Employee representatives in an enlarged Europe

Volume 2

European Commission

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Volume 2 of the publication *Employee Representatives in an Enlarged Europe* covers the following countries: Latvia, Liechtenstein, Luxembourg, Malta, The Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey, United Kingdom.

It also covers the role of the European Social Partners, as well as the European and International Institutions.

Volume 1 (ISBN: 978-92-79-08928-2) of the publication *Employee Representatives in an Enlarged Europe* provides a general overview of the basic characteristics of national systems of employee representation and participation in European undertakings within the framework of prevailing industrial relations in each country.

It covers the following countries: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland and Italy.

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PORTUGAL

The Portuguese system of industrial relations has undergone far-reaching changes in the last thirty years as a result of:

- The establishment of democracy in 1974 following the end of the regime of Salazar, which radically changed the whole economic, social and political foundation of industrial relations; and
- Economic changes with a renewal of structures marked by the entry into the European Community (1986) of a country with major regional disparities and facing the social challenge reflected by a lower standard of living than the other European countries.

In this context, employees' representation in undertakings was introduced in its current form fairly recently, after the 1974 revolution, through union representatives at the workplace and workers' committees.

As regards industrial relations, the system is predominantly centralised. Nevertheless, specific legal provisions and collective agreements exist for the Autonomous Regions of Madeira and Azores. Both islands have specific administrative and legislative powers according to the Constitution (arts. 227-228). The legislative power depends on the existence of a specific regional interest. However, in relation to the approval of the recent Labour Code, legal literature considered that the Autonomous Regions had not the possibility of legislating on the subjects regulated by the Labour Code given that it was qualified as an Act from the general Republic[43].

I. ECONOMIC AND SOCIAL FRAMEWORK

Some econonoic data

Economic structures continue to lag behind those of the rest of Europe despite a gradual convergence which has significantly slowed since 2002. The Portuguese economy has grown at an average rate over the last few decades, although in recent years **GDP growth** has been decreasing. Low points were experienced in 1983 (-0.2%), 1984 (-1.8%), 1993 (-1.4%) and 2003 (-1.1%)[44].

GDP annual growth rate between 1981 and 2005

1971-1980	1981-1990	1991-2000	1996-2005
4.8%	2.6%	2.8%	2.1%

Source: Banco de Portugal *(Portuguese Central Bank)*

Average labour productivity[45] grew from 68.7% (1995) to 72% in 1999 and 2000, but in 2005, it had decreased to 65.3% (estimate). The low productivity levels might be related to the nature of investment in physical capital, the low level of human resource qualifications, the accumulated deficit of education and training, the low level of dissemination and use of new technologies, flaws connected to strategic and organisational elements and the informal nature of the economy[46].

[43] JORGE BACELAR GOUVEIA, *«O anteprojecto de Código do Trabalho e a Constituição Portuguesa» in* Código do Trabalho – Pareceres, *vol. III, Ministério da Segurança Social e do Trabalho, 2004, pp. 130-131.*
[44] Livro Verde sobre as relações laborais*, Ministério do Trabalho e da Solidariedade Social, 2006, p. 39.*
[45] *Determined according to the* ratio *between the GDP and the employed population.*
[46] Livro Verde sobre as relações laborais*, cit., pp. 42-43.*

Productive structure

Small and micro-undertakings occupy a leading position. According to DGEEP[47] data from 2003, 93.2% of establishments had less than 20 employees. Also 97.7% of the undertakings had less than 50 employees, employing 56.4% of workers, and 64.5% have four or less employees. Undertakings with 100 or more employees are only 0.9% of the total number, although they employ 33.7% of workers. Finally, undertakings with 500 or more employees make up only 0.1% and employ 16.7% of the workers[48].

There are, however, some major public and private groups, especially in the energy, telecommunications and banking sectors.

The **employment rate in the service sector** has been increasing, reaching 57.5% of the employed population in 2005. Conversely, agricultural employment has decreased by about 20%. The industrial sector remains with about 30% of the employed population. However, between 1998 and 2005, manufacturing sector employment decreased at an annual average rate of 2.3 %, namely in the textiles industry where it reached an annual average rate of 4.5%.

Labour market

The most recent evolution of the Portuguese Labour Market can be summarised in the following table:

Key Employments indicators in Portugal

	2004 Average	2005 Average	1st Qt 2006	2nd Qt 2006	3rd Qt 2006
Activity rate %	52.2	52.5	52.6	52.8	52.9
Men	58.1	57.9	58.1	58.3	58.3
Women	46.7	47.4	47.4	47.6	47.9
Unemployment rate %	6.7	7.6	7.7	7.3	7.4
Men	5.8	6.7	6.5	6.4	6.2
Women	7.6	8.7	9.1	8.3	8.9

Notes: For reasons based on the rounding of figures the totals may not correspond to the sum of the partial figures set up
Source: INE's general statistic data

Self-employment is also substantial[49]. Although the majority do not employ anyone[50], the rate of self-employment with workers is stable[51]. **Part-time work** is not noteworthy. In 2004, the part-time work rate was 5.6% (2.9% male and 8.2% female).

One of the most significant changes concerns **non-permanent employment,** including fixed-term labour contracts. The precarious employment rate has increased during recent years from about 9% of the employed population (in 1992) to 14% (18.7% male and 21.1% female) in 2005.

In 2005, there was stagnation in total employment and **the unemployment rate** increased[52]. At the same time, there was an increase in the share of long-term unemployment, whose levels are now higher than in the previous years. The unemployment rate stood at 7.6% in 2005, a 0.9 percentage point. rise from 2004. Similarly to 2004, the change in the male unemployment rate was similar to that of the female unemployment rate, with a simultaneous increase in youth unemployment, which reached 16.1% in 2005.

[47] *Direcção Geral de Estudos, Estatística e Planeamento.*
[48] *Cf.* Livro Verde sobre as relações laborais*,* cit*., p. 44.*
[49] *In absolute numbers (thousands), it was 1244.8 (in 1998) and 1204 (in 2005).*
[50] *945.6 thousands (in 1998) and 903.8 (in 2005).*
[51] *299.2 thousands (in 1998) and 300.3 (in 2005).*
[52] *The following considerations and numbers belong to the Annual Report 2005 of* Banco de Portugal *(Portuguese Central Bank).*

In this age group, the unemployment rate is far higher in individuals with higher educational qualifications (college degree), but the unemployment duration for this group is traditionally quite low.

In 2004, only 49% of the population between 20 and 24 years old had completed high school (39.4% male and 58.8% female)[53]. Regarding population between 25 and 64 years old, only 23% (23.5% male and 27% female) has, at least, the complete high school education.

II. INDUSTRIAL RELATIONS

1. Key issues

Portugal had since 1933, a corporatist organisation combining employees and employers' representatives. Union representation was unitary ("legal monopoly") and could not carry out the activity within undertakings. At the end of the 1960s, semi-clandestine organisations were set up and penetrated the corporatist structures, leading in 1970 to Intersindical, the forerunner of CGTP.

The "carnation revolution" in April 1974 put an end to the corporatist structures, liberalised the labour movement and led to the spontaneous establishment of workers' committees. During 1974-1975, trade union freedom, the right to strike and to bargain became accepted. In 1976, the "legal monopoly" of the CGTP-IN ended, opening the door to the creation of a new confederation by agreement between socialists and social democrats in 1978: the UGT.

Arts. 55 to 57 of the Constitution of 1976[54] have since then guaranteed **trade union freedom**, the right to strike and the right to bargain. Arts. of Decree-Law 215-B/75 regarding "legal monopoly" were expressly revoked and substituted by others admitting a plural union representation. Nowadays, the freedom of trade unions is developed in arts. 475, and the Labour Code.

2. Social partners

Trade union pluralism is marked by the existence of two main confederations whose positions have historically been shaped by their political tendencies: CGTP has been shaped by "horizontal" unions, a unitary culture and a strong communist component; while UGT resulted from an agreement between the socialists and social democrats and has from the outset been made up of "vertical" and occupational unions. However, the trade unions and political parties grew apart to some extent at the end of the 1980s. In spite of that, there has been little dialogue between these two confederations, whose strategies have largely diverged. CGTP has concentrated itself on collective agreement policy and on the defence of rights and employees with a strong "rank-and-file" organisation. UGT has focused on national conciliation and dialogue, becoming the main partner of the government and employers, signing most of the tripartite agreements that followed one another between 1990 and 1996.

A corporative motivation led to the appearance of trade unions oriented to the representation of professional and managerial staff, during the 1980s, which conducted to the later establishment of confederations such as FENSIQ.

Subsequently, independent unions started to proliferate as a negative response to the so-called "directing philosophy" and political parties influence, leading to the establishment of confederations such as CSI and USI.

The competition is largely established between the two main confederations (UGT and CGTP). Nevertheless, the development of new union tendencies has sharpened the opposition in the negotiation procedures.

[53] Livro Verde sobre as relações laborais, cit., *pp. 54-57.*
[54] *This reference corresponds to the current numbering of the Constitution, after its subsequent amendments.*

In parallel, the freedom to set up **employers' associations** was introduced in 1975 by Decree Law 215-C/75, although no reference is made to them in the Constitution. Now, these provisions can be found in arts. 506 (and following) of the Labour Code.

Unions

In 2006[55], the number of active **trade union organisations**, formally constituted and registered in DGERT[56], was 421 corresponding to 348 unions, 27 federations[57], 39 leagues[58] and seven confederations[59].

Only CGTP and UGT are represented in the Standing Committee for Social Conciliation (*Comissão Permanente de Concertação Social*), a tripartite body of the Economic and Social Council (*Conselho Económico e Social*), and their affiliated unions are responsible for almost all collective bargaining.

The other confederations are largely occupational unions in the service sector and, in particular, in the public sector regarding mostly professional and managerial staff. About half of the active unions are affiliated or participants in CGTP or UGT and only 5 % of the other half are connected to CNSQ, CGSI, CSI and USI (see below)[60].

Despite the significant modifications felt in the union structures that led to many mergers in the 90's, the number of trade unions is, in 2005 (420), very similar to the one of 1995 (425) and noticeably superior to the one of 1985 (380) when the trade union density was considerably higher[61]. Regarding territorial distribution, data from 2004 show that most union structures are located in the main coastal cities. The recent Labour Code[62] allows, in art. 475.3, federations, leagues and confederations to directly represent employees who are not represented in unions, according to their by-laws.

Estimates of **trade union density** vary widely and are not completely reliable[63]. Nevertheless, there is no doubt that trade unionisation has declined sharply after peaking in the late 1970's and in the first half of the 1980's, increasing from 52% of employees in 1974-78 to 59% in 1979-84. After that, it has fallen to 44% in 1985-90 and to 36% in 1991-95[64]. At the present time, the number of trade union members is estimated at 1.1 million[65]. There are no official and recent data concerning union density, but there is some consensus that this rate is somewhere between 20% and 30%, probably closest to the first number[66].

The decline in trade union density in the 1990's, largely affecting the CGTP, took place mainly in the industrial sector. Trade union numbers have been maintained in the service sector, which had, between 1991 and 1995, close to two-thirds of unionised employees[67]. The decline affects all activities, except education (teachers), banking and insurance. The public sector continues to be highly unionised, which might be connected to the higher stability and protection of labour relations. Employees with precarious labour contacts are the least unionised[68].

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[55] *The following numbers are presented in* Livro Verde sobre as relações laborais*,* cit., *pp. 65-69 (source: DGERT) and do not include the islands of Madeira and Azores.*

[56] Direcção Geral do Emprego e das Relações de Trabalho*.*

[57] *Association of unions of the same profession or sector of activity (art. 476. b of the Labour Code).*

[58] *Association of unions of regional basis activity (art. 476.c of the Labour Code).*

[59] *National association of unions (art. 476.d of the Labour Code).*

[60] *MARIA DA CONCEIÇÃO SANTOS CERDEIRA,* Dinâmicas de transformação das relações laborais em Portugal, *Cadernos de Emprego e Relações de Trabalho n.º 02, MAET/DGERT, Lisboa, 2004, p. 151.*

[61] *After 1989, 93 unions and 11 federations were extinct, but many others were formed* — Livro Verde…, cit., *pp. 66-67.*

[62] *Approved by Act 99/2003, of August 27th, which entry into force in 1 December 2003.*

[63] *The following numbers are presented by CONCEIÇÃO SANTOS CERDEIRA,* op. cit., *pp. 151-154.*

[64] *The last two percentages might decrease to 35% and 30%, respectively, if we do not include the numbers referring to the independents with no workers, since the majority of them are not really independent. Cf. CONCEIÇÃO SANTOS CERDEIRA,* op. cit., *p. 153.*

[65] *This number differs from the one presented by EIRO corresponding to 1.2 million.*

[66] *Cf. CONCEIÇÃO SANTOS CERDEIRA,* op. cit., *p. 153; PEDRO ROMANO MARTINEZ,* Direito do trabalho, *3.ª ed., Almedina, Coimbra, 2006, p. 1045 (footnote 2) and p. 1073 (footnote 3);* Livro Verde sobre as relações laborais*,* cit., *pp. 67-68. An analysis of the unionisation evolution until 1995 can be found in FERNANDO RIBEIRO LOPES, «Contratação colectiva», in* I Congresso nacional de direito do trabalho — Memórias, *Almedina, Coimbra, 1998, p. 51.*

[67] *The last data available concerning the trade union density according to the activity sector are from 1995. See CONCEIÇÃO SANTOS CERDEIRA,* op. cit., *pp. 152-156.*

[68] *Cf.* Livro Verde…, cit., *p. 68. Source: DGERT, MTSS.*

Trade union confederations

- **CGTP-IN** (*Confederação Geral dos Trabalhadores Portugueses*—General Confederation of Portuguese Workers) is the Portuguese Confederation that is closest to the "masses syndicalism" and represents approximately 40 % of the unions formally constituted. It is well established all over the country, representing a wide variety of sectors, namely the industrial ones, although older workers with labour contracts for undetermined period are its main supporters. The increase in fixed-term contracts and other forms of precarious labour, as well as the reform of many unionised workers, has been responsible for the loss of a significant number of supporters. According to its figures, it has 136 unions (affiliated or cooperating ones), 29 leagues and 12 federations. Its main federations are FESETE (textiles), FNSFP (public administration), FEQUIMETAL (metallurgy, chemistry and pharmacist), FENPROF (teachers), FEPCES (commerce-services), and FESTRU (urban transports). It is affiliated to the ETUC (European Trade Union Confederation).
- **UGT** (*União Geral dos Trabalhadores* – General Workers' Union) stands for a much smaller number of union organisations than CGTP (about 57 affiliated or cooperating unions), mostly vertical unions of national basis, few federations (about six, including both affiliated and cooperating ones) and no leagues. It represents largely white-collar workers, namely in the financial sector and among office and commercial workers. It is affiliated to the ETUC (European Trade Union Confederation) and to the ITUC (International Trade Union Confederation).
- **CPQTC** (*Confederação Portuguesa de Quadros Técnicos e Científicos* — Portuguese Confederation of Technical and Scientific Office Workers) was set up in 1988 and is connected to CGTP.
- **CNSQ/FENSIQ** (*Confederação Nacional de Sindicatos dos Quadros* — National Confederation of the Office Workers' Unions) was set up in 1992 and is connected to UGT.
- **CSI** (*Convenção Sindical Independente* — Independent Union Convention) was set up in 1990.
- **USI** (*União dos Sindicatos Independentes* — Independent Union League) was set up in 2001.
- **CGSI** (*Confederação Geral de Sindicatos Independentes* — General Confederation of the Independent Unions*)* was set up in 2001.

Employers´organisations

In 2006[69], the number of **employers' associations**, formally constituted and registered in DGERT[70], was 534, corresponding to 497 basic employer's associations (activity sector associations with different geographical areas), 21 federations[71], nine leagues[72] and seven confederations[73]. Still, if we consider that about 185 associations are not active, the real number of basic employer's associations should be reduced to 312.

Only CIP, CCP, CAP, CTP are represented in the Standing Committee for Social Conciliation (*Comissão Permanente de Concertação Social*), a tripartite body of the Economic and Social Council (*Conselho Económico e Social*).

Regarding territorial distribution, in 2004, most of the employer's representation structures are located in the main coastal cities, such as Lisbon (56.4%), Porto (17.5%) and Aveiro (3.5%), but there is relevant representation in some interior areas: Leiria (4.7%), and Braga (3.5%)[74].

Many undertakings are not affiliated in any employer's organisation and many basic employers' associations are not members of any confederation.

[69] Livro Verde sobre as relações laborais*,* cit., *pp. 71-72.*
[70] Direcção Geral do Emprego e das Relações de Trabalho*.*
[71] *An organization of employer's associations belonging to the same sector of activity (art. 508.b of the Labour Code).*
[72] *A regional organization of employer's associations (art. 508.c of the Labour Code).*
[73] *A national organization of employer's associations (art. 508.d of the Labour Code).*
[74] *These data can be consulted in* CONCEIÇÃO SANTOS CERDEIRA*,* op. cit., *p. 149.*

Employers´organisations

- **CIP** (*Confederação da Indústria Portuguesa* – Confederation of Portuguese Industry) was set up in 1974. It is an umbrella organisation for two federations, 42 general and regional employers' associations and about 27 enterprises (affiliated or cooperating ones)[75]. It is a member of BusinessEurope (Confederation of European Business).

There are also two industry associations which chiefly represent the interests of enterprises:

- **AEP** *(Associação Empresarial de Portugal*[76]— Portuguese Business Association*)* in the north

- **AIP** *(Associação Indústrial Portuguesa* — Portuguese Industrial Association) based in Lisbon.

In addition,

- **CCP** (*Confederação do Comércio e Serviços de Portugal* - Portuguese Confederation of Commerce and Services), was set up in 1976 and is affiliated to EUROCOMMERCE. It represents about 80% of basic employers' associations in the retail trade and about 50% in the wholesale trade. Since 1995, its by-laws allow not only the direct affiliation of associations but also, in some cases, of enterprises.

- **CAP** (*Confederação dos Agricultores de Portugal* — Confederation of the Portuguese Agricultures) tends to represent large landowners.

- **CNA** (*Confederação Nacional da Agricultura* — National Confederation of Agriculture) tends to represent small and medium-sized agricultural concerns.

- **CTP** (*Confederação do Turismo Português* — Confederation of the National Tourism).

- **CPMPME** (*Confederação Portuguesa das Micro, Pequenas e Médias Empresas* — Portuguese Confederation of the SME)

- **CORPA** (*Confederação das Organizações Representativas da Pesca Artesanal* — Confederation of the Representative Organisations of Artisan Fishing).

3. Joint bodies

According to art. 56.2(d) of the Constitution, union associations have the right to participate in organisations aimed to social conciliation. This organisation is the **Economic and Social Council** (art. 92.1 of the Constitution), a consultation body regarding economic and social policies.

The **Standing Committee for Social Conciliation (Comissão Permanente de Concertação Social), which is a tripartite body** is of particularly importance in relation to labour issues.. **A series of tripartite agreements were negotiated and signed in the Standing Committee for Social Conciliation Council** from 1986 onwards, although they are not mandatory. CGTP did not sign these agreements until 1997, except for those on safety and vocational training. However, these tripartite or bilateral agreements did not reflect meaningfully in the content of the subsequent collective bargaining[77].

Other relevant types of agreements were made by the entities of the Standing Committee for Social Conciliation which has been very active during the last two years.

4. Collective bargaining

Collective bargaining is governed by arts. 531 to 563 of the Labour Code. The labour laws can be set aside by collective agreements, except when stated otherwise (art. 4 of the Labour Code).

There are three types of **collective agreements** (art. 2 of the Labour Code):

- Collective Contracts *(contratos colectivos)* — agreements entered into between union associations and employers associations;

[75] *According to its figures presented in May 2006.*
[76] *Former* Associação Industrial Portuense.
[77] *Cf.* Livro Verde…, cit., *pp. 180-181.*

- Collective Labour Agreements *(acordos colectivos)* — agreements entered into between union associations and multiple employers for different undertakings;

- Employer's Agreements (*acordos de empresa*) — agreements signed by union associations and an employer for one undertaking or establishment.

The **unions** are the only employees' representatives that are entitled to enter into collective labour agreements (art. 56.3 and 4 of the Constitution and art. 477.a of the Labour Code), including confederations.

The collective agreements are only binding to the employers who sign them and to those registered in the signatory employer's association, as well as to the employees in their service who are members of the signatory unions. There are no rules on the representativeness of trade unions and employers' associations, consequently agreements do not have an *erga omnes* effect and apply only to the contracting parties. All unions, all employers' associations and also the employers themselves, can sign collective agreements regardless of their representativity.

The negotiation process begins with the presentation of a draft proposal by one of the parties to the other to enter into a collective agreement. The entity receiving such proposal shall reply in writing within 30 days[78]. A lack of response means the proponent can request conciliation (art. 545 of the Labour Code) and constitutes a serious infringement (art. 686 of the Labour Code).

The scope of collective agreements may be enlarged, completely or partially, through an **extended regulation** issued by the minister responsible for labour issues (art. 575 of the Labour Code), when the economic and social circumstances justify it, in relation to:

- employers of the same sector of activity and employees of the same or similar profession, as long as they perform their activity in the geographic area and within the professional and sectoral scope determined in the agreement;

- employers and employees of the same sector and profession, as long as they perform their activity in a geographic area different from that in which such agreements apply, and there are no unions or employer' associations and the identity of the social and economic circumstances is verified.

Undeniably, collective agreement coverage of employees is chiefly ensured by extension procedures.

Main features

Formal collective bargaining is very centralised. Sector level bargaining (collective contracts) is indisputably predominant[79] and represents about 86% of the employees covered by collective regulation instruments[80]. Only about one-fifth (18.1%) were employer's agreements and collective labour agreements, which represented merely 9% of the employees covered. Employer's agreements are important especially in the transport, storage, communications and fishing sectors. Collective labour agreements can be found essentially in the financial sector, as well as in electricity, water and gas companies[81]. The sectoral distribution of collective agreements is not homogeneous, because in some sectors there are high numbers of employees who are not covered by them.

An analysis of the evolution of collective regulation instruments shows that those with a contractual source have been increasing and state intervention, through extension and minimum conditions' regulations, has been decreasing.

[78] *Unless there has been another agreed deadline or a longer deadline indicated by the proponent.*
[79] *It constitutes 44.5% of the collective regulation instruments.*
[80] *Including employees covered by extension procedures applied to such collective contracts.*
[81] Livro Verde…, cit., *p. 85.*

The number of employees covered by collective regulation instruments was, in 2006, 1,511,669[82]. The signatories of more than 80 % of collective agreements are CGTP and UGT affiliated unions and in almost equal shares, with some advantage to CGTP[83].

Traditionally, the content of collective bargaining largely involves pay[84]. In recent years, the parties have stated to pay more attention to other issues[85]. In many cases, the rules of collective agreements are to the same as the legal ones in existence when they were signed, and even when the law has been changed in a mandatory manner they remain the same.

Practical arrangements may not always conform to the legal or conventional rules, especially regarding working time and contract qualification.

5. Collective disputes

Dispute settlement methods include conciliation (arts. 583-585 of the Labour Code), mediation (arts. 587-589 of the Labour Code) and arbitration (arts. 590, 564-572 of the Labour Code).

Conciliation is the most frequently used method, particularly in collective agreement bargaining procedures and collective redundancies. Conciliation is provided, when requested, by a service supervised by the ministry responsible for labour issues, advised, whenever necessary, by the relevant services of the ministry responsible for the sector of activity.

Voluntary arbitration is uncommon. **Compulsory arbitration**, for which there has been formal provision since 1992, has not been applied. However, this situation will probably change in the near future. The presence of social judges in labour courts, for which there has been provision since 1976 in the Constitution (art. 207.2) and Decree Law 156/78, of June 30th, reinforced through arts. 67 and 88 of Act 3/99, of January 31st, has never taken place.

Strikes

A real evaluation of Portuguese labour conflicts is not easy, but the level appears to be low. The number of strikes has been decreasing over the last decade, except in the public sector, although this is not true with regard to the number of employees involved or the number of days of work lost, which increased significantly in 2002 as a consequence of the reform of labour and social security laws. The manufacturing sector was the most affected (49.7% of the total number of strikes and 53.7% of the total days not worked).

The main reasons are related to traditional subjects, such as salaries and working time conditions, although collective bargaining, employment, and health and safety at work are also relevant[86].

The immediate result regarding claims acceptance seems also to be low. However, the data available were determined through employer evaluations made soon after the end of the conflict[87].

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[82] *Source: DGERT (Direcção Geral do Emprego e das Condições de Trabalho).*
[83] *Livro Verde…, cit., p. 90. Source: MTSS/DGERT.*
[84] *Conceição Santos Cerdeira, op. cit., pp. 173 and 180.*
[85] *The analysis published in Livro verde…, cit., pp. 99-134, felt upon 65 collective agreements from all sectors of activity, selected according to type variety criteria (collective contracts, collective labour agreements and employer's agreements), numbers of workers of the undertaking or activity sector and variety of signatories unions. All of them were still in force in 2005, but many entered into force years before.*
[86] Livro Verde…, cit., *p. 173; CONCEIÇÃO SANTOS CERDEIRA,* op. cit., *pp. 140-147.*
[87] Livro Verde…, cit., *p. 173.*

IV. EMPLOYEE REPRESENTATION IN THE WORKPLACE

1. General issues

The Constitution[88] and Portuguese labour legislation[89] provide for a dual system of representation of employees in the undertaking with different origins and legitimacy:

- **trade union representatives** elected by the unionised workers of the undertaking; and
- **the workers' committee**, which is independent from the unions, representing all the workers of the undertaking (unionised and non-unionised).

The trade union representatives in the undertaking stand for the respective union association, connecting employees (especially those who are unionised) to their union and representing them, as well as the union, in negotiations with the undertaking's management. The workers' committee represents all employees.

Theoretically, the trade union representatives mostly control observance of the legal and conventional regulations in the enterprise and establish the connection between the union and their associates. Conversely, the workers' committees have the right to "scrutinise the undertaking's management", and it intends to defend the interests of all the undertaking's employees. However, in practice, these roles are often mixed and there are some overlapping prerogatives[90]. There is empirical evidence that union representation is more widespread than workers' committees. In addition the union representation usually dominates the workers' committee.

The unions associations are the only employees' representatives entitled to enter into collective labour agreements.

In practice, only a small percentage of undertakings have employee representation structures. According to 2000 data, only 22.7% of undertakings have employee representative structures and only 14.7% have workers' committees or unions committees[91]. This is partly a consequence of the large number of micro and small undertakings.

The application of the provisions on workers' committees has been patchy since the 1980s. Trade union representation is, in practice, the most relevant channel of employee representation. At 31.12.2005, there were only 192 workers' committees, 15 subcommittees and 6 co-ordination committees[92]. Today workers' committees are to be found only in public sector enterprises, large enterprises, the stock exchange and banking.

The reasons for this lie chiefly in political and social history. At the time of the 1974 revolution there was a spontaneous boom in workers' committees in enterprises. These committees were set up as a counterweight to the political power of the CGTP (Intersindical at that time) and lost some of their attraction, therefore, when the UGT was set up in 1978, despite their recognition in the Constitution[93]. Now, employers show some reluctance towards employee involvement, and there is a lack of employee initiative on these issues because of lack of information and fear of retaliation. Lastly, competition between the workers' committees and the unions contribute to minimising the role of the first[94].

It is possible and normal in practice to have both union representatives and a workers' committee in a workplace where some employees are union members and others are not, although it is not legally required.

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[88] *Arts. 54 to 57.*
[89] *The Labour Code was approved by Act 99/2003, of August 27th and regulated by Act 35/2004, of July 29th.*
[90] *ANTÓNIO MONTEIRO FERNANDES,* Direito do trabalho, *13.ª ed., Almedina, Coimbra, 2006, p. 712; BERNARDO LOBO XAVIER,* Curso de direito do trabalho, *vol. I, 3.ª ed., Verbo, Lisboa, 2004, p. 377.*
[91] *Cf. MARIA DA PAZ CAMPOS LIMA, «A negociação colectiva sectorial» in* Trabalho e Relações Laborais, *DEPP/MTS, Celta, Oeiras, 2001, p. 244.*
[92] *Cf.* Livro Verde sobre as relações laborais*,* cit., *p. 70. Source: DGERT.*
[93] *ANTÓNIO MONTEIRO FERNANDES,* op. cit., *pp. 714-716.*
[94] *P. ROMANO MARTINEZ,* Direito do trabalho, cit., *pp. 1028-1029.*

2. Trade Union representation

The Constitution (art. 55) and the Labour Code (arts. 496 to 504) enshrine the right of trade union action in enterprises via:

- union deputies ("delegados sindicais");
- union committees (organisations of union deputies of the same union in an undertaking or establishment); and
- multi-union committees[95] (organisations of representatives of union committees of employees of a confederation, as long as they cover at least five union representatives, or of all union committees of the undertaking or establishment)[96].

The union representation is not unitary, but plural. Consequently, it is theoretically possible to have in the same undertaking more than one multi-union committee.

All enterprises are covered by the right of trade union activity, and there are no statutory thresholds.

3. Composition and working

The undertaking's union branch or section is the group of employees of an undertaking or establishment that are members of the same union. The union deputies are elected and removed by the undertaking's unionised employees forming an undertaking's union branch or section, in the terms of the by-laws of the respective unions, by direct and secret ballot. Afterwards, the management of the union notifies the employer, in writing, of the identity of the union representatives[97]. However, in practice, the union deputy is often appointed by the union itself.

Union committees may be created in undertakings that have various establishments or when justified by the number of representatives elected.

Multi-union committees may be created whenever there are representatives from more than one union in the undertaking.

The maximum number of union representatives is determined according to the unionised number of employees in the undertaking (art. 500 of the Labour Code):

- less than 50 unionised workers: one member,
- 50 to 99 unionised workers: two members,
- 100 to 199 unionised workers: three members,
- 200 to 499 unionised workers: six members,
- 500 or more unionised workers: the number of members is the result of the formula 6 + (*n* - 500):200, where *n* = number of employees[98].
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The term of office is set in the trade union's statutes.

The unions and the employer's associations have the active legitimacy to act in court in relation to claims affecting the collective interest they represent. In some cases, they can also act in court to represent an employee with his consent (art. 5 of the Labour Procedure Code — *Código de Processo do Trabalho*[99]).

With regard to the protection of health, safety and hygiene at work, art. 44.1 of the Labour Procedure Code allows worker's representatives, including unions, to file a preliminary injunction requesting the necessary measures to prevent or avoid the risk.

In procedures initiated for the imposition of the fines set out in the Labour Code, the union representing employees in relation to whom an infringement has been committed may intervene (art. 640 of the Labour Code).

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[95] *"Comissões Inter-sindicais".*
[96] *Art. 476 of the Labour Code.*
[97] *Arts. 498-499 of the Labour Code.*
[98] *The result is always rounded-up to the nearest whole number.*
[99] *Decree-Law 480/99, of November 9th.*

In relation to an administrative procedure, art. 53 of the Administrative Procedure Code (*Código de Procedimento Administrativo*[100]*)* states that the unions do not have the necessary legitimacy to initiate it or to intervene in it. However, this provision was considered unconstitutional[101]

Neither of these legitimacy aspects is applicable to union deputies, union committees or multi-union committees, but only to the union itself, because they do not have legal personality or capacity.

Union representatives are entitled to convening workers' meetings at the workplace. Only the union committees or multi-union committees can call mass meetings of personnel at the workplace during working hours observed by the majority of the workers (counted as actual working time) up to a maximum limit of 15 hours per year, as long as they guarantee the operation of services of an urgent and essential nature. They may also call mass meetings **outside working hours** of the majority of the workers, without detriment to the normal operation of shifts or overtime work. However, the workers can have these meetings at the workplace without their representatives' intervention, when convened by one-third or 50 of the workers of the respective establishment. External trade union officers may attend these meetings.

4. ***Means***

The general rule of art. 452 of the Labour Code establishes that the employer cannot finance the operation of the employees' collective representation structures.

Premises must be made permanently available for union representatives in undertakings or establishments with over 150 employees, when requested (art. 501 of the Labour Code). In small undertakings or establishments, the employer must make available for union deputies (delegados sindicais), when requested, an appropriate space for their activity.

Employees' representatives are entitled to distribute information concerning the employees' interests, as well as displaying such information in an appropriate space assigned for such purpose.

Every workplace union representative is entitled to paid time-off rights to perform the duties that have been assigned to them. Each union deputy has at least five hours per month and this figure is increased to eight hours per month for representatives who are members of a multi-union committee.

Absences which exceed time-off rights as a result of necessary and undelayable acts associated to their duties are considered justified and taken into account but are not paid. Portuguese labour law does not provide for paid release for trade union training.

The Labour Code only refers to the possibility of **external assistance** from one expert during **collective redundancies** procedure. However, nothing is said about the expert financing. The assistance by experts financed by the undertaking is admitted when related to the establishment of an European Works Council or when regarding the involvement of employees in an European Company. In both cases, Portugal has chosen to limit the funding to cover one expert only.

Role and rignts

The unions associations are the only employees' representatives that are entitled to enter into **collective agreements** (art. 477.a of the Labour Code), which is based in the Constitution (art. 56.3 and 4).

Information and consultation

The 1997 constitutional reform extended the right of information and consultation to union representatives (art. 55.6).

The Labour Code has introduced for the first time in Portuguese labour legislation a specific provision on **information and consultation rights** of union representatives at the undertaking or establishment. Art. 503.2 of the Labour Code is an almost literal reproduction of art. 4.2 of the Directive 2002/14/EC. It establishes that information and consultation covers:

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[100] *Decree-Law 442/1991, of November 15th.*
[101] *Decision of the Constitutional Court 118/97, of February 19th.*

- information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;
- information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, namely where there is a threat to employment;
- information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations.

The union representatives should request this information, in writing, and it should be given, also in writing, within 10 days, unless due to its complexity, a longer period of upto 30 days is justified.

The information and consulting procedures are conducted by both parties s to achieve an agreement for all decisions of the employer concerning his direction and organisation powers.

Nonetheless, the practical arrangements for information and consultation do not apply to undertakings with less than 51 employees, nor to establishments with less than 20 employees[102]. This means that in practice these information and consultation procedures will not take place in approximately 97% of Portuguese's undertakings.

The unions have the right to **participate in undertaking restructuring processes**, although in apparently more limited terms when compared with the workers' committees since this right embraces, in particular, training programs and working conditions' modifications.

The union representatives should also receive adequate information concerning **part-time work** in the company (art. 187.2.b LC).

In some situations, the union representatives should be informed only if the employee is a member of the union:

- contracting (indicating the underlying legal reason) or termination of fixed-term work,
- reduction or exclusion of rest periods,
- individual dismissal.

Lastly, various prerogatives of the workers' committees pass, in their absence, to the trade union representatives, in particular:

- information and consultation procedures in cases of collective redundancy,
- information and consultation procedures in cases of lay-off for unsuitability,
- consultation prior to the definition, organisation and modifications of work schedules,
- the employment audit ,
- temporary reduction of the normal work period or suspension of the labour contract.

During bargaining, each of the parties should allow the other to access information and data on request to the extend that this does not harm their own interests. The employer should provide reports and published accounts of the undertaking, as well as employment data mentioning the number of employees, organised by professional category, involved in the process and within the scope of the agreement to be entered.

[102] *According to article 91 of the Labour Code, the number of employees is calculated on the basis of the average of the previous calendar year. In the year of start-up of a business, this threshold is determined on the particular day when the fact that determines the respective regime occurred.*

Protection granted to the members of workers' representative structures

Portugal legislation provides a set of guarantees to give special protection to all workers' representatives' in order to enable them to perform their duties.

The Labour Code (art. 453) starts with a **general principle of non-discrimination**. It prohibits and considers null and void any agreement or employer's act (*e.g.* lay-off, transfer) that harm in any way the employee due to the exercising of rights regarding participation in collective representation structures, or being member of a union.

The employees elected to the collective representation structures **cannot be transferred without their consent**, except when such transferral is a result of the total or partial moving of the establishment. When that occurs, prior notification should be given to the committee of which they are members.

Protection is also provided in cases of **disciplinary proceedings and dismissal** in several ways:

- If the employee elected to the collective representation structure is suspended from work, he is not barred from performing his duties. The same applies when there is a reduction in the normal work period or suspension of the labour contract.

- A disciplinary sanction is unfair when it is due to the fact the employee exercised their representation functions or was a candidate for the worker's representation body and compensation is payable.

- The dismissal of an employee who is a candidate to a body of a union association, as well as that of an employee who performs or has performed duties in such a body, within three years, is presumed to be without just cause.

- After a dismissal, if a preliminary injunction to suspend it has been filed, the court will only rule unfavourably if there is a serious possibility that there is just cause.

- If the court concludes that there was no just cause, the dismissed employee has the right to choose between reinstatement in the company or compensation.

5. Workers' Committees

The Constitution (art. 54) and the Labour Code (arts. 461 to 470 LC) enshrine the right of workers to set up workers' committees (*comissões de trabalhadores*) "for the defence of their interests and democratic action in enterprises".

Employees have the right to create in each undertaking, including the public sector, and independently of the number of employees, a workers' committee (art. 461 LC). The number of employees of the undertakings or establishments is relevant only to determinate the number of members of the workers' committees and sub-committees (arts. 464-465 of the Labour Code).

Employees can create workers' sub-committees in undertakings with geographically disperse establishments.

It is also possible to create co-ordination committees to improve intervention in economic restructuring or to articulate activities of workers' committees within undertakings in a dominant or group relationship.

Composition

Workers' committees are composed solely of employees' representatives. The number of members of **workers' committees** cannot exceed the following (art. 464 LC):

- in micro and small undertakings[103] — up to two members;

[103] *According to article 91 of the Labour Code,* micro undertaking *is the one that employs a maximum of 10 employees;* small undertaking *is the one that employs more than 10 and up to 50 employees;* medium undertaking *is the one that employs more than 50 and up to 200 employees,* large undertaking *is the one that employs more than 200 employees.*

- in medium sized undertakings — up to three members;
- in large undertakings with 201 to 500 employees — three to five members;
- in large undertakings with 501 to 1000 employees — five to seven members;
- in large undertakings with more than 1000 employees — seven to 11.

The number of members of **workers' sub-committees** cannot exceed the following (art. 465 of the Labour Code):

- in establishments with 50 to 200 employees — three members;
- in establishments with more than 200 employees — five members;
- in establishments with less than 50 employees — one member.

Capacity for representation

The workers' committee represents all the employees of the undertaking, including all types of contract relationships. Only contract and temporary agency workers are not represented by the workers' committee of the company where they temporarily work, but rather by the workers' committee (when existing) of their employer's undertaking or of the agency.

The workers' sub-committees represent all employees of the establishment in the same terms.

The workers' committees acquire legal personality by registration of their by-laws with the ministry responsible for labour issues. Their legal capacity includes all rights and duties necessary or convenient for the pursuit of the objectives established by law (art. 462 of the Labour Code). Consequently, the Civil Procedure Code[104] (art. 5.2) recognises them, in general, as having legitimacy to act in court. This is confirmed by art. 85.r of Act 3/99, of January 13th, that refers explicitly to the workers' committees, regarding their relationship with the co-ordination committees, the undertaking or its employees.

When the protection of health, safety and hygiene at work, is at stake, art. 44.1 of the Labour Procedure Code (*Código de Processo do Trabalho)*[105] allows worker's representatives, including workers' committees, to file a preliminary injunction requesting the necessary measures to prevent or avoid risks.

In relation to an administrative procedure, legal literature has considered that workers' committees have legitimacy to initiate and intervene in an administrative procedure, according to art. 53 of the Administrative Procedure Code (*Código de Procedimento Administrativo)*[106].

Election of members

The members of the workers' committee are elected by the employees of the undertaking (or of the establishment in the case of workers' sub-committees) in direct and secret ballot and following the principle of proportional representation (arts. 340-342 of Act 35/2004).

Lists must be drawn up by groups of workers obtaining, at least, 20% (or 100) signatures. In the case of elections to the workers' sub-committees, only 10% of signatures are necessary. The workers cannot sign or be candidates for more than one list.

All the employees of the undertaking (or of the establishment in the case of workers' sub-committees) are entitled to vote and can be elected, regardless of the type of employment contract relationship, age or position. In practise these rights are exercised mostly by permanent employees.

The elections must be convened with ample publicity, indicating the time, place, schedule and subject, with at least 15 days prior notice. The undertaking's management body must be informed.

The electoral committee must publish the election results within 15 days and inform the undertaking's management body.

The election results and the by-laws of the workers' committee have to be published in *Boletim do Trabalho e Emprego.* Only after that, the workers' committee is able to start its activity.

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[104] *Approved by Decree-Law 44 129/1961, of December 28th.*
[105] *Decree-Law 480/99, of November 9th.*
[106] *See* LUÍS GONÇALVES DA SILVA, *«Sujeitos colectivos», in* Estudos do Instituto de Direito do Trabalho, *vol. III, Almedina, Coimbra, 2002, pp. 359-361.*

The term of office may not exceed **four years**, but re-election is allowed (art. 343 of Act 35/2004).

Working of the body and decision-making

The workers' committees are governed by the **by-laws** they have approved (art. 329 of Act 35/2004). The by-laws shall govern: the rules concerning the electoral committee and the workers' committee that are not legally regulated (members' substitutions); the operating methods of the workers' committee, including decision-making issues when they result in a draw; the binding rules, which shall demand the signature of the majority of members with a minimum of two; financing issues; and the by-laws modification procedure.

An obligation to inform employees regularly is not specified and there are limits regarding informing employees when the information disclosed to the workers' committee is confidential (art. 458 LC).

The workers' committees are entitled to convening **mass meetings** of employees at the workplace **outside working hours** of the majority of the workers, without detriment to the normal operation in the case of shifts or overtime work (art. 468.1 LC).

They may call mass meetings of personnel at the workplace **during working hours** of the majority of the workers up to a maximum limit of 15 hours per year, as long as they guarantee the operation of services of an urgent and essential nature.

Means

The general rule of art. 452 of the Labour Code establishes that employers cannot finance the operation of the employees' collective representation structures.. This provision is reinforced by art. 329.1.f) of Act 35/2004, which refers fully to workers' committees, forbidding financing from other entities than the undertaking's workers.

The undertaking's management shall make available to the workers' committees or sub-committees adequate **premises,** as well as the **material and technical resources** necessary to pursue their activity (art. 469.1 LC).

The workers' committees or sub-committees are entitled to **distribute information** concerning the employees' interests, and **display such information** in an appropriate space assigned for such purpose.

Every workers' committee, sub-committee or co-ordination committee is entitled to **paid time-off** to perform properly their duties (arts. 454 and 467 of the Labour Code).

The workers' committees and the co-ordination committees have rights of 25 hours monthly. The sub-committees benefit from eight hours per month. A new regime was established with regard to micro-undertakings allowing the reduction to half of these time-off rights.

In undertakings with more than 1000 employees, the workers' committee can choose an overall amount determined according to a formula (credit of hours=number of members of the workers' committees x 25 hours monthly). This option must be approved by unanimity as well as the terms of distribution of the time-off rights among the various members and no more than 40 hours monthly can be given to any one of them.

In state-owned undertakings with more then 1000 employees, the workers' committees can use one of its members for half his normal work period as long as unanimity rule is observed[107].

The **absence** of the members of the general body of representation that exceed the time-off rights and that are given to the performance of their duties are considered justified and taken into account as effective time service, but are not paid.

There is no provision for specific training for representatives.

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[107] *In this case, there is no option to choose for an overall amount determined according to the formula mentioned in the text.*

As regards the external assistance from experts, financed by the undertaking, this is same as for union representatives.

Role and rights

Portuguese workers' committees have prerogatives ranging from information to participation, including consultation, "scrutiny of management" and the management of company welfare schemes. Nevertheless, the divergence between these legal prerogatives and actual practice should be borne in mind.

Information

The workers' committees have the right to receive **information** necessary to perform their functions. This provision is set out in art. 356 of Act 35/2004 which defines the subjects of the information right, covering economic and financial matters: general plans of activity and budget, production organisation and its implications for the level of use of the workforce and plant, supply position, forecasts of the volume and administration of sales, employee management and its fundamental criterion, undertakings' accounting position, financing methods, tax and tax-related charges, plans to modify business objectives or company capital and plans to redeploy the enterprise's production activity.

The members of the workers' committee should request, in writing, the information that should be given, in writing, within eight days (for complex information it can be up to 15 days (art. 358 of Act 35/2004).

Other **additional information rights** are set out, such as:

- information regarding part-time work in the company;
- contracting (indicating the underlying legal reason) or termination of fixed-term work;
- overtime hours records;
- reduction or exclusion of the rest periods;
- individual dismissal;
- information regarding the use of temporary workers.

Consultation

The workers' committees have a right of **consultation** and its written opinion (not binding) is mandatory before decisions are taken in respect of:

- regulation of remote surveillance methods at the workplace;
- handling biometrical information;
- internal regulations approval;
- changing the basic criteria for occupational grading and promotion;
- definition or modification of work schedules applicable to all or to the majority of employees;
- reduction or exclusion of rest periods;
- preparation of the annual leave plan;
- changing the workplace as a result of moving of undertaking or establishment;
- all measures that substantially reduce the number of employees, that substantially affect their working conditions or are likely to lead to substantial changes in work organisation or in labour contracts;
- the closure of the establishment or production lines; and
- dissolution or insolvency.

The workers' committee must give its opinion within 10 days after receiving the written request from the employer or the information demanded or meeting with the employer. This period is reduced to five days when the issue is the approval of internal regulations.

Other prerogatives of the workers' committees are:

- information and consultation procedures in cases of collective redundancy;
- information and consultation rights in the event of transfer of the undertaking or establishment explained below;
- information and consultation procedures in cases of lay-off for unsuitability;
- information and consultation procedures in cases of temporary reduction of the normal work period or suspension of the labour contract due to a fact concerning the employer;

- annual and multi-annual training plans performed by the employer;
- the employment audit;

The workers' committee has the right to **participate in undertaking restructuring processes** (art. 54.5.c of the Constitution and arts. 363-364 of Act 35/2004).

The co-ordination committee also has the right to participate in undertaking restructuring processes when they concern undertakings of the sector to which belong the majority of the workers' committees it coordinates.

Both committees have a right to be consulted and to issue a prior opinion. Secondly, they shall be informed on the evolution of subsequent action and on the final restructuring project, which cannot be approved without their prior opinion. Thirdly, they have the right to meet the company's body responsible for the restructuring project. Finally, they can give suggestions, criticise or make a claim to the undertaking's management or to other authorised entity.

The workers' committee or the co-ordination committee shall give their opinion within 10 days after receiving the written request from the employer.

Scrutiny of management ("controlo de gestão")

The workers' committees have a right to "scrutiny of management" (with exceptions in respect of activities connected with public or military services), which allows them to control the undertaking's management in same way (arts. 359-362 of Act 35/2004):

- evaluate and issue an opinion on the undertaking's budget and keep up with its execution;
- promote the suitable use of technical, human and financial resources;
- promote measures contributing to the improvement of the undertaking's activity;
- present recommendations for, or criticisms of, apprenticeships, continuous professional training of workers, improvements to the working environment and health and safety conditions; and
- defend the legitimate interests of employees before management and supervisory bodies of the enterprise and the competent authorities.

Relations with undertaking management

The Workers' Committee has also the right to regularly meet management to discuss and analyse subjects connected with their rights. These meetings must take place at least once a month (art. 355 of Act 35/2004). The same is applicable to sub-committees in relation to the directors of the respective establishments.

Protection granted

Members of workers' committees, sub-committees and co-ordination committees have the same **protection** as workplace union representatives in the terms described above.

Other forms of representation in the same indertaking

Employees can create **workers' sub-committees** in undertakings with geographically disperse establishments. The by-laws of the workers' committee regulate how this workers' committees and workers' sub-committees work together. The workers' committee can delegate some of its prerogatives to the workers' sub-committee. The workers' sub-committee should inform the workers' committee on the affairs considered relevant to the development of its activity and should establish communication between the employees of the establishments and the workers' committee .

The workers' committees can create **co-ordination committees** to improve intervention in an economic restructuring or to coordinate activities of workers' committees within undertakings in a dominant or group relationship (art. 461 of the Labour Code) and will approve their by-laws. However10% (or 100) of the employees of the undertaking can decide on the participation of the respective workers' committee on the institution of a co-ordination committee. The by-laws of the workers' committee shall regulate coordination between this entity and the co-ordination committee.

The members of the European Works Council shall inform the employees' representatives of the establishments or undertakings of the group about the information received from the undertaking's management and the results of consultation.

Codetermination rights

In the public sector, the workers' committees can elect employees' representatives to corporate bodies (art. 362 of Act 35/2004). However, the number of employees that can be elected and the determination of the specific corporate body they will be appointed to is set by the by-laws of the public corporate entity.

The workers' committee shall be entitled to manage or take part in the management of the enterprise's welfare schemes.

Other bodies of representation

There are other employees' representative structures:

- the **European Works Councils** for undertakings or groups of undertakings with community dimension (arts. 451, 471-474 of the Labour Code and arts. 380-383 of Act 35/2004),
- the **employees' representatives for health, safety and hygiene** at work which have information and consultation rights restricted to these subjects (arts. 272.3.d and 275 of the Labour Code and 186, 239.d, 253-254 of Act 35/2004),
- the Workers' Council in the **European Companies** (Decree-Law 215/2005, of December 13th).

However, until the end of 2005, employees' representatives for health, safety and hygiene at work had been elected in only 185 undertakings. No more than 12 members of European Works Councils have been elected in undertakings or establishments belonging to an undertaking or to a group with European scale, and these do not have headquarters in Portugal. One procedure for information and consultation of workers was established in a group of undertakings which has its headquarters in Portugal[108]

IV. EMPLOYEES PARTICIPATION IN THE CORPORATE SUPERVISORY BOARD

Employee participation in corporate bodies is only recognised in the **public business sector** (arts. 54.5.f and 89 of the Constitution).

According to art. 362 of Act 35/2004, workers' committees can elect employees' representatives to the corporate bodies of public companies. However, the number of employees that can be elected and the determination of the specific corporate body they will incorporate are set by the by-laws/statutes of the public corporate entity, which are defined by decree-law.

The development of the general rules regarding employees' participation on the governing bodies of public companies could be found in Decree-Law 29/84, of January 20th, which changed some of the provisions of Decree-Law 260/76, of April 8th, on public companies. Nevertheless, it was revoked by Decree-Law 558/1999, of December 17th, which abolished the stipulations regarding employee participation in the corporate board of public companies. Consequently, there has been no further legislation on this subject, making its practical application almost impossible.

Although this participation right has been set out in theory since 1979, it has almost never been applied. The privatisation of the vast majority of public enterprises since 1989 has drastically reduced the group of

[108] Livro verde…, cit., *p. 70.*

companies where this right of participation, in theory, could have some impact. The legislation on public companies from 1999 has practically obliterated this right since it has eliminated the specific regulation.

The legal protection is the same as that applicable to all employees' representatives.

In addition, the treatment of confidential information and the responsibility of representatives are regulated by the provisions applicable to all employees' representative structures (arts. 458-460 of the Labour Code)[109].

Representation of employees in the board of European Companies

Portugal transposed **Directive 2001/86/EC** through Decree-Law 215/2005, of December 13th. The compulsory transposition period established by the Directive (art. 14) – 8 October 2004 – was not respected, because Decree-Law 215/2005 entered was only enacted on the 18 December 2005.

With regard to the situation prior to transposition, no changes have been noticed in practice because sufficient time has not elapsed since the end of implementation in 2005, and no SE has been registered in Portugal. Nevertheless, there is one difference on the theoretical legislative level. Before the Directive's implementation, Portuguese law admitted workers' participation at the level of governing boards only in public companies. Consequently, after the transposition, Portuguese legislation has, for the first time, a participation regime in private companies, which may introduce a new element into Portuguese industrial relations.

If the parties decide to establish arrangements for employees' participation by **agreement,** they should mention the substance of those arrangements, namely the number of members in the SE's management or supervisory body who the employees or their representatives will be entitled to elect, appoint, recommend or oppose, and the necessary procedures (art. 18 of Decree-Law 215/2005)[110].

In the case of an SE established by means of transformation, the agreement shall provide for at least the same level of participation as the one existing within the company to be transformed into an SE (art. 16.2 of Decree-Law 215/2005)[111].

When standard rules are applicable, employees' participation in an SE is governed by arts. 29 to 32 of Decree-Law 215/2005 which implement annex part 3 of the Directive.

V. INVOLVEMENT AND EMPLOYEES´ PARTICIPATION IN DECISIONS THAT AFFECT THEM IN THE UNDERTAKING

Procedures to prevent difficulties

Workers' committees have a right of consultation and it is compulsory for them to issue an opinion prior to decisions being taken, within 10 days after receiving the written request from the employer, in respect of (art. 357 of Act 35/2004):

- all measures that reduce substantially the number of employees, that substantially affect their working conditions or that are likely to lead to substantial changes in work organisation or in labour contracts;

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[109] Concerning the responsibility due to the abusive exercise of rights by the members of the workers' committees, sub-committees and co-ordination committees, see also art. 470 of the Labour Code.

[110] They should also mention when the agreement shall be renegotiated, namely if the number of employees has changed, modifying the number or distribution of the management or supervisory bodies of the SE which the employees or their representatives will be entitled to elect, appoint, recommend or oppose (art. 16.1.d of Decree-Law 215/2005).

[111] As we can see, by comparing the text of article 16.2 of Decree-Law 215/2005 with article 4.4 of the Directive, the scope of the first one is more restrict than the last, since it should apply to all elements of employees' involvement and not only to participation.

– the closure of the establishment or production lines.

They also have a right of "scrutiny of management" in order to defend the interests of workers before the management and supervisory bodies of the enterprise and the competent authorities and a right to intervene in the reorganisation of undertakings (arts. 360, 363-364 of Act 35/2004).

Workers' committees, or failing them, workplace union representatives, must also be informed and consulted in cases:

– of collective redundancy (art. 419 of the Labour Code);

– of temporary reduction of the normal work period or suspension of the labour contract due to facts concerning the employer, namely when market, structural, technological, catastrophes or other occurrences seriously affect the normal operation of the undertaking (arts. 335-338 of the Labour Code). These measures can also apply following the undertaking being declared in financial difficulties or, with the necessary modifications, in a recovery process (art. 349 of the Labour Code).

Insolvency procedures

Workers' committees have a right of consultation and it is compulsory for them to issue an opinion prior to decisions being taken, within 10 days after receiving the written request from the employer, in respect of the dissolution of the enterprise or an insolvency-ruling petition or the closure of the establishment (art. 357 of Act 35/2004).

They also have a right of "scrutiny of management" in order to defend the interests of workers before the management and supervisory bodies of the enterprise and the competent authorities and a right to intervene in the reorganisation of the undertaking (arts. 360, 363-364, of Act 35/2004).

The Insolvency and Undertakings' Recuperation Code (*Código da Insolvência e da Recuperação de Empresas)*[112] allows the workers' committee to intervene in the insolvency procedure:

– art. 37.7 establishes the obligation to communicate the insolvency declaration to the worker's committee;

– art. 66.3 states that one of the members of the creditors commission must represent the employees and is designated by the worker's committee or, in its absence, by the employees themselves;

– art. 72.6 states that the employees have the right to be represented in the creditors assembly by three members belonging to the worker's committee or, in its absence, designated by the employees;

– art. 75.3 gives the worker's committee the right to be notified of the time and place of the creditors assembly meeting;

– art. 156.1 gives the worker's committee a consultation right regarding both the accounting report and the insolvency plan.

However, legal literature criticises the exclusion of the unions' representatives during this procedure, resulting in inefficiency in these provisions, because of the low influence of workers' committees, in practice, within Portuguese industrial relations[113].

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[112] *Approved by Decree-Law 35/2004, of March 18th, and altered by Decree-Law 200/2004, of August 18th.*

[113] *Regarding the situation prior to the actual Code, see the criticisms of legal literature in A. NUNES DE CARVALHO, «Reflexos laborais do Código dos Porcessos Especiais de Recuperação da Empresa e de falência»,* Revista de Direito e Estudos Sociais, *n.ºs 1/2/3, 1995, pp. 79-82 and n.º 4, pp. 342-349; after the entry into force of the new* Código da Insolvência e da Recuperação de Empresas, *see ROSÁRIO PALMA RAMALHO, «Aspectos laborais da insolvência. Notas breves sobre as implicações laborais do regime do Código da Insolvência e da Recuperação de Empresas»,* Questões Laborais, *n.º 26, 2005, p. 150.*

Termination of labour contracts as a result of closing the undertaking after a judicial ruling of bankruptcy shall be preceded by the process set out for cases of collective redundancy (art. 391 by reference to 419 of the Labour Code), with the necessary adjustments, where the workers' committees, or failing them, workplace union representatives, must be informed and consulted.

However, one exception is when the undertaking is considered a micro one (employs a maximum of 10 employees). In this case, the only legal obligation is to inform the employees of the undertaking's closure with 60 days advance notice (art. 390.4 of Labour Code). One of the necessary adjustments concerns the content of the negotiation procedure. The safeguard measures to avoid the collective redundancy or to reduce the number of workers affected, mentioned in art. 420 of the Labour Code, are not applicable to the bankruptcy situation, even when the employer has other establishments besides the one that is being closed.

The guarantee of payment of employee's credits arising from the labour contract, its breach and termination that cannot be paid by the employer due to bankruptcy or financial difficulties shall be assumed by *Fundo de Garantia Salarial* (Salary Guarantee Fund) — art. 380 of the Labour Code. This payment is limited to the credits that became due in the six months prior to the filing of the suit or to the presentation of the conciliation's request and that have been claimed at least three months before its forfeiture (art. 319 of Act 35/2004).

Operations affecting shareholders

Workers' committees have a right to information about plans to modify the business objectives or company capital and plans to redeploy the enterprise's production activity (art. 356.i of Act 35/2004).

In the event of transfer of the undertaking or establishment, art. 320 of the Labour Code determines that both transferor and transferee shall inform the workers' representatives[114] of the date and reasons for the transfer, the legal, economic and social consequences for the employees and the projected measures in relation to them.

This information shall be provided in writing, in good time, before the transfer is carried out and, if such is the case, at least 10 days prior to the consultation.

The consultation with a view to reaching an agreement shall take place when the transferor or the transferee envisages measures in relation to his employees as a result of the transfer.

Nevertheless, the infringement of information rights of the workers' committee when a transfer of undertakings occurs is considered only a minor infringement (art. 675 of the Labour Code) and there is no consequence set out in cases of failure to comply with the consultation procedure. There is no reference in the Portuguese law to the irrelevance of arguments concerning the decision being taken by an undertaking controlling the employer in order to implement art. 7.4 of the Directive.

The collective labour agreement that binds the transferor continues to apply up to its expiry, for at least 12 months, unless replaced by another contractual collective labour regulation instrument (art. 555 of the Labour Code).

[114] *In the absence thereof, they shall inform the employees themselves.*

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