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The Impact of European Union Law on Employee Involvement in Estonia

1. Introduction

Estonia started to co-ordinate its labour legislation with European Union (EU) law after entering into the Association Agreement^{*1} with the European Communities and their Member States in 1995, insofar as with that agreement Estonia undertook to converge and harmonise Estonian legislation with European Union law, especially in the fields of commerce, economy, and related areas, including with respect to matters pertaining to employee protection (addressed in Articles 68 and 69 of the Association Agreement). According to the European Commission White Paper of 1994, the associated Member States had to implement the necessary accession measures in order to transpose into national law and practice the basic rules of Community social policy, including the seven labour rights directives established by that time.^{*2} Of this legislation, employee involvement was discussed in Directive 94/45/EEC^{*3}, on the establishment of a European Works Council, and the obligation to inform and consult employees was also included in Directive 75/129/EEC^{*4}, on collective redundancies, and in Directive 77/187/EEC^{*5}, on transfers of undertakings.

The labour legislation that existed in Estonia before accession to the EU included no fundamental disagreement with EU law; in some areas that the EU had considered necessary to regulate, however, rules had not been established or were insufficient in their detail.^{*6} Three areas can be pointed out in which the harmonisation

¹ Association Agreement between the European Communities and their Member States and the Republic of Estonia (Europe Agreement). – RT II 1995, 22–27, 120 (in Estonian).

² Valge raamat. Assotseerunud Kesk- ja Ida-Euroopa riikide ettevalmistamine integreerumiseks Euroopa Liidu siseturgu (White Paper. Preparation of the Associated Central and Eastern European Countries for Integration into European Union Internal Market). Tallinn: Eesti Õigusteabe Keskus 1996, pp. 81–94 (in Estonian).

³ Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. – OJ L 254, 30.09.1994, pp. 64–72.

⁴ Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies. – OJ L 48, 22.02.1975, pp. 29–30. This Directive has been replaced by Directive 98/59/EC which has the same title (OJ L 225, 12.08.1998, pp. 16–21).

⁵ Directive 77/187/EEC on the approximation of laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses – OJ L 61, 5.03.1977, pp. 26–28. This Directive has been replaced with Directive 2001/23/EC which has the same title (OJ L 82, 22.03.2001, pp. 16–20).

⁶ On the harmonisation of Estonian labour legislation with EU law see M. Muda. Improving Estonian Labour Legislation on Integration with Europe. – *Juridica International* 1996, pp. 109–139; M. Muda. Application of International Labour Standards in the Regulation of Employment Relationship in Estonia. – *Juridica International* 1997 (2), pp. 112–118.

of Estonian legislation with European law turned out to be most problematic. These are the equal treatment of employees, the limitation of weekly maximum working time, and employee involvement.⁷ While with respect to harmonising the regulation of the amount of working time the most immediate necessity was to change practical organisation of work in order to decrease working time from 60 hours to 48 hours a week⁸, with respect to equal treatment of employees and employee involvement the differences existed more in principle. Estonian national law included individual provisions addressing both areas, but in practice their meaning was marginal. While, with regard to equal treatment of employees, the reason behind the minimal regulation could have been the society's meagre knowledge of equal treatment and equal opportunities⁹, the absence of employee involvement regulation was mostly due to the low importance of employee trustees in shaping employment relationships.¹⁰

Neither had attention been paid to improving national employee involvement rules in the EU integration action plans drafted in Estonia in the second half of the 1990s for the implementation of the rules established in the above-mentioned white paper.¹¹ On the one hand, this could be explained by the fact that the subject matter of employee involvement was unfamiliar to Estonian practice; on the other hand, also the EU started to pay more attention to developing this area only at the beginning of the current decade¹², when several significant employee-involvement-related directives were adopted — 2001/86/EC, on employee involvement in the affairs of the European Company (*Societas Europaea*, or SE)¹³; 2002/14/EC, establishing a general framework for informing and consulting employees¹⁴; 2003/72/EC, on the involvement of employees in a European co-operative society (or *Societas Cooperativa Europaea*, SCE)¹⁵; etc.

Although collective employment relationships have developed little in Estonia and consequently the associated employee involvement issues have been relatively unfamiliar, Estonia has now brought its labour legislation into concordance with the respective EU provisions. Hence, this article aims to examine the impact the transposition of EU employee involvement rules has had on the functioning of employment relationships in Estonia. In order to reach this goal, the author firstly studies the definition and subjects of employee involvement, insofar as the position of the latter has a great influence on the efficiency of employee involvement, continuing with the general framework of employee involvement, employee involvement in individual matters, and employee involvement in Community-scale undertakings, focusing not so much on analysing the transposition of directives verbatim as on trying to provide broader evaluation of the effects thereof.¹⁶

⁷ M. Muda. Impact of the European Community Labour Law on Estonian Labour Legislation. Labour Law in United Europe. 2003 m. spalio 16-18 d. Tarptautinės mokslinės konferencijos medžiaga. Vilnius, p. 93.

⁸ See also M. Muda. Trends in Regulating Working and Rest Time Estonia. Proceeding from the European Union Law – Juridica International 2000, pp. 147–148.

⁹ See M. Muda. Regulation of Gender Equality as a Fundamental Right in Estonia. – Juridica International 2002 (7), pp. 106–116.

¹⁰ See sub-item 2.2.

¹¹ M. Palmiste. Euroopa Liidu ja Eesti sotsiaalpoliitika diskursus (Socio-political Discourse of the European Union and Estonia). – Riigikogu Toimetised 2001 (4), p. 138 (in Estonian).

¹² Preparations for establishing the respective regulations were, however, started already in the 1970s. See R. Blanpain. European Labour Law. 11th and revised edition. The Hague: Kluwer Law International 2008, p. 713.

¹³ Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employees. – OJ L 294, 10.11.2001, pp. 22–32.

¹⁴ Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community. – OJ L 80, 23.03.2002, pp. 29–34.

¹⁵ Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees. – OJ L 207, 18.08.2003, pp. 25–36.

¹⁶ This article does not discuss employee involvement with regard to occupational health and safety issues, based on Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ L 183, 29.06.1989, pp. 1–8), insofar as the particularity and bulk of the regulation in that field deserves a separate study.

2. Definition and subjects of involvement

2.1. Definition of involvement

In the broadest sense, employee involvement means employee participation in making microeconomic decisions at the workplace (plant) or enterprise level.^{*17} Employee involvement thus refers to workers' opportunity to influence organisational decisions, regardless of their position in the company hierarchy.^{*18} Employee involvement can assume different forms. According to theoretical sources, employee involvement usually comprises the right to acquire information, the right to conduct consultations, and the right to co-decide (i.e., participate).^{*19} Also, EU employee involvement Directives 2001/86/EC (Article 2 (h)) and 2003/72/EC (Article 2 (h)) define employee involvement as any kind of procedure, including informing, consulting, and participation, that employee trustees can use to influence the decisions made in an undertaking.

Unlike several older Member States^{*20}, where the traditions of employee involvement go way back and where national regulations have served as a model in drafting the respective EU legislation, the concept of employee involvement was unfamiliar in the labour legislation existing in Estonia prior to accession to the EU. Influenced by EU law, the Trade Unions Act^{*21} (TUA) of 2000 obliged the employer to inform and consult the representatives elected by the trade union, but it did not elaborate on the concept of these terms, only listing the areas in which informing and consulting was obligatory.^{*22} The employee involvement-related terminology based on EU law is thus a new phenomenon in Estonia's legal order.

The concepts of informing and consulting employees have been established in the Employee Trustee Act^{*23} (ETA), which harmonises national law with EU Directive 2002/14/EC, and the Community-scale Involvement of Employees Act (CSIEA), which transposes into Estonian law Directives 94/45/EEC, 2001/86/EC, and 2003/72/EC, as well as the cross-border mergers directive (2005/56/EC).^{*24} Insofar as employees in Estonia do not have the right of co-decision — i.e., employees do not participate in the activity of the bodies of legal persons — the respective regulation is only laid down in the CSIEA, applying to European companies (SEs) and European co-operative societies (SCEs).

The concept of informing is laid down in the ETA's § 19 (1) and the CSIEA's § 3 (1) in almost identical wording^{*25} — informing refers to the informing of the employee trustees on an appropriate level that allows the employees to receive a clear and sufficiently detailed overview of the structure and economic and employment situation of the employer, on time, and possible development of the structure, situation, and other circumstances affecting the interests of employees, and to understand the effects of the situation and other circumstances on the employees. If one compares the definition of informing laid down in Estonian legislation to the corresponding definitions in the EU Directives (2001/86/EC (Article 2 (i)), 2002/14/EC (Article 2 (f)), and 2003/72/EC (Article 2 (i))), it may be concluded that, as the national regulation mostly provides a more thorough definition of the term than is required in EU law, it comprises that laid down in the directives.^{*26}

The ETA's § 19 (2) and CSIEA's § 3 (2) provide a similar definition of consulting — consulting means exchange of views and the establishment of dialogue between the employee trustee and the employer on an appropriate level allowing the employee trustee to express opinions and receive reasoned responses to the

¹⁷ M. Biagi, M. Tiraboschi. Forms of Employee Representational Participation. Comparative Labour Law and Industrial Relations in Industrialized Market Economies. R. Blanpain (ed.). 9th and revised edition. The Netherlands: Kluwer Law International 2007, p. 540. Employee involvement is also possible on the macro-economic level, but proceeding from EU directives underlying this article, only the company level is discussed here.

¹⁸ K. Jaakson, E. Kallaste. Employee Participation: Case Study of Estonian Companies. PRAXIS Center for Policy Studies 2005, p. 15. Available at http://www.praxis.ee/data/Employee_participation_2005_ENG.pdf (20.11.2008).

¹⁹ M. Biagi, M. Tiraboschi (Note 17), p. 505; K. Jaakson, E. Kallaste (Note 18), p. 15. In addition to these forms of involvement, employees can participate in a company's decision processes also through collective negotiations and collective labour disputes, but as the EU directives do not discuss these forms of involvement, neither does this article.

²⁰ The Member States of the EU prior to the enlargement of 1 May 2004 (EU15).

²¹ Ametiühingute seadus. Adopted on 14.06.2000. – RT I 2000, 57, 372; 2007, 2, 6 (in Estonian). The Act is available in English at <http://www.legaltext.ee/text/en/X30087K1.htm> (20.11.2008).

²² M. Muda. Employee Involvement in Estonia. – Handbook of Employee Involvement in Europe. M. Weiss, M. Seweryński (eds.). Kluwer Law International 2004, pp. 18–19.

²³ Töötajate usaldusisiku seadus. Adopted on 13.12.2006. – RT I 2007, 2 (in Estonian). The Act is available in English at <http://www.legaltext.ee/text/en/XX10005.htm> (20.11.2008).

²⁴ Directive 2005/56/EC on cross-border mergers of limited liability companies. – OJ L 310, 25.11.2005, pp. 1–9. As with regard to the organisation of employee involvement, Article 16 of this Directive largely refers to the provisions of Directive 2001/86/EC, it is not separately analysed in this article.

²⁵ The only difference is between the definition of employee trustees and employer.

²⁶ As the Directives specify the informing procedure, considering the level of its occurrence or its legal type, the respective rules have also been included in the ETA and the CSIEA.

opinions expressed from the employer. As Estonian legislation, similarly to Directives (94/45/EEC (Article 2 (f)), 2001/86/EC (Article 2 (j)), 2002/14/EC (Article 2 (g)), and 2003/72/EC (Article 2 (j)) open the definition of consulting by means of exchange of views, establishment of dialogue, and expressing of opinions, the definition of consulting provided in the national law is in compliance with EU law.

As the last form of employee involvement, employees' right of co-deciding (participating) was mentioned above. Under Estonian legislation, this is only possible with regard to SEs and SCEs.²⁷ Proceeding from Directives 2001/86/EC (Article 2 (k)) and 2003/72/EC (Article 2 (k)), the respective term is laid down in CSIEA § 46, where the participation of employees means the right to elect or appoint some of the members of the bodies of an SE or SCE, or the right to recommend or oppose the appointment of the members of the bodies of an SE or SCE. This, too, complies with the provisions of EU legislation.

In analysis of the definition of employee involvement, it may be concluded from the above that this concept was unfamiliar in Estonian law prior to EU accession and that it was adopted only as a consequence of the harmonisation of national law with EU regulations. Pursuant to Estonian law, employee involvement means informing, consulting, and participation of employees, and the respective terminology is in compliance with EU legislation. Insofar as the concept of employee involvement established in the legislation is clearly defined and sufficient, it creates a good legal basis for employee involvement in practice.

2.2. Subjects of involvement

The subjects of involvement constitute the employees through whom the employees' right to inform, consult, and co-decide is realised. A company's decision process usually involves the employee trustees or, in the absence of any such trustees, all employees. As different employee representation systems²⁸ have developed in EU member states historically, the employee-involvement-related directives discussed in this article do not interfere with the definitions thereof — pursuant to all of the relevant directives (94/45/EEC (Article 2 (d)), 2001/86/EC (Article 2 (e)), 2002/14/EC (Article 2 (e)), and 2003/72/EC (Article 2 (u)), employee trustees are considered to be the trustees of employees foreseen by national law and/or tradition. The present article further examines who constitutes employee trustees pursuant to Estonian legislation, and whether and how the respective regulation has been influenced by EU law.

As already mentioned, employees play a relatively insignificant role in shaping of employment and social relationships in Estonia. This is primarily due to the historical development of organisations representing employees. The first classic trade unions in Estonia were formed by the 1930s, but their activity was concluded by the occupation of Estonia by the Soviet Union in 1940. The aim of the trade unions operating in the Soviet era had to do with executing party policy rather more than with fighting for the rights and interests of employees. The restoration of traditional trade unions was only started in Estonia in 1990, meaning that employees have had only some 10 to 15 years to participate in the organisation of working life.²⁹

The Employee Trustee Act of 1993 established the double-channel system of employee representation. This means that employees at a company could be represented either by a trustee elected by a trade union or by a trustee elected by a general meeting of employees not belonging to the trade union. In practice, however, the trustees were elected for those employers in relation to which a trade union had been formed³⁰ whose legal status and competence, including its role in informing and consulting employees, were specified in the TUA.

Insofar as employees' right of informing and consulting as established in Directive 2002/14/EC was intended to be ensured in Estonia by means of the trustees of employees, the new ETA drawn up for the transposition of that directive altered the system for electing employee trustees. In Estonia, the double-channel system of employee representation continued to be in force, but, in view of the fact that approximately 11% of employees belong to trade unions³¹, it was found that informing and consulting employees only through trustees elected by a trade union would not be sufficient for implementation of the directive. As noted in the explanatory note accompanying the ETA, a situation wherein the non-trade-union-members forming the overwhelming majority of employees would remain in electing their trustee not only deprived of the right to participate but also

²⁷ Also in the event of cross-border mergers of undertakings.

²⁸ According to research by Professor M. Biagi and Professor M. Tiraboschi, employee involvement may occur through a trade union, a representative body of employees independent from a trade union (e.g., a works council), a joint body of a trade union and a representative body of employees independent from the trade union, and a joint body of trustees of employees and employers. See M. Biagi, M. Tiraboschi (Note 17), p. 505.

²⁹ M. Muda (Note 22), pp. 7–11.

³⁰ See G. Tavits. Töötajate esindamine ettevõtetes ja käitistes – Eesti valikud (Representation of Employees in Enterprises and Plants — Estonia's Choices). – *Juridica* 2004/10, p. 698 (in Estonian).

³¹ Tööelu baromeeter 2005. Elanikkonna uuringu aruanne (Working Life Barometer 2005. Population Survey Report). Tallinn: Saar Poll OÜ 2006, p. 54 (in Estonian).

of any right to advise their 'representative' in his or her activity, ask him or her to report, and withdraw him or her, as appropriate, could in no event be considered right, just, and democratic.^{*32}

Proceeding from the above, a trustee of employees shall, according to ETA § 2 (1) of 2007, be elected by a general meeting of the employees, which may be called by a trade union operating at the employer, by the majority of the members of the trade union who are employed at the employer if the trade union has not been founded at the employer, or by at least ten per cent of the employees of the employer (see § 5 (1)).^{*33} The adoption of the ETA somewhat organises the system for representation of employees — with the enactment of the ETA, the main channels for employee representation are a trade union and a trustee elected by a general meeting of the employees — but the legal regulation of their competence continues to replicate the functions of the trade union and the trustee.^{*34}

In addition to the general framework of informing and consulting established in the ETA, and the respective rights of a trustee elected by a trade union, provided for in the TUA, the obligation of informing and consulting employees is in many cases (transfer of company, collective redundancy, application of employees with part-time work hours, and fixed-term employment contracts) also established in the Employment Contracts Act^{*35} (ECA). The employee trustees mentioned in the ECA do not constitute a category of independent trustees; for the individual matters mentioned, they also have to be either a trustee or a trustee elected by the trade union, as, pursuant to both ETA § 2 (2) and TUA § 14 (4), the latter are considered to be the employee trustees for the purpose of the ECA.

The ETA's §§ 19 and 21, and the corresponding rules of the ECA (in §§ 6³ and 89²), provide that in the absence of the employee trustees, the employer shall inform and consult the employees.^{*36} Such regulation can be considered justified, because in most Estonian companies the employee trustee has not been elected and thus the right to be involved must be ensured for all employees. It is, however, a matter of some question how the informing and consulting of all employees would occur in practice. Informing the employees is probably easier to accomplish, for example, by displaying the relevant information on a notice board or by means of electronic notification. But how can consultation with all employees be arranged? The employer has the possibility of obliging the employees to create a representation system as necessary for conducting consultations. In smaller undertakings, negotiations can be conducted also by means of a general meeting of employees. Another question regards ensuring the knowledge and skills of the employee trustees elected *ad hoc*, so that they could successfully protect their interests during the consultations.^{*37}

In addition to a trade union and trustee operating on the national level, a separate representation system was created in 2005 with the adoption of the CSIEA for involvement of employees in Community-scale legal persons. The CSIEA established a trustee elected by a general meeting of employees as the trustee of Estonian employees in the context of the regulation of European Works Council matters, SEs, and SCEs. This means that the members of a special negotiating body and a lawful European Works Council, as well as the members of a lawful representative body of employees in the case of SEs and SCEs, shall be elected from the companies and legal persons that are situated in Estonia at a general meeting of employees pursuant to the procedure of CSIEA § 17.^{*38}

Therefore, similarly to what is provided for by the ETA, employee trustees elected by a general meeting of employees shall participate in the process of employee involvement (or determination of the procedure thereof) also at the Community-scale level. In development of the regulation of the CSIEA (and of the ETA), the trade unions insisted that the prerogative of electing employee trustees must be given to trade unions, but this approach was discarded here, too, because of the relatively low membership of trade unions.^{*39}

³² Explanatory note to the Employee Trustee Act (5.06.2006), p. 6. Available at www.riigikogu.ee (20.11.2008) (in Estonian).

³³ As can be seen from this provision, trade unions play an important part in organising the general meeting of employees that elect the trustee. The establishment of such regulation was brought on by the great resistance of Estonian trade unions to changing the procedure for electing the trustee. By way of compromise, the ETA increased a trade union's possibilities of organising the election of a trustee, and specified the competence of the trustee elected by the trade union, provided for in the TUA.

³⁴ This means that the right to informing and consulting belongs to both the trustee, pursuant to ETA §§ 17–21, and the trade union, pursuant to TUA § 22, whereby the contents of informing and consulting overlap. Also both the trade union and the trustee have the right to represent the employees in conducting collective negotiations and in the resolution of collective labour disputes, the latter only if there is no trade union at the employer or no employees belonging to the trade union are working at the employer (TUA § 18 (1) 2), ETA § 9 (4), (5)).

³⁵ Eesti Vabariigi töölepingu seadus. Adopted on 15.04.1992. – RT 1992, 15/16, 241; 2007, 44, 316 (in Estonian). Available in English at <http://www.legaltext.ee/text/en/X1056K10.htm> (20.11.2008).

³⁶ The ECA nevertheless only foresees the obligation of informing (not consulting) all employees.

³⁷ M. Muda. Töölepingute kollektiivne lõpetamine (Collective Redundancies). – *Juridica* 2003/8, p. 556 (in Estonian).

³⁸ It is specified in CSIEA § 17 (2) that if several enterprises or legal persons are located in Estonia, the trustees of employees of which have to be determined, the general meeting of each enterprise or legal person shall elect three members to the joint representation, which, in turn shall elect the members of the appropriate body representing Estonia.

³⁹ Directive 94/45/EC. National Implementation Report. Estonia. Report elaborated by the workgroup lead by Merle Muda. Studies on the Implementation of Labour Law Directives in the Enlarged European Union. Labour Asociados Consultores 2007 (in possession of the author), pp. 3–4.

It can be concluded from the above that unlike the Member States belonging to the European Union at the time of drafting of the employee involvement directives, wherein an employee involvement mechanism of a clear structure and competence had been developed over the years, in Estonia a corresponding system is still being developed. While the enactment of the new ETA in 2007 specified the employee representation system to be applied in Estonia and employees may now be represented by trade unions and trustees elected by a general meeting of employees, the two channels of employee representation have not started to show clear-cut functioning. On the one hand, this may be on account of the thus far brief time in force of the ETA, making it difficult to assess the effects of this act just yet. On the other hand, the historical traditions of communication between Estonian employees and employers lead one to believe that the future will not bring a boom in the election of employee trustees either, and that the informing and consulting of employees will primarily be occurring in enterprises that have formed trade unions. At the same time it is questionable to what extent the trade union will have a say in these matters, because the overall world trends foresee the role of employee representation shifting increasingly from the trade unions to other representation channels.^{*40}

3. General framework of employee involvement

As mentioned before^{*41}, the general framework for informing and consulting employees is established by Directive 2002/14/EC on the EU level, and in Estonia the respective regulation is provided for in the ETA. The present article next will consider in which way the EU directive has been transposed into national legislation and what impact it has on the informing and consulting of employees in practice.

In creation of a general procedure for employee involvement, the first question for consideration is which employers should be subject to obligatory informing and consulting of employees. Pursuant to Article 3.1 of the directive, a Member State may choose whether to create an employee involvement system for employers employing at least 50 employees or, instead, at enterprises employing at least 20 employees. Pursuant to ETA § 17 (1), an employer who employs at least 30 employees is required to apply the informing and consulting procedure.^{*42} Estonian legislation thus establishes a lower threshold than is required by the directive. Insofar as upon establishment of such a threshold it was taken into consideration that the majority of Estonian employees work in micro- and small-sized enterprises, and that by establishing a higher threshold the directive would in its scope cover only a very insignificant proportion of employees^{*43}, the regulation of the ETA can be deemed to be justified and to act in favour of employee involvement.

Proceeding from Article 4.2 of Directive 2002/14/EC, the content of informing and consulting under the ETA is defined as follows: the structure of the employer, the staff, changes therein, planned decisions that significantly affect the structure of the employer and the staff, and planned decisions that bring about substantial changes concerning the organisation of work and employment contract relationships. In addition to the above-mentioned, the employer shall inform employees of the annual report details. Also the procedure for informing and consulting provided for in ETA § 21 (written provision of information in a manner enabling preparation for consultations, employees' right to present opinions and proposals, and also application to commence consultation with the purpose of reaching an agreement on the planned activity, etc.) complies with the provisions of the EU directive (Articles 4.3 and 4.4). The ETA thus provides a detailed employee involvement mechanism complying with the requirements of EU legislation, which should serve as a good basis for implementation of the informing and consulting of employees in practice.

The efficient functioning of the general framework of employee involvement is definitely supported by the trustee's obligation to maintain confidentiality of information, laid down in the ETA's § 11 on the basis of the regulation of Articles 6 and 7 of the EU directive, and by the protection of employee trustees ensured in the ECA in case of termination of contract by the employer.^{*44} The employer's liability in the event of failure to fulfil the obligation of informing or consulting or the event of submission of false information, as laid down in ETA § 24, is also of vital importance.^{*45}

⁴⁰ M. Biagi, M. Tiraboschi (Note 17), pp. 552–553; K. Jaakson, E. Kallaste (Note 18), p. 18.

⁴¹ See sub-item 2.1.

⁴² Pursuant to ETA § 18, the employer shall determine the number of employees upon approval of annual reports or when significant changes arise in the organisation of work, taking into account the six months' average number of employees as of the date on which the obligation of informing and consulting arises.

⁴³ Explanatory note to the Employee Trustee Act (Note 32), p. 8.

⁴⁴ Pursuant to the ECA, termination of employment contract of an employee is prohibited during representing the employee (§ 91 (1) 4), and as a result of representation (§ 94 (3)); similarly, employment contracts with trustees of employees can be terminated during the term of authority of the employee and for within one year after termination of the authorisation only with the consent of the labour inspector (§ 94 (1)); trustees of employees have greater right of claim upon illegal termination of employment contract (§ 117 (3)), etc.

⁴⁵ Pursuant to the ETA, in the event of failure to perform the obligation of informing or consulting or submission of false information, the employer is punishable by a fine of up to 200 fine units. The same act, if committed by a legal person, is punishable by a fine of up to 50,000

It can be concluded from the above that the ETA regulation ensures that employees have the comprehensive right to be involved in the decision process of the employer. At the same time, we must recognise that, while the EU-level general framework of informing and consulting was created for the purpose of enhancing and improving the existing employee involvement mechanisms^{*46}, the Estonian ETA creates the respective system in an empty space.^{*47} In practice, therefore, Estonian employees and employers lack the habit of communicating with each other. Employee trustees have for the most part not been elected in Estonian enterprises. As explained above^{*48}, in the absence of employee trustees, the employer shall inform and consult all employees. It has, however, not been observed that the role of employees in making enterprise-related decisions has changed since the enactment of the ETA. The act may establish thorough employee involvement rules, but this does not mean that the informing and consulting of employees effectively occurs in practice.

4. Employee involvement in individual matters

Employee involvement in individual matters is seen as constituting the employer's obligation to inform and consult the employees with regard to significant reorganisations in the enterprise — i.e., transfer of enterprise and collective redundancy — and also the employer's obligation to inform employee trustees of use of non-typical forms of work — i.e., application of employees with part-time work hours and under fixed-term employment contracts. The informing and consulting of employees accompanying the reorganisation of the employer's activity has been laid down as an obligation in the above-mentioned directives 98/59/EC and 2001/23/EC. Informing the employee trustees of non-typical work forms has been mandated in the part-time work directive, 97/81/EC^{*49}, and in the fixed-term work directive, 1999/70/EC.^{*50} This section of the article discusses how the principles laid down in these EU directives have been transposed into Estonian legislation and whether the respective regulation establishes sufficient prerequisites for efficient involvement of employees.

As collective redundancy may bring about the redundancy of a large number of employees, the employer shall, pursuant to Article 2.2 of Directive 98/59/EC, conduct negotiations with the employee trustees before terminating the employment contracts of employees as to whether it would be possible to avoid or limit the termination of employment contracts and also on how to mitigate the consequences thereof. In order to provide substance for the consultations conducted with trustees of the employees, the employer is obliged to provide detailed information concerning the collective redundancy (see Article 2.3). In Estonia, the employee involvement regulation of Directive 98/59/EC has been transposed with the ECA's § 89², which complies with the provisions of EU legislation with respect to the purposes, content, and organisation of informing and consulting.^{*51}

As required in the directive (in Article 2.1), attempts are made to reach an agreement as a result of consultations conducted with employee trustees also pursuant to the provisions of the ECA. This constitutes a very strict form of consultations, which is similar to collective negotiations.^{*52} This provision grants the employee trustees relatively broad rights in making decisions related to the staff policy of the employer. This is also implied by the list of data that the employer is obliged to submit in writing to the employee trustees — employees can, among other matters, participate in determining the criteria for use in selection of dismissible employees and the methods for calculating the compensation for termination of an employment contract.^{*53} The ECA thus fully

kroons (3190 euros). Pursuant to § 47 of the Penal Code, a fine unit is the base amount of a fine and is equal to 60 kroons (3.80 euros). The value of 200 fine units thus amounts to 12,000 kroons (765 euros). See the Karistusseadustik (Penal Code). Adopted on 6 June 2001. – RT I 2001, 61, 364; 2008, 18, 87 (in Estonian). The Act is available in English at <http://www.legaltext.ee/text/en/X30068K7.htm> (20.11.2008).

⁴⁶ See A. C. Neal. *Information and Consultation for Employees — Still Seeking the Philosopher's Stone? — Quality of Work and Employee Involvement in Europe*. M. Biagi (ed.). The Hague/London/New York Kluwer Law International 2002, p. 83 *ff.*

⁴⁷ As explained in sub-item 2.1, prior to the enactment of the ETA, some provisions regarding the informing and consulting of employees were contained in the TUA. In certain cases (transfer of enterprise, collective redundancy, etc.), the employer's obligation to inform (and consult) the trustees of employees was also laid down in the ECA (see sub-item for further detail). The respective rules nevertheless did not reflect practice formed throughout times, but were established due to the necessity of transposing EU directives.

⁴⁸ See sub-item 2.2.

⁴⁹ Directive 97/81/EC concerning the Framework agreement on part-time work concluded by UNICE, CEEP and the ETUC. – OJ L4, 20.01.1998, pp. 9–14.

⁵⁰ Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE, and CEEP. – OJ L 175, 10.07.1999, pp. 43–48.

⁵¹ If pursuant to Directive 98/59/EC the employer is obliged to inform and consult the trustees of employees, then pursuant to ECA § 89² the employer shall inform the trustees of employees and in their absence inform the employees, but the employer is subjected to the obligation of consulting only with regard to the trustees of employees.

⁵² R. Blanpain (Note 12), p. 598.

⁵³ M. Muda (Note 37), p. 557.

follows the ideas of Directive 98/59/EC and provides the employee trustees with a large-scale opportunity to intervene in the employer's decision process in the event of collective redundancy.^{*54}

Similarly to the collective redundancy, the transfer of an enterprise often entails significant staff-related reorganisations for both the transferor and acquirer of the enterprise. Pursuant to Article 7 of Directive 2001/23/EC, the former and the new employer shall therefore both inform the employee trustees (or, in the absence of such trustees, the employees) of the planned changes and have the obligation to conduct consultation in the event that, because of the transfer of enterprise, measures are implemented also with regard to employees (e.g., there is a need to reduce workforce). Although the aim of consultations conducted with employees is to reach an agreement, the directive only allows employees to participate in the enterprise's business-related decisions. It does not give them the right of veto.^{*55}

In Estonia the obligation of employee involvement in the event of transfer of enterprise is laid down in ECA § 6³, which appropriately transposes the requirements of Directive 2001/23/EC into Estonian law. As with collective redundancy, the ECA provides the employee trustees with the right to have an active say in the changes that are occurring (reduction of staff, structural reorganisation of the enterprise, adoption of new work methods and means, etc.) also in the event of transfer of enterprise. The ECA thus creates all of the relevant prerequisites for the involvement of employees, especially in the event that the transfer of enterprise brings with it changes affecting the situation of employees.^{*56}

Although statistics show that an average of 120 collective redundancies annually^{*57} occurred in the years 2003–2006^{*58} and that transfers of enterprises are not rare in practice either, no court actions regarding employee involvement have been brought in relation to these questions^{*59} and it seems that in the event of collective redundancies and transfer of enterprise the system for informing and consulting employees has been activated without problems. While the informing of employees is relatively easily arranged, conducting efficient consultations with employees requires good will and the existence of preliminary knowledge from the employer as well as the trustees of the employees. No surveys have been conducted in Estonia as to how the conducting of negotiations with employees in the event of collective redundancy and transfer of enterprise works in practice (what the content of the discussions is, what proposals employees usually make, to what extent employers consider the opinions of employees, etc.). Considering, however, the scant experience of employees and employers with intercommunication, one can conclude that such negotiations probably remain formal quite often.

With the establishment of Directive 97/81/EC, on part-time work, and Directive 1999/70/EC, on fixed-term work, in the late 1990s, the usage of respective non-typical forms of work in practice was recognised, with emphasis on avoiding discrimination against people in such employment relationships.^{*60} As both part-time and fixed-term workers have more superficial contact with the employer (enterprise), they often receive unjustifiably different treatment when compared to so-called typical employees. For the purpose of avoiding discrimination and monitoring the situation of employees with atypical work arrangements, directives 97/81/EC (clause 5.3 (e)) and 1999/70/EC (clause 7.3) oblige the employer to inform the bodies of employee trustees as to the use of such forms of work in the enterprise.

Attempts were made to include a similar principle in the Estonian ECA, but without success. Pursuant to the ECA, the employer shall notify the trustees of the employees of the opportunity for part-time work (§ 13¹ (2)) and fixed-term vacant jobs (§ 13² (2)). This kind of information should be of interest to employees themselves, rather more than their trustees. Although the trustees of employees do receive information on the usage of non-typical forms of work in an enterprise through the provision of such information, the establishment of such a requirement lacks purpose and the ECA regulation does not comply with the directives. At the same time, this cannot be considered an important violation of employees' rights, as only the content of

⁵⁴ If the employer fails to inform the employee trustees and consult with them pursuant to the ECA, the labour inspectorate as the competent authority shall not provide approval for the collective redundancy. The collective redundancy without approval of the labour inspectorate is, however, illegal. *Töölepingu seadus. – Tööõigus. Näidised ja kommentaarid. Äripäeva Käsiraamat (Employment Contracts Act. – Labour Law. Examples and Comments. Äripäev handbook)*. Tallinn 2008; § 892 comm. 4.

⁵⁵ C. Barnard. *EC Employment Law*. 3rd edition. Oxford University Press 2006, p. 666.

⁵⁶ A shortcoming of the ECA can be deemed to constitute the failure to lay down the employer's liability in the event of violation of the rules of informing and consulting employees.

⁵⁷ Collective redundancies and compensation for collective redundancy. Five years of unemployment insurance in Estonia. 2002–2006. *Estonian Unemployment Insurance Fund 2006*, p. 32 (in Estonian). Collective redundancies are displayed in unemployment insurance statistics, because in that case the compensation for terminating employment contracts for employees is partly compensated by the Estonian Unemployment Insurance Fund.

⁵⁸ Provisions regarding the collective redundancies in the ECA entered into force on 1 January 2003.

⁵⁹ The employer's obligation to inform and consult with employees upon transfer of enterprise, laid down in the ECA, is in force as of 1 May 2004.

⁶⁰ C. Barnard (Note 55), pp. 469–471.

the information has been insufficiently prescribed; informing employees also comprises the realisation of the so-called passive involvement right.^{*61}

It may be concluded from the above that in Estonia a sufficient and appropriate employee involvement system has been created, enabling the employee trustees to participate in making decisions concerning the economic activities of an enterprise upon collective redundancy and transfer of enterprise as well as upon the usage of part-time and fixed-term employment contracts.^{*62} The procedure for informing employee trustees of the use of atypical forms of work requires some specification, but in practice this is not a problem in employee involvement. There are no statistical data concerning the informing and consulting of employees in respect of the above-mentioned questions. A survey conducted in 2005 on employee involvement shows, on the other hand, that, as a rule, employees do not participate in making strategic decisions regarding the economic activity of the enterprise.^{*63} This leads to the conclusion that the role of employees in co-deciding on the areas analysed in this section of the paper is not significant. Although the ECA regulation on informing and consulting employees had been in effect for only a short while at the time of the survey, presumably no significant changes have occurred in employee involvement in practice. As the reason behind the modest participation of employees cannot be inadequate legislation, the problem can also here probably be reduced to the awareness and competence of employees and employers.

5. Employee involvement with Community-scale legal persons

Involvement of employees in Community-scale legal persons is considered to refer to participation of employees in making decisions concerning the economic activities (including employees) of the employer in Community-scale undertakings and Community-scale groups of undertakings, also in SEs and SCEs, as provided for in the above-mentioned directives 94/45/EEC, 2001/86/EC, and 2003/72/EC. The main features of the regulation in these directives are similar — they first foresee the creation of a trustee body for employees (special negotiating body), then this body decides by agreement with the representatives of the legal person on the employee involvement mechanism to use, and eventually the rules for establishing a lawful representative body are laid down.^{*64} As a difference it can be pointed out that while in Community-scale undertakings and Community-scale groups of undertakings the trustees of employees must only have a guaranteed right of being informed and consulted, while the employees of SEs and SCEs have also been granted the chance to participate in the activity of the decision-making bodies of a legal person.

As mentioned above^{*65}, directives 94/45/EEC, 2001/86/EC, and 2003/72/EC have been transposed into Estonian legislation with the CSIEA, which lays down the employee involvement rules for Community-scale legal persons. The relevant regulation is very bulky, and, insofar as the directives do not leave the Member States with many options for discretion, it is also largely technical in nature. The author thus considers it unnecessary to analyse these rules further in this article, especially since the results of the surveys initiated by the European Commission in 2007 proved that the CSIEA fully complies with the requirements of the directives that served as the basis for its drafting.^{*66} The CSIEA also establishes liability in the case that the procedure for employee involvement established therein is violated.^{*67} A suitable and appropriate mechanism has thus been created in Estonia for the involvement of employees in making decisions also on the Community-scale level.

⁶¹ A shortcoming of the ECA is also the failure to lay down the employer's liability in the event of violation of the rules of informing the trustees of employees.

⁶² By the present moment, the Ministry of Social Affairs of the Republic of Estonia has developed a new Draft Employment Contracts Act, which will replace, if adopted, the existing employment contract regulation. In the new Act the employee trustees will have a guaranteed right to co-decide in the event of collective redundancies (§ 101) as well as transfer of enterprise (§ 113). The Act also foresees the employer's liability in the event of violation of the obligation of informing and consulting provided by the law in these cases (§ 128 and 129). As the employer's obligation to inform of non-typical forms of work has been left out of the Act, the Act should be complemented in that respect. Employment Contracts Act. Draft. 29.4.2008. In the web: <http://eoigus.just.ee/> (15.05.2008) (in Estonian).

⁶³ K. Jaakson, E. Kallaste (Note 18), pp. 65 and 74.

⁶⁴ The rules concerning a lawful representative body are usually applied if the parties negotiating about introducing an informing and consulting mechanism so decide, or if they fail to reach an agreement on the procedure of informing and consulting.

⁶⁵ See sub-item 2.1.

⁶⁶ Directive 94/45/EC. Directive 2001/86/EC. Directive 2003/72/EC. National Implementation Reports. Estonia. Reports elaborated by the workgroup led by Merle Muda. Studies on the Implementation of Labour Law Directives in the Enlarged European Union. Labour Asociados Consultores 2007 (reports are in possession of the author).

⁶⁷ The CSIEA among else provides liability for violation of prohibition on international informing and consulting and involvement of employees (§ 85), and for violation of obligation of annual informing and consulting and informing and consulting under exceptional circumstances (§ 87). In event of such violations the extent of liability is the same as with the violation of the rules of the general framework of informing and consulting (see Note 46).

In practice, the scope of application of the CSIEA is not very great, mainly because there are no Community-scale undertakings or groups of undertakings or SCEs with headquarters in Estonia or bearing responsibility for the Community-scale functional involvement of employees. Two SEs have indeed been established in Estonia^{*68}, but this does not include extensive application of the act. Given the state of the Estonian economy, significant changes in this respect are probably not anticipated. If Community-scale legal persons are still established, it will be difficult to forecast the level of effectiveness with which they will activate the employee involvement mechanism. As mentioned above^{*69}, local employers and employees do not have the habit of communicating with each other. Experience of the two SEs established in Estonia shows that mutual informing and consulting was considered insignificant by the competent bodies of the participating legal persons and the trustees of the employees.^{*70} Thus, the CSIEA regulation has practical meaning only in situations wherein Estonian representatives need to be elected to bodies of employee trustees from the Estonia-situated enterprises of Community-scale legal persons.^{*71}

6. Conclusions

Before accession to the EU, the concept of employee involvement was an unfamiliar phenomenon in the Estonian legal order. The entirety of the respective regulation thus rests on EU directives that are correctly transposed into national law, creating a sufficient and appropriate legal basis for employee involvement in enterprise-related decisions. In Estonia's practice, the informing and consulting of employees is, however, not common. On the one hand, this may be because the provisions related to employee involvement have been in force for only a relatively short time. A greater problem can be seen in the fact that employee trustees have not been elected at most employers or they are incompetent in co-deciding on matters concerning employment relationships and the labour market and the employer's economic activity. As the informing and consulting of employees is a new area in Estonian employment relationships and requires additional knowledge and skills on the part of the employee trustees as well as employers, it will probably take years for a constructive dialogue to develop between employees and employers.

⁶⁸ In 2007 SE Sampo Life Insurance Baltic and Seesam Life Insurance SE were entered into the commercial register in Estonia.

⁶⁹ See sub-items 3 and 4.

⁷⁰ In both cases the first meeting of the special negotiation body decided not to commence the negotiations concerning the determination of procedure for employee involvement.

⁷¹ Also see M. Muda. Estonia. – European Works Council. Kluwer Law International 2008, paragraphs 139–142.