

European Works Councils: fully realising their potential for employee involvement for the benefit of enterprises and their employees

First stage consultation of the Community cross-industry and sectoral social partners on the review of the European Works Councils Directive

1. Introduction

It is not yet ten years since the Directive providing for the establishment of European works councils was adopted; and only eight years since the deadline for its transposition in the Member States and for the conclusion of transnational information and consultation agreements outside its ambit.

However, European works councils have clearly demonstrated their value, not only in meeting the objective of providing access to information and consultation for employees at the relevant level of decision making but, equally significantly, in providing a mechanism through which effective transnational employee involvement can make a significant positive contribution to company development, particularly to the successful management of change.

The challenge now is to ensure that the undoubted potential of European works councils is fully realised in the years ahead. The purpose of this paper is to consult the social partners on how best to achieve this objective.

1.1 Overview

The European works councils Directive was adopted to give employees access to information and consultation at the transnational level at which key decisions affecting their enterprises were increasingly being taken. It was a new departure which posed challenges for both employers and employees. Impressive progress has been made in meeting those challenges, notwithstanding that shortcomings have been identified. The foundation for the development of genuine transnational social dialogue at the enterprise level has been laid.

Since the Commission reported on the implementation of the Directive in April 2000¹ the landscape has changed considerably. The Lisbon Summit has given the Union a new strategy for economic and social renewal; a strategy based on economic dynamism, on embracing change to take advantage of the opportunities and possibilities it presents. How change is managed will be crucial for the success of the strategy. The changed economic situation since 2001 has pushed the issue of change management further to the fore.

These developments underscore the importance of European works councils (EWCs) and of fully realising their potential. Change can be managed most successfully if employees are fully involved in the life of the enterprises in which they work. European works councils have proved their value as a vehicle for ensuring such

¹ See 2.2 below

involvement. Where both sides have shown a willingness to embrace the potential of EWCs there have been cases where management and employee representatives have reached agreement on the general principles of how large scale transnational restructuring should be implemented.

Conversely, it is instances where the information and consultation process has been seen to be absent or ineffective in restructuring situations that have given rise to the greatest concern and anger among employees. Calls for the revision of the Directive have essentially been aimed at ensuring its effectiveness in all situations.

Other significant developments in the period since 2000 include: the advances in Community legislation on employee involvement; valuable input from the Community institutions on the Directive; significant developments in the conduct of social dialogue at European level; and, not least, advances within European works councils themselves. Adapting to the impact of enlargement on EWCs is a challenge that must be faced.

In the light of these new circumstances it is now opportune to formally consult the Community social partners on the Directive, on how best to secure the continued functioning and development of transnational social dialogue at enterprise level.

2. Progress under the Directive

2.1 The legislative and institutional background

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 was adopted by the Council on 22 September 1994². On 15 December 1997 the Council adopted Directive 97/74/EC extending the application of Directive 94/45/EC to the United Kingdom.³

Under Article 15 of the 94 Directive the Commission was required, in consultation with Member States and with management and labour at European level, to review the operation of the Directive with a view to proposing any amendments that might be necessary to the Council. In April 2000 the Commission submitted to the European Parliament and to the Council a Report on the legal and practical application of the Directive⁴.

In September, 2001 the European Parliament adopted a Resolution on the Commission report⁵. The Resolution, while acknowledging the positive impact of the Directive, identified a number of weaknesses and called on the Commission to submit a proposal to revise the Directive to address these. It highlighted, in particular, the challenges posed by industrial restructuring and the positive contribution that employee involvement through the EWC can make in smoothing the adjustment process.

² OJ L 254/64 of 30.9.1994

³ OJ L 10/22 of 16.1.1998

⁴ COM(2000) 188 final

⁵ A5-0282/2001 PE 308.750/28

Most recently, the European Economic and Social Committee (EESC), at the request of the Commission, adopted an exploratory opinion on the Directive⁶ in September 2003. It is primarily meant to be a corpus of information to take stock of the experience acquired following the implementation of the Directive. It is particularly useful in that it draws on a wide range of studies and analyses, from both the employers' and employees' perspectives, in presenting the Committee's view of experience to date.

2.2 The success in developing European works councils

Consideration of future policy regarding EWCs must begin by fully recognising the very significant progress that has already been achieved. As the European Parliament Resolution notes, the impact of the Directive can be seen in the sheer numbers of EWCs established. We now have some 650 companies or groups with European works councils' agreements. It is estimated that these agreements cover some 11 million employees with some 10,000 employee representatives directly involved.

The basis has been laid for the development of a genuine transnational social dialogue at the enterprise level. The EESC opinion outlines the considerable benefits that European works councils have brought: to employees directly and also with beneficial effects for the development of social dialogue at both the transnational and national levels; to companies in terms of their effects on internal decision making processes and the potential to facilitate change management; and also in terms of the contribution European works councils can make to wider European objectives such as those set at Lisbon.

The commitment and effort of those directly involved in achieving this progress should be explicitly acknowledged. The Directive was a completely novel development posing new challenges for both employers and employees. Agreeing the establishment of EWCs and making them operational has required re-focussing perspectives to the transnational level; developing new relationships and learning new ways of working together; becoming familiar with and accommodating different industrial relations practices and traditions; and, not least, it has involved developing communications across different cultures and languages.

This has required considerable effort and resource commitment on the part of both management and employee representatives. The part played by European level trade unions, especially the European sectoral federations should be mentioned in particular. Their involvement has brought a coherence to the practical process of establishing EWCs; a fact acknowledged also by employers and evidenced by the involvement of European level federations as joint signatories in so many agreements.

It should also be mentioned that the Community has, through its funding mechanisms, actively supported the process of securing the successful implementation of the Directive. Reflecting the importance that has been attached to the issue at Community level, a significant amount of funding has been allocated each year to the budget line

⁶ Opinion of the European Economic and Social Committee on the practical application of the European Works Council Directive and on any aspects of the Directive that might need to be revised CESE 1164/2003

which specifically supports transnational co-operation between employee and employer representatives on employee involvement issues⁷.

2.3 Key aspects of the Directive's underlying success

There are also solid grounds for believing that, alongside the energy and commitment of those directly involved and the support from Community funding, the manner in which the Directive itself has been formulated has contributed significantly to its successful implementation. Two aspects in particular are worth highlighting.

Firstly, the Directive provides maximum flexibility to the social partners themselves at enterprise level to agree solutions best suited to their own circumstances. Article 13 of the Directive provided complete flexibility in this regard and its success is evident by the willingness of both trade unions and employers to make use of it; the majority of agreements under the Directive have been concluded on this basis. But within the Directive itself the priority remains focussed on achieving agreed solutions; the subsidiary requirements set out in the Annex come into play only if agreed solutions cannot be arrived at: they have hardly ever been applied in practice.

The success of this principle of giving priority to social partner negotiations, and the fact that it has been replicated as a key feature of subsequent Community instruments on employee involvement, serves to establish it as a cornerstone of the Community approach in this field which should persist in the future operation of the Directive.

Secondly, the Directive does not seek to determine the manner in which employee representatives are selected. This is left to be determined at Member State level in accordance with national law and practice. Thus it has been possible for the Directive to be smoothly integrated into the industrial relations systems of the different Member States. Once again this principle has been preserved in subsequent Community instruments on employee involvement.

The view that the overall approach of the Directive has been broadly correct is supported by the relative lack of recourse to the courts to adjudicate issues. Three cases referred to the European Court of Justice⁸ have involved issues concerning the extent of the obligation on management to provide employee representatives with information necessary for the initiation of the process of establishing a European works council. The judgements of the Court and Opinion of the Advocate General in these cases have held that the obligations on management should be read expansively. There have also been a number of relevant cases at Member State level, most notably concerning breaches of the information and consultation requirements under European works councils' agreements but also concerning the applicable procedures for appointing employee representatives and questions of legal jurisdiction. However it is clear that, particularly having regard to the novelty of the Directive, the number of occasions on which the parties have been obliged to have recourse to the courts has been relatively few.

⁷ Budget Heading 04030303 " Information, consultation and participation

⁸ Cases C-62/99 Bofrost, C-440/00 Kuhne & Nagel and C-349/01 ADS Anker GmbH.

2.4 Issues identified with the operation of the Directive

To acknowledge the success of the Directive does not mean, of course, that one is not alive to the weaknesses that have been identified in its operation. Indeed the Commission's report of April 2000 already outlined some problems that had been identified. European-level trade unions have been active in seeking to improve the basis for the successful operation of EWCs. A range of issues that have arisen and proposals to address them have also been comprehensively set out in the Resolution of the European Parliament referred to at 2.1, above.

It is clear that the primary concern of the criticisms levelled at the operation of the Directive has been to ensure the effectiveness of information and consultation procedures. A particular concern has been the way in which information and consultation functions in restructuring situations. It is in such situations that employees feel most at risk and most in need of the security provided by being genuinely involved in the process. There is an anxiety to ensure that the real advantages for both sides stemming from genuine engagement are realised in all situations. Much of the concern and criticism derives from instances where this has clearly, and sometimes dramatically, not been the case.

Other issues raised relate to the prerogatives of, and facilities available to, European works council members and the role played by trade unionists as representatives of workers. While a further set of concerns could be said to relate, on the one hand, to facilitating the more timely and widespread creation of European works councils and, on the other, to dealing with practical issues that have arisen regarding their operation in situations not explicitly provided for in the Directive.

3. The changing context

Since 2000 there have been significant changes on a number of fronts that affect consideration of the future of the Directive and of the role and importance of EWCs: developments in Community legislation, in the economic environment facing businesses and their employees, and significant advances in the conduct of social partner relations at European level. Indeed it is apparent that European works councils themselves are a dynamic rather than a static process and that both agreements and practices within EWCs have developed during the period.

3.1 Developments in Community legislation on employee involvement

Within the last three years the legislative acquis on employee involvement has developed very considerably with the adoption of three significant new instruments: the Directive dealing with employee involvement in the European Company⁹, the Directive providing a general framework for information and consultation at national level¹⁰ and the Directive dealing with employee involvement in the European Co-

⁹ Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees - OJ L294 of 16.11.2001

¹⁰ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - OJ L 80 of 23.3.2002

operative Society¹¹. The Charter of Fundamental Rights of the European Union of December 2000¹² has also endorsed the right of workers to information and consultation at appropriate levels.

The need for efficient information and consultation systems at national level to enable the different levels of worker representation within undertakings to be linked was identified as an issue in the Commission's report of 2000. The adoption of the Directive setting a general framework for information and consultation now allows for the establishment of such systems throughout the Union. The new provisions dealing with employee involvement in the European Company and the European Co-operative Society open up the potential for the expansion and deepening of transnational employee involvement in these new legal entities.

This development of the Community *acquis* is significant in two respects. Firstly because some of the issues that have been addressed and dealt with in the recently adopted Directives are relevant to the issues that have been raised regarding the application of the EWC Directive. Secondly there is the consideration that, with the deadlines for transposition of the new texts into national law falling within a period of about two years commencing in October 2004, there will be a considerable challenge over that period for social partners, both at Member State and transnational levels, in preparing themselves for the practical implementation of the new legislative provisions.

3.2 Dynamism in agreements and in European works councils

The recent EESC opinion points to a dynamic process of development giving rise to a wider recognition of the positive role played by EWCs in promoting social dialogue within enterprises. This dynamism can be seen in the manner in which EWC agreements appear to be developing and in the actual functioning of European works councils themselves.

As regards EWC agreements, one of the issues raised in the Commission's report of April 2000 was the fact that some of the agreements negotiated seemed to provide for only a very low level of transnational information and consultation. It appears, however, that as agreements fall to be renewed their content is being fleshed out more fully. This may result from the incorporation of experience and best practice from outside the EWC in question. It can also reflect the overcoming of reservations which may have existed at the outset and the development of a greater degree of comfort and confidence among the parties. Such renegotiated agreements often result in the strengthening of the operation of the European works councils in terms of issues such as the frequency of meetings and the prerogatives and facilities afforded to employee representatives.

The developing scope of EWC agreements is also evident in the extension of the range of issues being dealt with within European works councils. In many agreements

¹¹ Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees - OJ L207 of 18.8.2003

¹² OJ C364 of 18.12.2000

the range of issues has been extended far beyond the 'core' issues referred to in the Annex to the Directive. Issues with a strong European dimension such as health and safety, equal opportunities policy, training and mobility and environmental policy are now the subject of employee/management consultation. The range of issues finding their way onto the agenda of EWCs is being extended in many cases through actual practice rather than through any formal extension of the agreement to comprehend new issues. The importance of practical operation of the EWC, as opposed to formal extension of agreements, as a determinant of the ability on an EWC to play active role has been highlighted in the EESC opinion. There is potential for issues where there could be a strong group-wide interest, such as employee financial participation, to come onto EWC agenda's in this way.

This process of dynamic development within European works councils has reached its fullest expression to date with the emergence of a negotiating role within some EWCs. This has led to the conclusion of agreements on joint texts that go far beyond the basic information and consultation requirements of the Directive. In addition to agreements in the areas mentioned above, the issues addressed in such joint texts include the consequences of restructuring, trade union rights and fundamental social rights. As regards restructuring, the EWC has functioned, in some instances, as a forum in which management and employees have reached agreement on how the restructuring of their European operations should be implemented.

3.3 The number of European works councils' agreements

While dynamism can be observed in EWC agreements and in the actual functioning of EWCs, it must be conceded that there is less sense of continuing dynamic development as regards the numbers of EWCs: there are issues regarding the pace of creation of new European works councils and the total number of councils now in place.

Agreements have been concluded in some 650 transnational companies or groups. The majority of these agreements, some 400 in all, were adopted before the deadline for transposition of the Directive in 1996. Since then the pace of adoption of new agreements has slackened with an average of perhaps 40 to 50 new European works councils being created in each of the intervening years. The early peak in the number of agreements concluded can be attributed to the desire to take advantage of Article 13 of the Directive. The subsequent tapering off has resulted in a situation where, of the 1800 or so companies or groups estimated to fall within the scope of the Directive, less than 40% have an EWC agreement in place. Coverage of employees is higher; with some 11 million, or about 65% of the 17 million estimated to fall within the scope of the Directive, employed in the companies having EWC agreements.

Several reasons have been advanced as to why EWCs have been established in only 40% of relevant cases. Company size is a factor, with more European works councils having been created in the larger companies and groups. It has been suggested that in smaller entities transnational operations may be fewer and smaller, with the vast bulk of operations located in one Member State, and thus EWCs seen as of less significance and interest to employees. Difficulties for employee representatives in initiating the procedures provided for in the Directive have also been advanced as a reason why more EWCs have not been established.

Whatever the reasons, the absence of EWC agreements in such a large proportion of companies falling within the scope of the Directive represents a challenge for the further development of transnational information and consultation structures.

3.4 The economic and business environment

The developments mentioned above have taken place against a background where the greatest challenge facing transnational enterprises and their employees over the last two to three years has been the issue of large scale corporate restructuring. The pace of restructuring has quickened as industry responded to the economic downturn. Restructuring situations have been a very particular focus for the concerns of employees regarding the functioning of information and consultation mechanisms.

It was because of the widespread concerns about restructuring and its social consequences that the Commission adopted, in January 2002, the first stage consultation of the social partners *Anticipating and managing change: a dynamic approach to the social aspects of corporate restructuring*. The paper advocated a positive approach to corporate restructuring balancing the interests of businesses faced with changes in the conditions governing their activity and those of employees threatened with the loss of their jobs. Proper information and consultation in restructuring situations was a key issue raised in the paper.

The social partners agreed to explore the possibilities of social dialogue on this issue and included it as a key element of their joint work programme adopted in November 2002. Following a number of seminars exploring practical experience on restructuring, the social partners submitted to the Commission in October 2003 a joint text '*Orientations for reference in managing change and its social consequences*'. The text addresses, inter alia, the issue of information and consultation in restructuring situations saying that obligations arising from the legislative and contractual framework on information and consultation must be met. It also states that existing European bodies are the appropriate level when changes concern the strategy of a group and affect sites in several Member States. It is further noted that all the cases studied underlined the importance of continuous quality communication with workers and/or their representatives.

This social partner activity in the context of restructuring could have a bearing on their approach to the issues raised in the present consultation document.

3.5 Development in EU-level social partner relations

Consideration of the future operation of the European works councils Directive arises against a background of significant development in social partner relations at EU level over the past two years. In June 2002 the Commission presented its views on the further development of the European social dialogue *The European Social Dialogue, a force for innovation and change*¹³. The Communication highlighted, inter alia, the role of the European social dialogue as an important instrument for economic and

¹³ COM(2002) 341 final

social modernisation and expressed the Commission's wish to stimulate a more autonomous dialogue of the social partners. As regards dialogue at the enterprise level, the Communication noted that the link between company level and more centralised levels of dialogue is crucial.

At the Social Dialogue Summit in November 2002 the social partners presented their joint multi-annual work programme for 2003 to 2005. The adoption of such a joint work programme must be seen as a significant positive development in social partner relations at European level, demonstrating their willingness to adopt a more proactive approach to setting the agenda for social dialogue. This new approach has already enabled the social partners to include the important and difficult issue of corporate restructuring on their agenda and to develop a joint approach to the issue.

The social partners' role at the European level was further strengthened with the Council's Decision in March 2003 to formalise the arrangement for annual meetings before the spring European Council through the establishment of a Tripartite Social Summit for Growth and Employment. The intention is to strengthen contacts between the social partners and the European institutions on economic and social policies and to send a strong political signal about the importance of tripartite concertation in boosting the involvement of the social partners in the pursuit of the Lisbon objectives.

4. Enlargement

The imminent enlargement of the Union presents a particular challenge for the application of the European works councils Directive and for the operation of EWCs in practice; the issues it raises must be faced irrespective of any changes that arise from the current process of consultation regarding the operation of the Directive.

Almost all acceding countries have already adopted legislation transposing the Directive into national law and all will have done so before the accession date. But, while critically important, the adoption of the legislation is only an initial step in process of securing the practical application of the Directive.

The Directive and EWCs will be affected in two ways. On the one hand the inclusion of activities in the new Member States will swell the number of undertakings or groups falling within the scope of the Directive. Companies headquartered in the existing Member States and in the new Member States will be affected. The possibility of forming new European works councils in these entities will thus be opened up. Secondly, where undertakings or groups with subsidiaries in the new Member States already have European works councils, these will need to be extended to ensure representation of the newly included subsidiaries.

Preparing representatives from the acceding countries to assume the new responsibilities that will fall to them is a major task. The EESC stressed the need to recognise the specific characteristics of industrial relations systems in the new Member States and the learning process necessary to comprehend features that are the product of different economic, social and cultural traditions. The Commission has endeavoured to provide practical assistance in preparing for the extension of the Directive to the new Member States as well as monitoring the formal implementation of the *acquis*. The social partners themselves have, of course, also been actively

engaged in this work. It is encouraging to note that, in many cases, European works councils have already been enlarged to include representatives from operations in the acceding countries, either as full members or as observers, in advance of the legal obligation to do so. Nevertheless, making transnational information and consultation fully effective in an enlarged Union remains a major challenge that will require sustained energy and commitment from the social partners in the short to medium term.

5. Aim of the consultation

The Directive providing for the establishment of European works councils has had very substantial success in meeting its objectives. EWCs have already demonstrated their value as a mechanism for effective transnational employee involvement which can make a significant positive contribution, particularly to the successful management of change, for the benefit of both companies and their employees. It is now opportune to consult the social partners on how best to ensure that the potential of EWCs is fully realised so as to maximise their contribution to meeting the objectives set at the Lisbon European Council.

The European social dialogue, through its ability to develop appropriate responses to formidable challenges and to mobilise a range of tools, is a force which promotes change through its positive management. Its crucial role has been recognised by successive European Councils. With the adoption of their joint work programme for the period 2003-05 the social partners have taken a decisive step to act, in full autonomy, in support of the implementation of the Lisbon strategy. This approach has already yielded significant results.

In its Communication *The European social dialogue, a force for innovation and change* the Commission held that reinforcing transnational dialogue within firms has become a fundamental challenge for tomorrow's Europe and stressed that the link between the company level and more centralised levels of dialogue. The views of the social partners on how the continued development of European works councils can best be facilitated will be crucial. They are best placed to address the issue.

In accordance with Article 138 of the EC Treaty and in the light of the considerations outlined above the social partners are called upon to give their opinion on:

1. How best to ensure that the potential of European works councils to promote constructive and fruitful transnational social dialogue at the level of the undertaking, which will benefit both companies and their employees, is fully realised in the years ahead.
2. The possible direction of Community action in this regard, including, as the case may be, the revision of the European works councils Directive.
3. The role they believe the social partners themselves can play in addressing the issues that arise having regard, as appropriate, to their recent reflections on related issues in the context of managing change and its social consequences.