the Parliament and called for general elections that will take place on 20 February 2005. A few days later the government stepped down.

At the moment it seems that the Socialist Party will beat the governing right-wing coalition in the coming elections and that there will be a new government supported by a left majority. That means that the transposition project which has been drawn up by the present right-wing government may be subject to major changes, even if it comes into force before the elections.

The bill was published in the Labour Ministry’s Bulletin (*Boletim do Trabalho e Emprego* 10, Separata) on 20 October 2004. The text is available to read (but not to be copied or printed) at

<http://www.deep.msst.gov.pt/edicoes/bte/separatas/sep1004.pdf> .

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1. The Directive and Existing Portuguese Legislation

The rules on information, consultation and participation of workers as defined in the Directive differ positively from existing Portuguese law on these issues. According to experts, the procedures and content of information and consultation rights are defined more concretely than in Portuguese legislation. Furthermore, Portuguese law guarantees workers' participation at the level of governing boards only in state-owned companies. Transposition of the Directive would for the first time introduce legislation on participation in private companies.

1.1 Participation

According to the Constitution (1976) and specific legislation (1979, 1984) workers have the right to be represented on all governing bodies in companies that are completely owned (directly or indirectly) by public entities (state, regions, municipalities). This right is specified in relation to the board of directors and the audit committee. Nevertheless, effective representation of workers on the boards of directors of public companies has so far not been permitted by government. Only in a limited number of cases have governments allowed workers' representatives to sit on audit committees.

As workers' rights of representation on governing bodies apply exclusively to 100%-owned public companies, large-scale privatisation of public enterprises over the last 14 years has drastically reduced the number of firms to which these rights, even in theory, might apply. Furthermore, new legislation on public companies (1999) abandoned all reference to this constitutional right, thus further promoting its non-observance.

The legal possibility for the social partners to agree upon workers' representation on the governing bodies of private companies (from 1979) had no practical consequences, and the legislator never took the steps necessary for effective promotion of workers' representation in the management of private companies.

The Directive's "Standard Rules for Participation" open the way for the introduction of participation rights in some private companies. Despite the stipulations that make it possible to avoid the introduction of workers' participation (Directive, Art. 7, par. 3; Standard Rules, Part 3, b), this may introduce a new element into Portuguese industrial relations.

1.2 Information and Consultation

The absence of workers' representatives from executive bodies has hindered workers' representative bodies at company level from exercising their extensive information and consultation rights, guaranteed by the Constitution and specific legislation. This refers in particular to the efficacy of workers' commissions' right to "scrutinise management" (controle de gestão) since that depends on the activities of workers' representatives on governing bodies, particularly the board of directors.

Transposition of the Directive may give a new impulse to information and consultation in the companies concerned. One reason for this is that the Directive's stipulations on the procedures and content of information and consultation are more concrete than those in Portuguese legislation, as one trade union expert pointed out. Another reason may be the strong legitimacy of European law in Portuguese society. Portuguese labour law is largely a product of the revolutionary period in 1974–75 and the years of democratic institution-building which followed. The labour movement had significant power at that time. Since then, power relations have changed dramatically to the detriment of workers' organisations. Now employers and governments tend to disregard workers' rights as embodied in the Constitution and other legislation. However, as already mentioned, European legislation has strong social and political legitimacy and failure to observe it may give rise to problems with EU institutions.

2. The "State of the Art" As Regards Transposition

The transposition of the Directive seems to be a non-issue in the debate between the Portuguese government and the social partners. The Labour Ministry started work on a transposition bill without previously consulting the social partners. Unions and employers' associations have not started a debate on the issue within their own organisations and have not come forward with specific demands. Experts expect that transposition will not be concluded in time. The bill may be presented to the social partners in the autumn, and trade union officials expect that there will be great pressure for a rapid consultation process in order to avoid further delays.

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