



Country report: (3) Transposition

Portugal

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Portuguese transposition of the Directive 291/86/EC (SE Directive)

The present report is based on SEEurope's '**Checklist 1: Monitoring the national transposition processes of the SE legislation (May 2004)**¹', section B: The SE Directive. It consists of a total of 23 points – extracted from the document mentioned above – and the corresponding results.

1. Checklist

- √ Member states should provide that the highest national level of worker representation existing within the company + the represented national trade unions + the EWC (where existing) + the European industry federations are always informed by companies of their intention to establish an SE. In case there is no national worker representation, the employees must be informed directly.

Result

Legal basis: article 6, paragraph 2 read in conjunction with article 39 Decree-Law 215/2005 of 13 December 2005

- R In accordance with article 6, paragraph 2a) those workers' representatives are to be informed who also participate in the appointment or election of the special negotiating body (SNB). In Portuguese law, article 39 determines – depending on the existing workers' representation – identifies the works council and/or the trade unions.
- R If national law does not specify the participation of workers' representatives in the appointment or election of the SNB, the employees of the relevant companies, subsidiaries or establishments have to be informed.

2. Checklist

Information should include:

- √ the identity of the participating companies, subsidiaries and establishments, and the number of employees (Art. 3 I);
- √ the existing workers; representatives;
- √ the number of employees in each country (total number and numbers in each economic entity);
- √ the number of employees covered by a participation regime and their proportion of total employees.

Result

Legal basis: article 6, paragraph 1 Decree-Law 215/2005 of 13 December 2005

In accordance with article 6, paragraph 1 information shall include 'in particular':

¹ http://www.seeurope-network.org/homepages/seeurope/file_uploads/se_checklist_unieuropa_etui.pdf

- R the identity of the participating companies, subsidiaries and establishments (article 6, paragraph 1, a)
- R the number of employees (article 6, paragraph 1, b).

3. Checklist

- √ The national solution with regard to the question ‘How are the national SNB members appointed/elected?’ should be in accordance with the ‘normal’ domestic representation arrangements, for example, the role given to trade union organisations.

Result

Legal basis: article 39, Decree-Law 215/2005 of 13 December 2005

- R The appointment or election of national SNB members is regulated in article 39. Depending on the form of workers’ representation in the participating companies, subsidiaries or establishments, the SNB members are appointed by the relevant works council(s) together with the relevant trade labour union(s); by the works council(s) alone if there are no trade unions; or by the employees if there are neither work councils nor trade unions.

4. Checklist

- √ The transposition law should stipulate the inclusion of female members in the SNB according to the proportion of female employees in the companies concerned.

Result

Legal basis: none

- R The inclusion of female members in the SNB according to the proportion of female employees is not regulated.

5. Checklist

- √ Member states shall make use of their possibility to provide that the SNB may include trade union representatives even if they are not employed by the companies concerned (Art. 3 II b + consideration 19). It should be possible to nominate representatives from the European industry federations as well.

Result

Legal basis: article 38, paragraph 3, Decree-Law 215/2005 of 13 December 2005

- R Article 38 stipulates that the SNB can include representatives from trade unions that represent workers of the company even if they are not employed by the company.
- R The nomination of representatives from the European industry federations is not regulated.

6. Checklist

- √ Member states must ensure that the SNB is given the resources it needs to function, including the cost of conference rooms, materials, interpreting, experts, office staff, and the accommodation and travel of SNB members.

Result

Legal basis: article 35, paragraph 1, a) e b) Decree-Law 215/2005 of 13 December 2005

- R In article 35, paragraph 1 a) lays down that the participating companies must bear the SNB's costs in relation to negotiations in such a way that the latter can perform its tasks adequately.
- R Article 35, paragraph 1 b) further regulates that the participating companies must provide the necessary material resources for the functioning of the SNB, including installation and a notice board for announcements.

7. Checklist

- √ Member states shall not exercise their option to limit the funding of external expertise to one expert (Art. 3 VII). Furthermore, member states should explicitly state that the SNB may select representatives from national and/or European-level trade union organisations as experts to assist it with its work (Art. 3 V).

Result

Legal basis: article 35, paragraph 1 c) Decree-Law 215/2005 of 13 December 2005

- R Article 35, paragraph 1 c) stipulates that the SNB is entitled to funding for 'at least one expert'. This can be understood liberally to mean 'one or more' or more restrictively to mean 'one, but no more'. Article 35, paragraph 8 regulates that 'the expenses of one expert' are to be divided between the participating companies according to the proportion of employees at each company.
- R The SNB is allowed to freely select an expert to assist it with its work. It is not explicitly stated whether this may be a representative from national and/or European-level trade union organisations.

8. Checklist

- √ Member states shall not 'opt-out' of the application of standard rules on participation.

Result

Legal basis: none

- R Portugal did not make use of the 'opt-out' clause.

9. Checklist

- √ The appointment or election procedure for the allocation of

the national seats on the representative body should fall in with the national system (it might include, for example, a right for trade unions to directly nominate one or more members).

Result

Legal basis: article 40, Decree-Law 215/2005 of 13 December 2005

- R Appointment or election for the allocation of national seats on the representative body is regulated in Article 40. Depending on the form of worker representation in the participating companies, subsidiaries or establishments, the national members on the representative body are appointed by the works council(s), together with the trade union(s); by the works council(s) alone if there are no trade union(s); or by the employees if there are neither work councils nor trade unions.

10. Checklist

- √ Member states must lay down rules to ensure adjustment of the number and allocation of seats in case of changes occurring in the SE and its subsidiaries.

Result

Legal basis: article 21, paragraph 2, read in conjunction with paragraph 1, Decree-Law 215/2005 of 13 December 2005

- R Article 21, paragraph 2 stipulates that the number of members should be reviewed at the end of each mandate, taking into consideration the criteria laid out in paragraph 1.

11. Checklist

- √ As compared to the EWC Directive, it must be ensured that the member states use enhanced information and consultation rights (especially with regard to the definition of information and consultation, and the competences and actual rights of the representative body).

Result

Legal basis: article 4 g) e b), articles 23–28 Decree-Law 215/2005 of 13 December 2005

- R The information rights are established in article 4 g) and correspond to the requirements of article 2 i) of the Directive.
- R The consultation rights are laid down in article 4 b) and correspond to the requirements of article 2 j) of the Directive.
- R The competences and concrete rights of the representative body are regulated in articles 23–28 and correspond to those of the Directive Part II a) to n f).

12. Checklist

- √ Member states must ensure that the representative body is given the resources it needs to carry out its tasks adequately, including resources for training, conference rooms, external experts, materials, interpreting and translation, office staff, and accommodation and travel of its members and the members of the select committee.

Result

Legal basis: article 35, paragraph 2 a), read in conjunction with paragraphs 3 and 2 b) Decree-Law 215/2005 of 13 December 2005

- R Article 35, paragraph 2 a) entitles the representative body to the necessary means for its functioning. In accordance with paragraph 4 these include the costs of organising conferences, translation, accommodation, travel and one expert.

Article 35, paragraph 2 b) further regulates that the participating companies have to provide the necessary material resources for the functioning of the representative body, including equipment installation and a noticeboard for announcements.

13. Checklist

- √ Member states shall not exercise their option to limit funding of external expertise to one expert. Moreover, member states should state explicitly that the representative body has the right to select representatives from national and/or European-level trade union organisations as experts to assist it with its work.

Result

Legal basis: article 35, paragraph 2 c), read in conjunction with paragraph 3, Decree-Law 215/2005 of 13 December 2005

- R Article 35, paragraph 2 c) stipulates that the representative body is entitled to 'at least the expenses of one expert'. This can be understood liberally to mean 'one or more' or more restrictively to mean 'one, but no more'. Article 35, paragraph 3 regulates that the SE has to pay 'the expenses of one expert'.

14. Checklist

- √ Each member state can determine the allocation of seats it is given within the administrative or supervisory organ (Annex Part 3 b). If a member state wants to make use of this option, it must be ensured that the allocation procedure is in accordance with the national system (respecting, for example, existing rights of trade unions to directly nominate one or more board members).

Result

Legal basis: article 42 read in conjunction with article 39 Decree-Law 215/2005 of 13 December 2005

- R Article 42 establishes that the appointment or election of workers' representatives to the administrative or supervisory organ

follows – with the necessary modifications –the procedure established by article 39. Hereafter, depending on the actual worker representation in the participating companies, subsidiaries or establishments, the workers' representatives in the administrative or supervisory organ are appointed by the relevant works council(s), together with the trade union(s); by the works council(s) alone if there are no trade union(s);, or by the employees if there are neither work councils nor trade unions.

15. Checklist

Member states must regulate that members of the SNB, the representative body and the experts assisting them may not reveal information which has been given to them confidentially (Art. 8 I). Member states have to provide, further, that under certain circumstances SE organs shall not be obliged to transmit information where this could seriously harm the functioning of the SE (Art 8 II). Moreover, member states must make provision for administrative or judicial appeal procedures (Art. 8 IV).

- √ National rules must not prevent workers' representatives from performing their duties. They must remain able to report back to the employees in a comprehensive and prompt manner.

Result

Legal basis: article 34, Decree-Law 215/2005 of 13 December 2005, read in conjunction with article 460, paragraph 1, Labour Code

- R The topics of confidentiality and refusal of information are regulated in article 34, which refers to the general provisions of articles 458–460 of the Labour Code. In accordance with article 460, paragraph 1, Labour Code, qualification of information as confidential and a refusal to provide information are to be made in writing and based on objective business criteria.

16. Checklist

- √ Member states should exercise their option to prescribe that prior administrative or judicial authorisation is needed when a company wants to withhold information. This requirement would ensure that social dialogue within the SE cannot easily be 'bypassed'.

Result

Legal basis: none

- R The Portuguese transposition does not establish the requirement of prior administrative or judicial authorisation for a company to withhold information.

17. Checklist

- √ In the few countries where this is relevant, member states should refrain from introducing exceptional provisions for companies 'which pursue directly and essentially the aim of ideological guidance with respect to information and the

expression of opinions' (Art. 8 III).

Result

Legal basis: none

- R The Portuguese transposition doesn't stipulate exceptional provisions for companies 'which pursue directly and essentially the aim of ideological guidance with respect to information and the expression of opinions'.

18. Checklist

- √ Member states must lay down appropriate provisions for administrative or judicial appeal procedures for workers' representatives if information is withheld or confidentiality demanded (Art. 8 IV).

Result

Legal basis: article 34, Decree-Law 215/2005 of 13 December 2005, read in conjunction with article 460, paragraph 2, Labour Code

- R The topics of confidentiality and refusal of information are regulated in article 34, which refers to the general provisions of articles 458–460, Labour Code. In accordance with article 460, paragraph 2, Labour Code, the affected workers' representation can challenge the qualification of information as confidential, as well as the refusal of information, under the terms of the Labour Procedural Code (Código de Processo do Trabalho).

19. Checklist

- √ Member states must ensure through appropriate means (including sanctions) that SEs cannot be misused to deprive workers of acquired rights or to withhold these rights from them (Art. 11).

Result

Legal basis: article 46 et seq. Decree-Law 215/2005 of 13 December 2005, read in conjunction with articles 614–640, Labour Code

- R Article 47 qualifies which infringements of Decree-Law 215/2005 are qualified as administrative offences (contra-ordenação). In compliance with article 46, paragraph 1, the general rules of administrative offence laid down in the Labour Code are applicable. Sanctions include: administrative fine, temporary closure of the business, disqualification from participation in public tenders, and publication of the infringement.

20. Checklist

- √ Member states should stipulate in their national transposition law a right to renegotiate worker involvement if a substantial change in enterprise structure occurs after the SE has been set up (this situation is not regulated by the Directive). This is particularly important for the purpose of

reducing the danger of a loss of existing national participation rights, for example, if a company with a higher standard of participation rights merges with an SE. The transposition law should list the circumstances leading to a right to renegotiate. It is important to ensure that this right not only exists in SEs where an agreement has been concluded, but also in those where the standard rules have been applied or where no initial negotiations took place or were aborted.

Result

Legal basis: article 16, paragraph 1 d), and article 36, Decree-Law 215/2005 of 13 December 2005

- R The Portuguese transposition itself does not specify circumstances which would lead to renegotiation. However, article 16, paragraph 1 d) obliges the parties to include such circumstances in the agreement, notably a significant change in the number of employees.
- R In cases where the standard rules have been applied, article 36, paragraph 2 entitles the representative body to propose renegotiation after four years, calculated from the date of its establishment.
- R In cases in which no initial negotiations took place or were aborted, article 36, paragraph 1 establishes the right for the employees of the company, their subsidiaries or establishments, with a quorum of 10%, to request renegotiations after two years have elapsed, calculated from the date the SNB decided to abort or not to start negotiations with the employer side.

21. Checklist

- √ Member states must ensure that the members of the SNB, the representative body and the supervisory or administrative board enjoy the same protection and guarantees as provided under national laws and/or practice (Art. 10).

Result

Legal basis: article 44, Decree-Law 215/2005 of 13 December 2005

- R Article 44, paragraph 1 provides members of the SNB, the representative body and the supervisory or administrative board with the right to exemption from normal duties, continued payment of wages during absences due to carrying out their duties in the abovementioned bodies, and protection against disciplinary measures, dismissals or transfer.

22. Checklist

- √ Member states have to provide for appropriate measures (especially administrative or legal procedures) in the event that the SE management or the supervisory or administrative organ fail to comply with the Directive (Art. 12 + consideration 16).

Result

Legal basis: article 46 et seq. Decree-Law 215/2005 of 13 December 2005, read in conjunction with

articles 614–640, Labour Code

- R As mentioned in point 19, in compliance with article 46, paragraph 1 the general rules on administrative offences (contra-ordenação) laid down in the Labour Code are applicable.

23. Checklist

The Directive allows member states to ensure that existing structures of worker representation in participating companies which will cease to exist are maintained after the establishment of the SE (Art. 13 IV).

- √ In countries where this is relevant and could improve information and communication between the European and the national level, the member states should make use of this option. In this case, however, these member states should oblige the SE's management to nominate authorised and competent contact persons for these retained national worker representatives, at both European and national level.

Result

Legal basis: none

- R Portugal did not exercise this option.