

Report
Group of Experts
**Implementation of Recast Directive 2009/38/EC
on European Works Councils**

December 2010





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Introduction

Examined on 27 September 2010

As for the Directives 94/45/EC (European Works Councils), 2001/86/EC (workers' involvement in the European Company) and 2003/72/EC (workers' involvement in the European Cooperative Society), the Commission set up an Expert Group composed of national experts and the social affairs counsellors in order to provide a forum for discussing the arrangements for the transposition of Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works council or a procedure in Community-scale undertakings and community-scale groups of undertakings for the purpose of informing and consulting employees (recast)¹ into national legislation.

Since the transposition involves provisions with a transnational dimension, the Expert Group has endeavoured to seek ways of avoiding any contradictions between the various national systems by exchanging information and co-ordinating the transposition work. It exchanged views on those points relating to the Directive which implementation into national law is likely to present particular difficulties. The Expert Group focused its work on the changes made to Directive 94/45/EC and refers to the work done in preparing the transposition of the latter for the unchanged provisions.

The Expert Group had informal status, and the role of the Commission has been limited to providing it with logistical support and helping to develop its ideas. While aiming at improving the implementation of the Directive through preventing measures and favouring a better common monitoring of the process by providing the Member States with technical assistance in the implementation of the Directive, the Commission has not sought to interfere with the transposition process at national level in any way, nor to intervene in the right of interpretation of the Court of Justice, or other courts concerned. The same applies to the experts in the Expert Group who, in their countries, are responsible, as the case may be, for producing draft legislation or monitoring discussions between the social partners as part of agreement-based transposition.

The Commission is extremely pleased with the work and achievements of the Expert Group, which has had a fruitful exchange of views in a remarkable spirit of co-operation on the basis of 8 working documents presented by the Commission. This positive judgement is shared by the members of the Expert Group. A total of 5 day's meetings were held between October 2009 and September 2010, during which the main issues arising from the implementation of the Directive were extensively discussed. The consensual approach with the objective of simplifying what, in any event, is a complex corpus of legal provisions allowed the Expert Group to agree with the report deriving from the minutes and working documents.

The report is, in fact, a simple reminder to all which are or will be involved in the legislative work leading to the transposition of the Directive in all countries concerned by it. It is by no means binding and does not in any way exonerate Member States from the responsibility of ensuring its correct transposition and application, as it does not exempt the Commission from its obligation to monitor that work.

¹ OJ L122 of 16.5.2009 p 1-28





I - New rules for European Works Councils

Insight into the Directive 2009/38/EC

Working document 1 examined on 5 October 2009

What are European Works Councils for?

European Works Councils (EWCs) are bodies representing the European employees of a company. Through them, workers are informed and consulted at transnational level by management on the progress of the business and any significant decision that could affect them.

The right to establish EWCs was introduced by Directive 94/45/EC² in undertakings or groups of undertakings employing at least 1000 employees in the European Union and the other countries of the European Economic Area (Norway, Iceland and Liechtenstein³) with at least 150 employees in each of two Member States⁴. Some 900 EWCs represent over 15 Million employees, favouring social dialogue and anticipation of change in transnational companies.

The Commission presented the context in which the implementation of Directive 2009/38/EC takes place, characterising the situation of EWCs today, in particular as to the great diversity in their functioning, the importance of the anticipatory agreements establishing them, the benefits and problems stemming from them in particular as to their role in restructuring, the issues for disputes and results of court cases as well as the EU legal framework on employee information and consultation (see presentation "European Works Councils today")

More, and more effective, European Works Councils

The legal framework on EWCs dates back to 1994 and needed to be adapted to the evolution of the legislative, economic and social context and to be clarified. After consulting the European social partners⁵ and carrying out an impact assessment⁶, the Commission submitted in 2008 a proposal to recast the Directive⁷. This new directive⁸ has been adopted in 2009 by the European Parliament and the Council⁹, with some amendments mainly suggested by the European social partners¹⁰.

Building on the results of the existing legal framework, recast Directive 2009/38/EC aims, in particular, at ensuring the effectiveness of employees' transnational information and consultation rights, at favouring the creation of new EWCs and at ensuring legal certainty in their setting up and operation.

² Council Directive 94/45/EC of 22.09.1994, OJ L254 of 30.09.1994, p.64, as amended by Directives 97/74/EC of 15.12.1997, OJ L10 of 16.01.1998, p.22 and 2006/109/EC of 20.11.2006, OJ L363 of 20.12.2006, p.416

³ Annex XVIII of the Agreement on the European Economic Area

⁴ Art.1.2 & 2.1a of 94/45/EC and 2009/38/EC

⁵ C(2008)660 of 20.02.2008

⁶ SEC(2008)2166 of 02.07.2008

⁷ COM(2008)419 of 02.07.2008

⁸ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works council or a procedure in Community-scale undertakings and community-scale groups of undertakings for the purpose of informing and consulting employees, OJ L16.5.2009 p28

⁹ 2008/0141 (COD)

¹⁰ Joint advice of 29.08.2008



New framework in place in June 2011

As from 6 June 2011¹¹, when Member states have finished transposing its provisions in their legal order, EWCs will be established and operate within the framework of recast Directive 2009/38/EC.

Negotiation at company level

A request of 100 employees from two countries or an initiative of the employer triggers the process of creating a new EWC¹². The composition and functioning of each EWC is adapted to the specific situation of the company by an agreement between management and workers' representatives of the different countries involved¹³. Subsidiary requirements are to apply only in the absence of this agreement¹⁴.

The priority given to negotiated formula within the companies for their establishment and operation is at core of the success of EWCs from their early days. This mechanism remains unchanged.

Establishing European Works Councils - New rules of Directive 2009/38/EC

- **Providing necessary information**

Central and local managements are responsible to provide the information allowing negotiations to be opened to set up a new EWC¹⁵.

- **Setting up a Special Negotiating Body (SNB)**

The SNB, which represents the employees in the negotiations aiming at concluding an agreement over the EWC, is composed of one representative per 10% portion of the employees in a Member State¹⁶. It has the right to meet alone before and after any meeting with the central management¹⁷.

- **Role of social partners**

The competent European trade union and employers' organisations are to be informed of the start of negotiations¹⁸, to enable them to monitor the establishment of new EWCs and promote best practice (See contact points). Trade unions are also among the experts on whom the SNB may call for assistance in the negotiations¹⁹.

- **Content of agreement**

The agreement on the EWC should take into account the need for a balanced representation of employees in the EWC²⁰ and provide arrangements for adapting it²¹.

¹¹ Art.16-17 of 2009/38/EC

¹² Art.5.1 of 2009/38/EC

¹³ Art.5-6 of 2009/38/EC

¹⁴ Art.7 & Annex of 2009/38/EC

¹⁵ Art.4.4 of 2009/38/EC, Art.11.2 of 94/45/EC, C-62/99 *Bofrost*, C-440/00 *Kühne & Nagel*, C-349/01 *ADS Anker GmbH*

¹⁶ Art.5.2.b of 2009/38/EC

¹⁷ Art.5.4 of 2009/38/EC

¹⁸ Art.5.2.c, rec.27 of 2009/38/EC

¹⁹ Art.5.4, rec.27 of 2009/38/EC

²⁰ Art.6.2.b of 2009/38/EC

²¹ Art.6.2.g, rec.28 of 2009/38/EC



- **Fall back rules**

Subsidiary requirements applying in the absence of an agreement draw a distinction between fields where information is required and those for consultation, and provide the possibility of obtaining a response, and the reasons for that response, to any opinions expressed²². The EWC is composed of one representative per 10% portion of the employees in a Member State²³. In order to enable the select committee to perform a more important function, its maximum number of members is set at five and the conditions enabling it to exercise its activities on a regular basis must be met²⁴.

Operation of European Works Councils - New framework of Directive 2009/38/EC

- **General principle**

The arrangements for informing and consulting employees shall be defined and implemented in such a way as to ensure their effectiveness and to enable the company to take decisions effectively²⁵.

- **Transnational competence of EWCs**

Issues fall within the competence of the EWC when they are transnational. Matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States. Elements that can be considered in the determination of whether a matter is "transnational" are the number of Member states concerned, the level of management involved or the importance of the issues for the European workforce given the scope of their potential effects²⁶.

- **Link with national bodies**

Information and consultation of the EWC shall be linked to those of the national employee representation bodies. Arrangements to that aim are to be defined by agreement. Failing that, consultations at both European and national levels have to be ensured in case of restructuring²⁷.

Concepts of information and consultation

"**Information**" means transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings²⁸.

²² Annex 1.a, rec.44 of 2009/38/EC

²³ Annex 1.c of 2009/38/EC

²⁴ Annex 1.d, rec.44 of 2009/38/EC

²⁵ Art. 1.2, rec.14 of 2009/38/EC

²⁶ Art.1.3-1.4, rec.12,15,16 of 2009/38/EC

²⁷ Art.12, 6.2.c, rec.29, 37-38 of 2009/38/EC

²⁸ Art.2.1.f, rec.21-22 of 2009/38/EC



"**Consultation**" means the establishment of dialogue and exchange of views between employees' representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as enables employees' representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings²⁹.

Role and capacity of employee representatives

- **Collective representation**

The members of the EWC shall have the means required to apply the rights arising from the directive to represent collectively the interests of the employees³⁰. They shall inform employees of the content and outcome of the information and consultation procedure carried out within the EWC³¹.

- **Training**

Employees' representatives shall be provided with training without loss of wages³².

Adaptation clause

Where the structure of the undertaking or group of undertakings changes significantly, for example due to a merger, the EWC(s) needs to be adapted. This adaptation is carried out pursuant to the provisions of the applicable agreement(s) or, by default and where employees so request, in accordance with the negotiation procedure for a new agreement in which the members of the existing EWC(s) are to be associated. These EWCs will continue to operate, possibly with adaptations, until a new agreement is reached³³. This clause (art.13 of Directive 2009/38/EC) applies to all situations.

Continuity

There is no general obligation to renegotiate the agreements establishing EWCs in the new directive³⁴. In addition, since the first directive, an incentive is given to the early establishment of EWCs, in advance of the legal requirements³⁵. Those companies which had agreements in place providing for transnational information and consultation of their entire workforce when the directive first took effect in 1996 are not subject to the obligations arising from the new directive³⁶. The same applies in relation the extension of

²⁹ Art.2.1.g, rec.21,23 of 2009/38/EC

³⁰ Art.10.1 of 2009/38/EC

³¹ Art.10.2, rec.33 of 2009/38/EC

³² Art.10.4, rec.33 of 2009/38/EC

³³ Art.13, Art.6.2.g, rec.40, 28 of 2009/38/EC

³⁴ rec.7, 39,41 of 2009/38/EC

³⁵ Art.13 of 94/45/EC

³⁶ Art.14.1.a, 14.2, rec.39,41 of 2009/38/EC



the directive to the UK in 1999³⁷. The continuity of such agreements is ensured by Directive 2009/38/EC³⁸, as long as the adaptation clause is not of application (see above).

A two-year window until June 2011 to sign or review agreements on European Works Councils

A window of opportunities of two years is provided for by Directive 2009/38/EC: companies where agreements to establish new EWCs are concluded between 5 June 2009 and 5 June 2011 or where existing agreements are revised during this period are not bound by the new obligations introduced by Directive 2009/38/EC³⁹.

Compliance

The Member States must take appropriate measures in the event of failure to comply with the obligations laid down in the Directive. In accordance with the general principles of Community law, administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations arising from the Directive⁴⁰.

Timetable

Directive 2009/38/EC is to be transposed by Member States before 6 June 2011⁴¹. At that date, the existing Directive 94/45/EC (as amended by Directives 97/74/EC and 2006/109/EC) will be repealed and replaced with Directive 2009/38/EC⁴².

National implementing measures for the repealed directives will, however, be maintained after 6 June 2011, to cover the cases where the new obligations introduced by Directive 2009/38/EC do not apply⁴³.

More information

Text of Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purpose of informing and consulting employees (OJ L122 of 16.5.2009 p28) and more information can be found on the labour law website of the European Commission.

See http://ec.europa.eu/labour_law/⁴⁴

³⁷ Art.3.1 of 97/74/EC

³⁸ Art.14.1.a, 14.2, rec.39,41 of 2009/38/EC

³⁹ Art.14.1.b of 2009/38/EC

⁴⁰ Art.11, rec.35-36 of 2009/38/EC

⁴¹ Art.16.1 of 2009/38/EC

⁴² Art.17 of 2009/38/EC

⁴³ Art.14.1 of 2009/38/EC

⁴⁴ in particular <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPagelId=211>



Promotion and Funding

The European Union makes efforts to support awareness raising and promotion of best practices, in connection with the social partners, notably by funding projects of transnational cooperation, through a specific budget line (04.03.03.03 - Information, Consultation and Participation of representatives of undertakings) to which a sum of EUR7.3 million has been allocated for 2009.

See <http://ec.europa.eu/social/funding>

Contact points

- **European Commission**

European Commission, DG Employment, social affairs and equal opportunities, Labour law, B-1049 Brussels

E-mail: [EMPL-LABOUR-LAW AT ec DOT europa DOT eu](mailto:EMPL-LABOUR-LAW@ec.europa.eu)

- **Trade unions**

European Trade Union Confederation, European Works Councils, 5 Bd Roi Albert II, B-1210 Brussels

E-mail: [ewc AT etuc DOT org](mailto:ewc@etuc.org) or website www.ewc-etuc.org

- **Employers' organisations**

BusinessEurope, Social Affairs, European Works Councils, 168 av. de Cortenbergh, B - 1000 Brussels

E-mail: [ewc AT businessseurope DOT eu](mailto:ewc@businesseurope.eu)



II - New framework of Directive 2009/38/EC for the operation of European Works Councils

General principles (Art.1.2)
Concepts of information and consultation (Art.2.1f-g)
Transnational competence of EWCs (Art.1.3)
Link between European and national information and consultation (Art.12)

Working document 5 examined on 15 March 2010

1. General principles (article 1.2)

1.1 Provisions of the Directive

Art. 1.1 : The purpose of this Directive is to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings.

Art.1.2 : (...). The arrangements for informing and consulting employees shall be defined and implemented in such a way as to ensure their effectiveness and to enable the undertaking or group of undertakings to take decisions effectively.

Recital (7) It is necessary to modernise Community legislation on transnational information and consultation of employees with a view to ensuring the effectiveness of employees' transnational information and consultation rights (...).

Recital (9) This Directive is part of the Community framework intended to support and complement the action taken by Member States in the field of information and consultation of employees. This framework should keep to a minimum the burden on undertakings or establishments while ensuring the effective exercise of the rights granted.

Recital (14) The arrangements for informing and consulting employees need to be defined and implemented in such a way as to ensure their effectiveness with regard to the provisions of this Directive. To that end, informing and consulting the European Works Council should make it possible for it to give an opinion to the undertaking in a timely fashion, without calling into question the ability of undertakings to adapt. Only dialogue at the level where directions are prepared and effective involvement of employees' representatives make it possible to anticipate and manage change.

1.2 Origin and objectives of the provisions

Explanatory memorandum of proposal COM(2008)419 points 5 and 38: "European Works Councils need to be up to the task of playing their full role in anticipating and managing change and building up a genuine transnational dialogue between management and labour. The objective of this proposal is thus, in conjunction with non-regulatory action, to ensure that employees' transnational information and consultation rights are effective (...)." "Article 1 (...) stipulates that the arrangements for informing and consulting employees must follow the general principle of effectiveness."

Impact assessment SEC(2008)2166 page 16, 17, 21, 27, 36 and 52: "the effectiveness of transnational information and consultation rights is not guaranteed and social unrest and



higher economic and social costs arise due the subsequent absence of anticipation and negotiated accompanying measures in a significant proportion of the companies where EWCs are established” “The existing EWCs are not properly informed and consulted in over half of restructuring cases (...).”

“The general EC law principle of ‘useful effect’ information and consultation processes, although it does not appear explicitly in the Directive, was highlighted in *Renault Vilvoorde*⁴⁵ and a series of further national court cases. As to timing, the principle set out in the Charter of Fundamental Rights of the European Union that workers or their representatives must be guaranteed information and consultation ‘in good time’ is not clearly expressed in the present Directive and is therefore unclear to companies and workers.”

“An underlying principle of the review is to contribute to improving the rights of workers to transnational information and consultation through means that are efficient and balanced, taking into account the interests of all stakeholders, in particular companies.” “At present, a majority of companies disagree with the assertion that an EWC slows down managerial decision-making. On the other hand, it is clear that the operation of EWCs should contribute to an efficient decision-making process allowing companies to adapt as rapidly as necessary. (...). This should be achieved by adopting as a general principle of the Directive that EWCs should contribute to the goal of efficient decision-making at company level (...).”

1.3 Other references

Art.27 of Charter of Fundamental Rights of the European Union “Workers’ right to information and consultation within the undertaking: Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.”

Art 1 of Directive 2002/14/EC: “1. The purpose of this Directive is to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community. 2. The practical arrangements for information and consultation shall be defined and implemented in accordance with national law and industrial relations practices in individual Member States in such a way as to ensure their effectiveness. 3. When defining or implementing practical arrangements for information and consultation, the employer and the employees’ representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees.”

1.4 Issues

What is the aim of the general principles introduced? First, these principles recall the general principles of law referred to by national court cases, providing that arrangements for informing and consulting employees need to ensure an effective exercise of the rights of employees to transnational information and consultation, including in relation to the timing, which proves of particular relevance in cases of restructuring. Second, these principles state that the arrangements for informing and consulting employees need to take into account the interests of the companies by enabling efficient decision-making and ability to adapt for them.

⁴⁵ Cour d’Appel Versailles, 7.5.1997.



How do these principles and other elements of the new Directive affect companies where an EWC has already been established by agreement? There is no general obligation to renegotiate agreements concluded (Recital 41). However, this does not mean that the new Directive does not affect companies in which an agreement has been concluded. The ECJ ruled that "according to settled case-law, new rules apply, as a matter of principle, immediately to the future effects of a situation which arose under the old rule (...). The Court has also held that the principle of legitimate expectations cannot be extended to the point of generally preventing a new rule from applying to the future effects of situations which arose under the earlier rule (...). By contrast, the substantive rules of Community law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such effect must be given to them (...)"⁴⁶. In this regard, the objectives of the changes introduced by the Directive recalled in Recital 7 and detailed in the impact assessment under the titles "ensure the effectiveness of employees' transnational information and consultation rights in existing EWCs", "ensure legal certainty in the setting up and operation of EWCs", "ensure better coherence and interplay between directives in the field of information and consultation" clearly point in the direction of such effect. In addition, it should be recalled that Article 1.2, as well as Recital 14 refer to the need for the arrangements for informing and consulting employees not only to be "defined" but also to be "implemented" in such a way as to ensure their effectiveness with regard to the provisions of this Directive.

On examples put forward by an expert, the Commission indicated that the principles should affect companies with article 6 agreements from June 2011, and not only when agreements are later renegotiated, as Article 1.2 refers, not only to the way to "define", but also to "implement" the arrangements for informing and consulting employees. An expert suggested making this clear in the transposing measures.

2. Concepts of information and consultation (Article 2.1.f-g)

2.1 Provisions of the Directive

Definition of information:

Art.2.1.f "information" means transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings.

Rec. (22) The definition of "information" needs to take account of the goal of allowing employees representatives to carry out an appropriate examination, which implies that the information be provided at such time, in such fashion and with such content as are appropriate without slowing down the decision-making process in undertakings.

Definition of consultation:

Art.2.1.g "consultation" means the establishment of dialogue and exchange of views between employees' representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as enables employees' representatives to express an opinion on the basis of the information provided

⁴⁶ ECJ, Ruling of 11 December 2008, Commission/Freistaat Sachsen, C-334/07 P, points 43 and 44



about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings.

Recital (23) The definition of "consultation" needs to take account of the goal of allowing for the expression of an opinion which will be useful to the decision-making process, which implies that the consultation must take place at such time, in such fashion and with such content as are appropriate.

Recital (37) (...) Opinions expressed by the European Works Council should be without prejudice to the competence of the central management to carry out the necessary consultations in accordance with the schedules provided for in national legislation and/or practice. (...)

2.2 Origin of the provisions

Explanatory memorandum of proposal COM(2008)419 point 34 "Article 2 adds a definition of information and brings the definition of consultation into line with that of more recent directives, including the concepts of time, fashion and content appropriate to the information and consultation"

Impact assessment SEC(2008)2166 page 22 and 39 "The EWC Directive does not include a definition of information. The Framework Directive 2002/14/EC defines information as the 'transmission by the employer to the employees' representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it' and states that 'information shall be given at such time, in such fashion and with such content as are appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation'. Equivalent provisions are also found in the directives on the involvement of employees in a European Company ('SE') and European Cooperative Society ('SCE') — Directives 2001/86/EC and 2003/72/EC.

The EWC Directive defines consultation as 'the exchange of views and establishment of dialogue between employees' representatives and central management or any more appropriate level of management'. A more precise and concise definition is used in Directives 2001/86/EC and 2003/72/EC, i.e. 'the establishment of dialogue and exchange of views between the body representative of the employees and/or the employees' representatives and the competent organ [of the Company], at a time, in a manner and with a content which allow the employees' representatives, on the basis of information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within [the Company]'. This definition corresponds to the provisions of the Framework Directive 2002/14/EC, which also states that consultation must take place at the relevant level of management and representation, depending on the subject under discussion, in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate, and with a view to reaching an agreement on decisions within the scope of the employer's powers which may bring about substantial changes in work organisation or in contractual relations.

More recent directives also include the concepts of appropriate time, means and content and stipulate that 'information and consultation procedures shall be established and implemented (...) so as to ensure their effectiveness'".

"Adding a definition of 'information' and clarifying the definition of 'consultation' would clarify the concepts and better link them with the definitions in more recent directives concerning the information and consultation of workers (2002/14/EC, 2001/86/EC, 2003/72/EC). This would also significantly enhance the role and effectiveness of EWCs."



Joint advice of the European social partners: Art.2.1.f "information" means transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to *undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings.* **Art.2.1.g** "consultation" means the establishment of dialogue and exchange of views between employees' representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content (as) enables employees' representatives to express an opinion on the basis of the information provided *about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings.*

Letter of ETUC and BusinessEurope of 2 October 2008: "We would suggest a further point for clarification to be included in the text. The definition of 'information' which was agreed by European social partners in their joint advice stipulates that the information provided to employees' representatives should enable them to undertake "an in-depth assessment". In order to clarify the notion of "in depth assessment", which should not slow down decision-making in companies, recital 22 should read as follows: "The definition of "information" needs to take account of the goal of allowing employees representatives to carry out an in-depth assessment of the possible impact and where appropriate prepare consultations, which implies that the information be provided at such time, in such fashion and with such content as are appropriate *without slowing down the decision-making process in undertakings.*"

2.3 Other References

Art 2.1.f. of Directive 94/45/EC: "consultation" means the exchange of views and establishment of dialogue between employees' representatives and central management or any more appropriate level of management'.

Art 2.f and 4.3 of Directive 2002/14/EC: ""information" means transmission by the employer to the employees' representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it;" "Information shall be given at such time, in such fashion and with such content as are appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation."

Art 2.g and 4.4 of Directive 2002/14/EC: ""consultation" means the exchange of views and establishment of dialogue between the employees' representatives and the employer;" "Consultation shall take place: (a) while ensuring that the timing, method and content thereof are appropriate; (b) at the relevant level of management and representation, depending on the subject under discussion; (c) on the basis of information supplied by the employer in accordance with Article 2(f) and of the opinion which the employees' representatives are entitled to formulate; (d) in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate; (e) with a view to reaching an agreement on decisions within the scope of the employer's powers referred to in paragraph 2(c)⁴⁷".

⁴⁷ Decisions likely to lead to substantial changes in work organisation or in contractual relations, including collective redundancies and transfers of undertakings



Art 2.j of Directive 2001/86/EC: ""consultation" means the establishment of dialogue and exchange of views between the body representative of the employees and/or the employees' representatives and the competent organ of the SE, at a time, in a manner and with a content which allows the employees' representatives, on the basis of information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within the SE.

2.4 Issues

How are the new concepts of information and consultation to be treated? As definitions. The new concepts of information and consultation are labelled as "definitions", are drafted as definitions ("information" means, consultation" means...) and are referred to in all elements of the preparatory work and the Directive as definitions. In their joint advice, the European social partners also attached strong importance to the wording of these definitions.

An expert noted that definitions are a key part of social partners' joint advice, that they introduce obligations which should not apply to "exempted" companies and that it is technically difficult to implement them as definitions under the structure of national law, notably as this would mean a coexistence of different sets of definitions.

What do the new definitions change?

- First, they clarify what is already implied under these terms: elements of the new definitions were already considered, notably by national courts⁴⁸, as implicit in that they correspond to general principles of "useful effect" in Union law or to definitions contained in the framework Directive 2002/14/EC.
- Second, they provide for indications on how the arrangements for informing and consulting employees shall be defined and implemented, for example as to the time, fashion and content of that information and consultation.
- Third, they are to be used to determine whether an agreement providing for transnational information and consultation of employees has been concluded.
- Fourth, they may create new obligations, for example in enabling employees' representatives to undertake an in-depth assessment.

An expert noted that the definitions could have financial consequences for companies, for example if they were to be considered as implying an obligation to translate all documents in all languages. The Commission indicated that it is up to agreements to determine the detailed arrangements for the information and consultation processes, including the way to address needs for translation and interpretation. An expert stressed the need to avoid unnecessary financial and administrative burden and that central management is responsible for creating the conditions for the proper functioning of the SNB and EWC. An expert considered that the new definitions are mainly clarifications of what is already to be meant by information and consultation for existing EWCs.

Will the definitions apply to existing EWCs in "non-exempted" companies? On a question raised by an expert, the Commission indicated that, although no obligation to renegotiate any EWC agreement arises directly from the new definitions, agreements in force are to be interpreted in accordance with the new principles and definitions. It was also noted that some other elements of the directive, such as training in Article 10, will apply to existing EWCs irrespective of the provisions of their agreements. An expert added that the conditions need to be put in place for the concepts to be concretized, that the directive establishes minimum requirements, that arrangements laid down in agreements may provide for more extensive rights for employees provided there is no abuse of rights.

⁴⁸ Particularly in the *Renault Vilvoorde* and subsequent cases



Will the definitions apply also to “exempted” companies? Not in the sense that they create new obligations, but elements of the new definitions, as listed above and in particular clarifications, will also affect “exempted” companies. (See also first issue above)

Will the definitions of the Directive prevail over the ones of the agreements establishing EWCs? Yes, the directive forms the framework in which agreements are to be concluded and applied. The agreements are to provide for “detailed arrangements for implementing the information and consultation of employees“(art.6.1), not to define what is to be meant with these terms.

What is meant under the terms "employer" and "management"? An expert enquired about the terms "employer" and "management" used in the definitions. The Commission indicated that the suggested assimilation of these terms to "central management or any more appropriate level of management" appears appropriate.

3. Transnational competence of EWCs (article 1.3-4)

3.1 Provisions of the Directive

Art.1.3 Information and consultation of employees must occur at the relevant level of management and representation, according to the subject under discussion. To achieve that, the competence of the European Works Council and the scope of the information and consultation procedure for employees governed by this Directive shall be limited to transnational issues

Art.1.4 Matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States.

Recitals (15) Workers and their representatives must be guaranteed information and consultation at the relevant level of management and representation, according to the subject under discussion. To achieve this, the competence and scope of action of a European Works Council must be distinct from that of national representative bodies and must be limited to transnational matters.

(16) The transnational character of a matter should be determined by taking account of both the scope of its potential effects, and the level of management and representation that it involves. For this purpose, matters which concern the entire undertaking or group or at least two Member States are considered to be transnational. These include matters which, regardless of the number of Member States involved, are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States.

(12) (preexisting in Directive 94/45/EC) Appropriate provisions must be adopted to ensure that the employees of Community-scale undertakings or Community-scale groups of undertakings are properly informed and consulted when decisions which affect them are taken in a Member State other than that in which they are employed.

3.2 Origin of the provisions

Explanatory memorandum of proposal COM(2008)419 point 35 “Article 1 establishes the principle of the relevant level according to the subject under discussion. To achieve this,



the competence of the European Works Council is limited to transnational issues, and the determination of whether an issue is transnational is transferred from the current subsidiary requirements to Article 1, so that it can be applied to the European Works Councils established by agreement. It is specified as relating in particular to the potential effects of an issue in at least two Member States.”

Impact assessment SEC(2008)2166 page 54: “Defining the transnational competence of the EWC as relating to issues going beyond the powers of decision-making bodies in a single Member State would

- Increase legal certainty, thus reducing labour disputes on the issues to be addressed in EWCs and their associated costs as well as the risks of uncertainty and delays in decision-making,
- Facilitate dialogue at the relevant levels of management and representation and help ensure a better link between the levels of information and consultation, thus enhancing the quality and effectiveness of dialogue,
- Reduce the reluctance of national representation bodies to accept EWCs by limiting clearly their sphere of competence, thereby facilitating the creation of new EWCs,
- Allow the development of coherent and linked Community rules.

The potential risk of bringing up local issues at European level (with a subsequent increase in the number of meetings and the associated costs) where decision-making is centralised would nevertheless need to be avoided. (...)

In order to take into account as much as possible the views of the stakeholders and to avoid the various risks, the solution envisaged in the consultation document may be adapted in order to provide a definition of transnational competence:

- based primarily on the effects of a decision;
- recalling the principle of dialogue ‘at the relevant level of management and representation, depending on the subject under discussion’.

In exceptional circumstances, where, for example, the decision to close down an establishment in a subsidiary is taken by headquarters and the management of the subsidiary has no major involvement in that decision, the latter principle should lead to a solution enabling a meaningful consultation to take place.”

Informal Triologue December 2008: Recital (16) was the most important topic for discussion between Council, Parliament and Commission in the search for a first reading agreement. It was agreed to add “These include matters which, regardless of the number of Member States involved, are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States.” This clarification was aimed at ensuring that, for example, the decision by *Nokia* to close down its plant in Bochum was covered by the definition.

3.3 Other References

Standard rules of Directive 2001/86/EC: Part 2 of Annex “The competence of the representative body shall be limited to questions which concern the SE itself and any of its subsidiaries or establishments situated in another Member State or which exceed the powers of the decision-making organs in a single Member State”

Leaflet “new rules for European works councils”: Issues fall within the competence of the EWC when they are transnational. Matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking



or group situated in two different Member States. Elements that can be considered in the determination of whether a matter is “transnational” are the number of Member states concerned, the level of management involved or the importance of the issues for the European workforce given the scope of their potential effects.”

3.4 Issues

How should recitals be considered? Recitals 15 and 16 are very substantive explanations on how new articles 1.3 and 1.4 should be interpreted and transposed. They need therefore to be considered in the implementation of these articles. The wording used in the leaflet “new rules for EWCs” could be of use to that effect. An expert noted that recital 12 needs to be taken into account also in addition to the text proposed in the Commission’s leaflet.

Do employees need to be adversely affected in two Member states for an issue to be considered as transnational? No, the concept of transnationality is broader, as the Directive uses the term “concern”, which is broader than “adversely affected” and includes potential positive effects (art.1.4). Matters shall for example be considered as transnational where they involve transfers of activities between MS, the employees of some MS being in that case to be considered as positively affected (Rec.16). Matters shall also be considered as transnational where they concern the undertaking or the group as a whole, for example by being of importance for the European workforce in terms of the scope of their potential effects (Art. 1.4 and Rec. 16). An expert noted that recital 16 makes it clear that the number of Member States is not determinant.

Is a decision concerning one country taken in another country a transnational decision? The *determinant* element is not the country in which the decision is taken but “*the level of management that it involves*” and “*the scope of its potential effects*” (Rec.16). For example, a technical decision taken by a shared service based in country A and affecting only country B in a limited way would not be transnational. By contrast, a strategic decision taken by the headquarters to stop a production and close down first related facilities in the same country would be transnational in the sense that it concerns the group as a whole and is important for the European workforce in terms of potential effects over time. Where employees are affected by a decision taken in another country which is not to be considered as transnational, these employees need however to be properly informed and consulted (preexisting Rec.12, impact assessment), in accordance with implementing provisions of framework Directive 2002/14/EC⁴⁹. An expert noted that an issue may be both national and transnational. Another expert noted that recital 12 needs to be taken into account.

What is to be meant under “matters of importance for the European workforce” and “transfers of activities”? An expert noted that part 3. of the Annex on exceptional circumstances gives examples of such matters, the Commission indicated that strategic issues such as major changes in R&D policy may also be of importance for the European workforce even if they don’t have immediate impact on employment levels. An expert enquired about meaning of “transfers of activities” under recital 16. The Commission indicated that it refers to the change of location for production and services and not to a change in the legal nature of the employer, thus not a “transfer of undertaking” under Directive 2001/23/EC.

Will the transnational competence as defined in the Directive prevail over the ones of the agreements establishing EWCs? Yes, the determination of whether an issue is transnational

⁴⁹ Which did not exist at the time where the EWC Directive 94/45/EC was adopted



has been transferred to Article 1, so that it can be applied to the European Works Councils established by agreement (explanatory memorandum). The agreements can therefore no more restrict the competence of EWC or expand them to issues which fall within the competence of national employee representatives. Flexibility is however provided at company level as the agreements are to provide for arrangements for linking information and consultation of the EWC and national employee representation bodies, in accordance with the principle of relevant level of management and representation, according to the subject under discussion (art.6.2.c-1.3). An expert enquired about the situation of transnational company agreements providing for information and consultation above the framework of the directive. The Commission indicated that such agreements may provide for additional arrangements but that their provisions conflicting with implementing rules of the Directive would have no effect.

4. Link between European and national information and consultation (article 12)

4.1 Provisions of the Directive

Art. 12 Relationship with other Community and national provisions

1. Information and consultation of the European Works Council shall be linked to those of the national employee representation bodies, with due regard to the competences and areas of action of each and to the principles set out in Article 1(3).

2. The arrangements for the links between the information and consultation of the European Works Council and national employee representation bodies shall be established by the agreement referred to in Article 6. That agreement shall be without prejudice to the provisions of national law and/or practice on the information and consultation of employees.

3. Where no such arrangements have been defined by agreement, the Member States shall ensure that the processes of informing and consulting are conducted in the European Works Council as well as in the national employee representation bodies in cases where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged.

4. This Directive shall be without prejudice to the information and consultation procedures referred to in Directive 2002/14/EC and to the specific procedures referred to in Article 2 of Directive 98/59/EC and Article 7 of Directive 2001/23/EC.

5. Implementation of this Directive shall not be sufficient grounds for any regression in relation to the situation which already prevails in each Member State and in relation to the general level of protection of workers in the areas to which it applies.

Recitals (29) Such agreements must lay down the arrangements for linking the national and transnational levels of information and consultation of employees appropriate for the particular conditions of the undertaking or group of undertakings. The arrangements must be defined in such a way that they respect the competences and areas of action of the employee representation bodies, in particular with regard to anticipating and managing change.

(37) For reasons of effectiveness, consistency and legal certainty, there is a need for linkage between the Directives and the levels of informing and consulting employees established by Community and national law and/or practice. Priority must be given to negotiations on these procedures for linking information within each undertaking or group



of undertakings. If there are no agreements on this subject and where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged, the process must be conducted at both national and European level in such a way that it respects the competences and areas of action of the employee representation bodies. Opinions expressed by the European Works Council should be without prejudice to the competence of the central management to carry out the necessary consultations in accordance with the schedules provided for in national legislation and/or practice. National legislation and/or practice may have to be adapted to ensure that the European Works Council can, where applicable, receive information earlier or at the same time as the national employee representation bodies, but must not reduce the general level of protection of employees.

(38) This Directive should be without prejudice to the information and consultation procedures referred to in 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 and to the specific procedures referred to in Article 2 of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies and Article 7 of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

4.2 Origin of the provisions

Explanatory memorandum of proposal COM(2008)419 point 36 "Links between the levels of information and consultation of employees. Article 12 introduces the principle of a link between the national and transnational levels of information and consultation of the employees with due regard for the competences and areas of action of the representative bodies. The arrangements for this link are defined by the agreement concluded pursuant to Article 6, which now covers this matter. Where there are no such arrangements and where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged, the process would have to start in parallel at national and European level. Since certain national legislation may have to be adapted to ensure that the European Works Council can, where applicable, receive information earlier or at the same time as the national bodies, a clause has been added to stipulate that there must be no reduction in the general level of protection of employees. The titles of the directives relating to collective redundancies and to transfers of undertakings have been updated and a reference to the framework Directive 2002/14/EC has been incorporated."

Impact assessment SEC(2008)2166 pages 23 and 39: "The interplay between national and transnational levels of information and consultation, which is not addressed by any of the directives concerned, is a major challenge as well as a key legal uncertainty in the operation of EWCs. According to the 2008 EPEC survey, three quarters of companies have undergone a restructuring that has affected more than one European country in the last three years. In a very high proportion of cases (60% — to be further researched), company and employee representatives had differing views on which level had been consulted first for the same past restructuring event. In those cases where there were no divergent views:

- in 51% of cases, information and consultation took place at national or local level first,
- in 16% of cases, EWCs were consulted first,
- In 33% of cases, all levels were consulted at the same time.



Companies needed to seek legal advice as to which level had to be informed and consulted first in 27% of cases, and, in as many as 39%, companies had already been challenged by employees on this issue."

"Information and consultation levels could be linked through a procedure taking into account the diversity of situations and allowing both an anticipatory approach and consideration of the employees potentially most affected by decisions, based on:

- the principle of dialogue 'at the relevant level of management and representation, depending on the subject under discussion',
- priority for negotiations on procedures for linking the information and consultation of the European Works Council and national representative bodies, in compliance with the above principle;
- the introduction of provisions applicable in the absence of an agreement on the subject under discussion in exceptional circumstances, which would allow the information and consultation of the European Works Council and the national bodies to start in parallel."

4.3 Other References

Specific decisions: Art.4.2.c and 4.4 of Directive 2002/14/EC: "Information and consultation shall cover (...) decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the Community provisions referred to in Article 9(1)" (collective redundancies and transfers of undertakings). "Consultation shall take place (...) with a view to reaching an agreement on decisions within the scope of the employer's powers referred to in paragraph 2(c)".

4.4 Issues

What is to be dealt with under the link between the levels? Arrangements should in particular address the order in which national and European information and consultation are to be started and closed as well as the circulation of information (impact assessment). Transnational company agreements on restructuring are examples of good practice in this area.

Can an agreement provide for any system of link between the levels? No, the arrangements must be defined in such a way that they respect the competences and areas of action of the employee representation bodies, in particular with regard to anticipating and managing change (Article 12.2, 12.4, 12.5, Recital 29).

Which level comes first: national or transnational? An expert asked whether a particular order in the start and closure of European and national consultations was to be respected. The Commission indicated that the schedule forms part of the arrangements on the link between levels to be established per agreement at company level.

It recalled that the Commission's initial proposal for default rules to this regard was discarded and in any case concerned only the start of consultations in parallel, not their closing. It indicated that recital 37 refers to the possibility for the EWC to receive information earlier or at the same time as national representation bodies. The possibility for the EWC to receive information after the national representation bodies was not



mentioned in this sentence as it doesn't need any adaptation of national legislation and/or practice⁵⁰.

The Commission added that this recital also states that opinions of the EWC should not prevent respecting the schedules of consultations provided for in national legislation and/or practice.

Experts noted that different management levels are involved in practice in information and consultation proceedings and stressed the need to ensure link with representative bodies set up in accordance with Framework Directive 2002/14/EC. It was considered that, whatever the arrangements adopted to link national and transnational levels, and whatever the level to come first where applicable, the process followed needs to provide for information and consultation "in good time" at both levels.

What happens if the existing agreement does not provide for adaptation to changes or link between the levels? Default rules will apply: the adaptation clause will be applicable in case of significant changes in the structure and the processes of informing and consulting will be conducted in the European Works Council as well as in the national employee representation bodies in cases where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged (article 12.3 and Article 13).

Have default EWCs also to establish links with national bodies? An expert enquired about the situation of EWCs established under the subsidiary requirements of the Annex. The Commission indicated that Article 12 applies to all EWCs and provides for default rules in the absence of an agreement.

Is there a need to change legislation on National information and consultation? This might be the case as "National legislation and/or practice may have to be adapted to ensure that the European Works Council can, where applicable, receive information earlier or at the same time as the national employee representation bodies". However, this "must not reduce the general level of protection of employees" (Rec.37).

⁵⁰ An expert noted that the social partners' suggestion to remove the start in parallel from the proposed text of the Directive was understood as addressing the practical difficulty to inform both levels exactly at the same time. Therefore, both levels should in any case be informed in a short time frame (See "at the same time" in recital 37).





III - New rules of Directive 2009/38/EC in establishing European Works Councils

Responsibility of management (Art.4.4)
Negotiating agreements (Art.5)
Content of agreements (Art.6)
Content of subsidiary requirements (Annex I)

Working document 3 examined on 12 January 2010 and 14 June 2010

5. Responsibility of management (article 4.4)

5.1 Provisions of the Directive

Art.4.4 : The management of every undertaking belonging to the Community-scale group of undertakings and the central management or the deemed central management within the meaning of the second subparagraph of paragraph 2⁵¹ of the Community-scale undertaking or group of undertakings shall be responsible for obtaining and transmitting to the parties concerned by the application of this Directive the information required for commencing the negotiations referred to in Article 5, and in particular the information concerning the structure of the undertaking or the group and its workforce. This obligation shall relate in particular to the information on the number of employees referred to in Article 2(1)(a) and (c)⁵².

Recital (25) The responsibility of undertakings or groups of undertakings in the transmission of the information required to commence negotiations must be specified in a way that enables employees to determine whether the undertaking or group of undertakings where they work is a Community-scale undertaking or group of undertakings and to make the necessary contacts to draw up a request to commence negotiations.

5.2 Origin and objectives of the provisions

Explanatory memorandum of proposal COM(2008)419 points 4 and 38: "In three cases referred to it for preliminary rulings [C-62/99 Bofrost; C-440/00 Kühne & Nagel. C-349/01 ADS Anker GmbH], the Court of Justice of the European Communities also interpreted the provisions of the Directive with regard to the communication of the information required to set up a European Works Council". "In accordance with the interpretation principles of the European Court of Justice [C-62/99 Bofrost; C-440/00 Kühne & Nagel. C-349/01 ADS Anker

⁵¹ "In the absence of such a representative, the management of the establishment or group undertaking employing the greatest number of employees in any one Member State shall take on the responsibility referred to in paragraph 1" [The central management shall be responsible for creating the conditions and means necessary for the setting-up of a European Works Council or an information and consultation procedure, as provided for in Article 1(2), in a Community-scale undertaking and a Community-scale group of undertakings]

^{52a)} "Community-scale undertaking" means any undertaking with at least 1000 employees within the Member States and at least 150 employees in each of at least two Member States

c) "Community-scale group of undertakings" means a group of undertakings with the following characteristics: at least 1000 employees within the Member States, at least two group undertakings in different Member States, and at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State



GmbH], Article 5 clarifies the responsibility of the local managements to provide the information allowing negotiations to be opened with a view to setting up new European Works Councils.”

Impact assessment SEC(2008)2166 page 19 and 46 “As regards the setting up of new EWCs, three cases brought before the European Court of Justice for a preliminary ruling⁵³ have established the principle that the managements of all undertakings located in Member States are required to supply any information required to open negotiations on setting up an EWC, in particular information on the structure or organisation of the group, to employee representatives, irrespective of where the headquarters of the group is located or of the central management’s opinion as to the relevance of the Directive. This principle would need to be made clear.” “As regards the clarification of local management’s responsibility for information needed to open negotiations on setting up new EWCs, in line with ECJ rulings, this is not controversial. It is likely to ease the first steps for workers in subsidiaries, a key to boost new requests for EWCs⁵⁴, and therefore contribute to increasing the take-up rate”.

5.3 Other references

Art.5.1 “(...) the central management shall initiate negotiations for the establishment of a European Works Council or an information and consultation procedure on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States”

Art 11.2 of Directive 94/45/EC: “Member States shall ensure that the information on the number of employees referred to in Article 2 (1) (a) and (c) is made available by undertakings at the request of the parties concerned by the application of this Directive”

5.4 Issues

Who is responsible for obtaining and transmitting information to employees? The management of every undertaking belonging to the group (art.4.4)⁵⁵. This means that the scope of this obligation cannot be made dependent on the location of the central management (same kind of provision as protection of employees’ representatives).

What is the responsibility of establishments in Community-scale undertakings? The Directive treats establishments in Community-scale undertakings in the same way as undertakings in Community-scale groups of undertakings and the responsibility of both should be considered as equivalent.

Who is entitled to ask for and receive information? The parties concerned by the application of this Directive (art.4.4). These include employees and their representatives. These include as well the central management where it is situated in a Member State, the central management’s representative agent in a Member State where it has been designated or the “deemed” central management - In the absence of such a representative, the management of the establishment or group undertaking employing the greatest number of employees in any one Member State- (recital 25 and ECJ rulings).

⁵³C-62/99 *Bofrost*, C-440/00 *Kühne & Nagel*, C-349/01 *ADS Anker GmbH*.

⁵⁴See sections II 1.a p.18 and III 2.b p.28.

⁵⁵ An expert noted that, whereas there is a responsibility for the management of every undertaking belonging to the group, including central management, to obtain and transmit the information required for starting the process leading to negotiations, this does not mean that all of them need to transmit it to the parties concerned. Parties concerned need simply to have the information required to start the process.



Some experts raised the situation of individual workers in that respect. The Commission pointed out that both “employees and their representatives” are entitled to request the opening of negotiations (Art.5.1) and are therefore equally to be considered as “parties concerned”. In particular, employees from a site without employee representatives should not be deprived from the right to ask for and receive information.

What is the extent of the information to provide? The information required for commencing the negotiations, in particular the information concerning the structure of the undertaking or the group and its workforce, in particular to the information on the number of employees within the Member States and in each Member State (art.4.4, art.2.1 a and c). This includes all information enabling employees to determine whether the undertaking or group of undertakings where they work is a Community-scale undertaking or group of undertakings and to make the necessary contacts to draw up written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States to commence negotiations (rec.25 and ECJ rulings). Requests for information and requests to initiate negotiations should be differentiated in that respect. It was recalled that information has to be provided to enable employees to draw up a request to initiate negotiations and cannot be made dependent on receiving such request to initiate negotiations. An expert suggested however different levels of detail in the information to provide before and after the receipt of a valid written request to initiate negotiations.

6. Negotiating agreements (Article 5)

6.1 Provisions of the Directive

Setting up and internal meetings of the SNB:

Art.5.2.b The members of the special negotiating body shall be elected or appointed in proportion to the number of employees employed in each Member State by the Community-scale undertaking or Community-scale group of undertakings, by allocating in respect of each Member State one seat per portion of employees employed in that Member State amounting to 10 %, or a fraction thereof, of the number of employees employed in all the Member States taken together.

Art.5.4 §2 Before and after any meeting with the central management, the special negotiating body shall be entitled to meet without representatives of the central management being present, using any necessary means for communication.

Rec. (26) The special negotiating body must represent employees from the various Member States in a balanced fashion. Employees' representatives must be able to cooperate to define their positions in relation to negotiations with the central management.

Role of the social partners:

Art.5.2.c The central management and local management and the competent European workers' and employers' organisations shall be informed of the composition of the special negotiating body and of the start of the negotiations

Art.5.4 §3 For the purpose of the negotiations, the special negotiating body may request assistance from experts of its choice which can include representatives of competent



recognised Community-level trade union organisations. Such experts and such trade union representatives may be present at negotiation meetings in an advisory capacity at the request of the special negotiating body

Recital (27) Recognition must be given to the role that recognised trade union organisations can play in negotiating and renegotiating the constituent agreements of European Works Councils, providing support to employees' representatives who express a need for such support. In order to enable them to monitor the establishment of new European Works Councils and promote best practice, competent trade union and employers' organisations recognised as European social partners shall be informed of the commencement of negotiations. Recognised competent European trade union and employers' organisations are those social partner organisations that are consulted by the Commission under Article 138 of the Treaty⁵⁶. The list of those organisations is updated and published by the Commission.

6.2 Origin of the provisions

Explanatory memorandum of proposal COM(2008)419 points 38 and 39 "In order to resolve legal uncertainty and simplify the composition of the special negotiating body, it is modified to one representative per 10% portion of the employees in a Member State (...). The right of employees' representatives to meet without the employer being present is clarified. Article 5 introduces the obligation to inform the trade union and employers' organisations of the start of negotiations on setting up a European Works Council and explicitly mentions the trade union organisations among the experts on whom employees' representatives may call for assistance in the negotiations"

Impact assessment SEC(2008)2166 page 37 and 45 "In order to address the legal uncertainties (...) and clarify the process for the negotiation of agreements establishing EWCs, the proposal is to:

- simplify the composition of the SNB by deleting the reference to the maximum number of members and introducing a system that allows the SNB to better reflect the number of employees in the company: 1 member per 10% of the workforce (as in the SE Directive, 2001/86/EC), (..)
- clarify the right of employees' representatives to meet without the employer being present, with the linguistic facilities necessary for communication, before and, where appropriate, after negotiation meetings with the employer,
- clarify the right of SNB experts to be present at such negotiations."

"It is proposed (..) to recognise explicitly the special role that trade union organisations can play in negotiations and support for European Works Councils, by including trade union organisations among the experts who may be present at meetings of the special negotiating body, at the request of the latter.

The information of both employers' and workers' organisations at the starting of new negotiations to establish EWCs should be proposed to improve the monitoring of EWCs, via the social partners, instead of an administrative registering mechanism. This information would also allow social partners to promote the dissemination of the best practices they have identified to the parties starting negotiations to establish new EWCs."

"As regards the impact of the envisaged clarifications relating to SNB meetings and the presence of experts during negotiations, where requested by the employee representatives, they should help workers' representatives get to know each other, in particular workers from subsidiaries, and facilitate the development of working relations

⁵⁶ Now article 154 TFUE



during the initial starting period. The presence of experts at negotiations is also useful as this could help raise awareness of best practices. Even if opposed by some individual companies wishing to reduce the negotiating power of their counterparts, the presence of experts is not controversial for the European social partners, who recognise its positive role in their joint *Lessons learned*⁵⁷".

Joint advice of the European social partners: Art.5.4 §3 For the purpose of the negotiations, the special negotiating body may request assistance from experts of its choice *which can include representatives of competent recognised Community-level trade union organisations*. Such experts and such trade union representatives may be present at negotiation meetings in an advisory capacity at the request of the special negotiating body

Letter accompanying the joint advice: "ETUC and the European employers, BusinessEurope, CEEP, UEAPME, are prepared to inform their members about the extended possibilities offered by this revised directive".

6.3 Other References

Joint letter of ETUC and BusinessEurope of 14 June 2010: "Article 5.2.c has been amended in the Commission's proposal of 2 July 2008. European social partners did not comment on it in their joint advice of 29 August 2008. They have accepted the requirement to inform competent European workers' and employers' organisations on the composition of the SNB and of the start of the negotiations.

The ETUC and BusinessEurope understand "competent European workers' and employers' organisations" as the European social partners' organisations that are consulted by the European Commission under Article 154 TFUE. The Commission publishes and regularly updates a list of European Social Partners' organisations which fulfill the required criteria of representativeness.

In order to secure an effective implementation of this new obligation, BusinessEurope and ETUC stress the importance of a simple, non bureaucratic procedure.

Accordingly, the ETUC and BusinessEurope have provided single contact email addresses⁵⁸ in order to assure an effective transmission of information from companies to European social partner organisations. Once they have received information from companies, both organisations are responsible for disseminating the information to the addressees identified in the recast directive in a timely manner. This will be done according to their respective structures and procedures. On the trade union side, the relevant European Trade Union Federation(s) will notify companies when the information has been received so that companies get a clear feedback on which European trade union organisation(s) is/are involved."

Art 5.2.d of Directive 94/45/EC: "The central management and local management shall be informed of the composition of the special negotiating body"

Annex 4. of Directive 94/45/EC: " Before any meeting with the central management, the European Works Council or the select committee(...) shall be entitled to meet without the management concerned being present"

Composition of the SNB: Art.3.2.a of SE Directive 2001/86/EC and of SCE Directive 2003/72/EC

Role of trade unions: Art.3.5 of SE Directive 2001/86/EC and of SCE Directive 2003/72/EC

⁵⁷ Point 4 'reconciling different cultures' and point 5 'ensuring ownership of the EWC by the workforce'

⁵⁸ ewc AT business europe DOT eu and ewc AT etuc DOT org (or website www.ewc-etuc.org)



List of European social partner organisations consulted by the Commission under Article 154 TFUE (ex Art.138 TCE) online <http://ec.europa.eu/social/main.jsp?catId=522&langId=en>

6.4 Issues

Who are the European social partners to be informed? Those social partner organisations that are consulted by the Commission under Article 154 TFUE. The list of those organisations is updated and published by the Commission (rec.27, joint letter of BusinessEurope and ETUC of 14.06.2010). 66 employers' organisations and 20 trade union organisations are included in that list available on the Commission's social dialogue webpage⁵⁹. For employees and management at company-level, it would however not be easy to use this list to identify the competent organisations. In order to secure a simple and non bureaucratic procedure, single e-mail contact points for employers' organisations (ewc AT businesseurope DOT eu) and for trade union organisations (ewc@etuc.org) and standard procedures to proceed for this information have therefore been provided by BusinessEurope and ETUC (Joint letter of 14.06.2010).

Who is responsible for informing the European social partners? The drafting of article 5.2.c is silent. In addition to the already existing obligation for individual employees' representatives to inform management of their appointment as a member of the SNB, three options could be considered as to the obligation to inform European social partners of the composition of the SNB and of the start of the negotiations⁶⁰.

- First option: employees' representatives would be responsible for informing European social partners.
- Second option: employees' representatives would be responsible for informing European trade unions and central management would be responsible for informing European employers' organisations.
- Third option: central management would be responsible for informing European social partners.

First and second options raise following problems: employees' representatives do not have the global picture of SNB's composition before the first meeting of the SNB and are not responsible of organising this meeting. Furthermore, it would be difficult to provide for sanctions towards individual employees' representatives in case of non compliance. An information obligation upon employees' representatives towards European social partners or European trade unions could only be effective after the first meeting of the SNB. Giving the responsibility to inform to the SNB would however lead to delayed information and raises the question of the sanctions to be provided.

Third option may be simpler and more effective to achieve the objectives to allow social partners to monitor EWCs and promote the dissemination of the best practices. Although not corresponding to the immediate reading of the article's wording, it seems also more in line with Art.4.1 of the Directive stating that "The central management shall be responsible for creating the conditions and means necessary for the setting-up of a European Works Council or an information and consultation procedure". However, an expert stressed the risk of increase in administrative burden, should management bear the responsibility of the information. The Commission recalled in that regard that the information obligation is one shot and that actions aimed at simplifying procedures and informing on legislation are key in avoiding or diminishing administrative burdens.

⁵⁹ <http://ec.europa.eu/social/main.jsp?catId=522&langId=en> ; figures on 10 September 2010

⁶⁰ A fourth option was envisaged by a Member state: the SNB informs central management of its composition. Then central management and the SNB inform local management and the European social partners



It could therefore be suggested that the new obligation to inform European social partners is clearly separated in its subject (and timing) from the existing obligation for individual employees' representatives to inform management of their appointment as a member of the SNB. An expert considered that Member States should be free to determine who is to bear the responsibility, taking into account the objective of the information. As to the responsibility to inform, an expert enquired whether social partners consider that it is for central management to inform them. The ETUC representative answered positively.

When are the European social partners to be informed? This is not explicit in the Directive. However, content of the information relates to 'the composition of the SNB and of the start of the negotiations' (Art.4.4). The aim of this provision is notably to "allow social partners to promote the dissemination of the best practices they have identified to the parties starting negotiations to establish new EWCs" (impact assessment). The information should therefore be provided as early as possible in the negotiating process. One could suggest that this information takes place when convening the first negotiating meeting with the SNB.

As to the timing of the information, the ETUC representative stressed that the information of the social partners needs to be made timely, otherwise social partners will not be in a position to contribute to negotiations as from their start and noted that parties concerned as per Art.4.4 of the Directive include organizations covered by Art.5.2.c. The BusinessEurope representative considered that information has to be done when it is appropriate, which is not necessarily before the start of negotiations⁶¹. He also noted that Art.4.4 and Art.5.2.c have a different role, Art.4.4 relating to information addressed to people who are directly involved in EWC negotiations, and that no automatic link should be made between both.

How should the monitoring of EWCs by European social partners take place? This is primarily an issue for European social partners themselves to organise. Arrangements by European social partners to transmit information, to follow-up negotiations, to store, update and analyse agreements would be needed to achieve the objective of an actual monitoring of EWCs with similar results as an administrative registering mechanism.

The BusinessEurope representative considered that the way to use the information further depends on the structures and procedures of each organization. The ETUC representative indicated that further discussion is needed, together with the Commission, on the overall use of the information that will be made available.

7. Content of agreements (article 6)

7.1 Provisions of the Directive

Art.6.2 Without prejudice to the autonomy of the parties, the agreement referred to in paragraph 1 and effected in writing between the central management and the special negotiating body shall determine (...)

b) the composition of the European Works Council, the number of members, the allocation of seats, *taking into account where possible the need for balanced representation of employees with regard to their activities, category and gender*, and the term of office

c) the functions and the procedure for information and consultation of the European Works Council *and the arrangements for linking information and consultation of the*

⁶¹ An expert disagreed with that position, considering that the information about the start of the negotiations should in any case be done before negotiations actually start



European Works Council and national employee representation bodies, in accordance with the principles set out in Article 1(3);(...)

e) where necessary, the composition, the appointment procedure, the functions and the procedural rules of the select committee set up within the European Works Council (...)

g) the date of entry into force of the agreement and its duration, the arrangements for amending or terminating the agreement and the cases in which the agreement shall be renegotiated and the procedure for its renegotiation, including, where necessary, where the structure of the Community-scale undertaking or Community-scale group of undertakings changes.

Art.12.2 The arrangements for the links between the information and consultation of the European Works Council and national employee representation bodies shall be established by the agreement referred to in Article 6. That agreement shall be without prejudice to the provisions of national law and/or practice on the information and consultation of employees.

Recitals (20) In accordance with the principle of subsidiarity, it is for the Member States to determine who the employees' representatives are and in particular to provide, if they consider appropriate, for a balanced representation of different categories of employees.

(28) The agreements governing the establishment and operation of European Works Councils must include the methods for modifying, terminating, or renegotiating them when necessary, particularly where the make-up or structure of the undertaking or group of undertakings is modified.

(29) Such agreements must lay down the arrangements for linking the national and transnational levels of information and consultation of employees appropriate for the particular conditions of the undertaking or group of undertakings. The arrangements must be defined in such a way that they respect the competences and areas of action of the employee representation bodies, in particular with regard to anticipating and managing change.

(30) Those agreements must provide, where necessary, for the establishment and operation of a select committee in order to permit coordination and greater effectiveness of the regular activities of the European Works Council, together with information and consultation at the earliest opportunity where exceptional circumstances arise.

(41) Unless [the] adaptation clause is applied, the agreements in force should be allowed to continue in order to avoid their obligatory renegotiation when this would be unnecessary. (...). This Directive does not establish a general obligation to renegotiate agreements concluded pursuant to Article 6 of Directive 94/45/EC between 22 September 1996 and 5 June 2011.

7.2 Origin of the provisions

Explanatory memorandum of proposal COM(2008)419 points 41 and 42 "The agreements pursuant to Article 6 must include provisions for amendments and renegotiation." "In Article 6, the establishment and the operation of a select committee are, where applicable, part of the content of the agreement."

Impact assessment SEC(2008)2166 pages 38, 39 and 46: "The introduction of an adaptation clause to stipulate what should happen to representative bodies in the event of a significant change in make-up (merger, acquisition, take-over) could help improve legal certainty and be useful for the introduction of transitional arrangements to ensure the information and consultation of workers at key moments in reorganisations and for modifying operational frameworks that have become obsolete. A proposal could



therefore provide that all new agreements must include procedures for their adaptation and termination, and also for their renegotiation, especially in the event of a change in make-up (...)”.

“Information and consultation levels could be linked through a procedure taking into account the diversity of situations and allowing both an anticipatory approach and consideration of the employees potentially most affected by decisions, based on: the principle of dialogue ‘at the relevant level of management and representation, depending on the subject under discussion’; priority for negotiations on procedures for linking the information and consultation of the European Works Council and national representative bodies, in compliance with the above principle.”

“In addition to the measures envisaged in the consultation document, CEC European Managers proposes different systems for the representation of managers in the SNB. This proposal is difficult to take on board, given the very considerable differences in industrial relations systems between Member States and the principle of subsidiarity governing the election or designation of employee representatives. A recital in the Directive already states that Member States, if they consider this appropriate, may provide for a balanced representation of different categories of employees. However, it could be envisaged that the composition of an EWC established by agreement should ensure, where possible, a balanced representation of the workforce in terms of employee categories, as well as gender and company activities.”

7.3 Other References

Adaptation: Art.4.2.h of SCE Directive 2003/72/EC “the date of entry into force of the agreement and its duration, cases where the agreement should be renegotiated and the procedure for its renegotiation, including, where appropriate, in the event of structural changes in the SCE and its subsidiaries and establishments which occur after the creation of the SCE”

7.4 Issues

Are all agreements to be renegotiated to include the new items? No, there is no general obligation to renegotiate agreements concluded (Recital 41); The new items should be included while adapting or renegotiating agreements according to their own rules, the will of the parties or while applying the adaptation clause under Article 13.

How far does the request for a balanced representation go? The need for a balanced representation has to be taken into account where possible (Article 6.2)

What is meant under "term of office"? Upon a question of an expert on the meaning of "term of office", the Commission recalled that this expression in Article 6.2 was already present in Directive 94/45/EC. It refers to the periodicity in appointing or electing the employee representatives.

Are parties free to determine the scope of the EWC ? An expert inquired about the freedom of the parties to determine the scope of the EWC and more precisely about the levels in establishing EWCs per agreement (Art.6.2.a in relation to Art.1.6). The Commission noted that these provisions were already present in directive 94/45/EC. By default, an EWC is to be established at the highest level of the group. However, an agreement may provide for a different solution, for example providing for an EWC in each business unit. Parties may also choose to involve representatives from outside the EEA (which is frequently the case with Switzerland or candidate countries).



Can an agreement provide for any system of link between the levels? No, the arrangements must be defined in such a way that they respect the competences and areas of action of the employee representation bodies, in particular with regard to anticipating and managing change (Article 12.2, 12.4, 12.5, Recital 29). This aspect is dealt with in details while analysing Article 12 in conjunction with recitals 29, 37 and 38.

What happens if the existing agreement does not provide for adaptation to changes or link between the levels? Default rules will apply: the adaptation clause will be applicable in case of significant changes in the structure and the processes of informing and consulting will be conducted in the European Works Council as well as in the national employee representation bodies in cases where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged (article 12.3 and Article 13)

What about agreements on information and consultation procedures as per Article 6.3? An expert enquired about the requirements as to the agreement on a procedure instead of an EWC. The Commission recalled that they were already present in Directive 94/45/EC. The agreement on a procedure can only be required to contain elements of Article 6.2 not corresponding to an EWC.

8. Content of subsidiary requirements (Annex I)

8.1 Provisions of the Directive

Annex 1 a. The competence of the European Works Council shall be determined in accordance with Article 1(3)⁶².

The information of the European Works Council shall relate in particular to the structure, economic and financial situation, probable development and production and sales of the Community-scale undertaking or group of undertakings. The information and consultation of the European Works Council shall relate in particular to the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies

The consultation shall be conducted in such a way that the employees' representatives can meet with the central management and obtain a response, and the reasons for that response, to any opinion they might express.

Annex 1 c. The members of the European Works Council shall be elected or appointed in proportion to the number of employees employed in each Member State by the Community-scale undertaking or Community-scale group of undertakings, by allocating in respect of each Member State one seat per portion of employees employed in that Member State amounting to 10 %, or a fraction thereof, of the number of employees employed in all the Member States taken together.

Annex 1 d. To ensure that it can coordinate its activities, the European Works Council shall elect a select committee from among its members, comprising at most five members,

⁶² Art.1.3 Information and consultation of employees must occur at the relevant level of management and representation, according to the subject under discussion. To achieve that, the competence of the European Works Council and the scope of the information and consultation procedure for employees governed by this Directive shall be limited to transnational issues



which must benefit from conditions enabling it to exercise its activities on a regular basis.(...)

Annex 3. Where there are exceptional circumstances or *decisions* affecting the employees' interests to a considerable extent, particularly in the event of relocations, the closure of establishments or undertakings or collective redundancies, the select committee or, where no such committee exists, the European Works Council shall have the right to be informed. It shall have the right to meet, at its request, the central management, or any other more appropriate level of management within the Community-scale undertaking or group of undertakings having its own powers of decision, so as to be informed and consulted -.

Those members of the European Works Council who have been elected or appointed by the establishments and/or undertakings which are directly concerned by the circumstances or *decisions* in question shall also have the right to participate where a meeting is organised with the select committee (...)

The information and consultation procedures provided for in the above circumstances shall be carried out without prejudice to Article 1(2) and Article 8⁶³.

Recital (44) The content of the subsidiary requirements which apply in the absence of an agreement and serve as a reference in the negotiations must be clarified and adapted to developments in the needs and practices relating to transnational information and consultation. A distinction should be made between fields where information must be provided and fields where the European Works Council must also be consulted, which involves the possibility of obtaining a reasoned response to any opinions expressed. To enable the select committee to play the necessary coordinating role and to deal effectively with exceptional circumstances, that committee must be able to have up to five members and be able to consult regularly.

8.2 Origin of the provisions

Explanatory memorandum of proposal COM(2008)419 point 40 "The Annex draws a distinction between fields where information is required and those where consultation is required, and introduces the possibility of obtaining a response, and the reasons for that response, to any opinions expressed. With a view to anticipating such eventualities, the exceptional circumstances requiring information and opening the possibility of a select committee meeting are extended to include circumstances in which decisions are envisaged that are likely to affect the employees' interests to a considerable extent. In order to enable the select committee to perform this more important function, its maximum number of members is set at five and a provision is added stipulating that the conditions enabling it to exercise its activities on a regular basis must be met."

Impact assessment SEC(2008)2166 pages 37-38 and 49: "Subsidiary requirements are fall-back provisions that regulate the operation of EWCs in the absence of an agreement. They are not minimum requirements all EWCs would have to observe, and have been applied up to now only in a very limited number of cases (about five), as nearly all European Works Councils are established on the basis of an agreement. However, they play an important benchmark role, especially in the negotiation or renegotiation of agreements". "In order to meet the objectives of increased effectiveness while minimising costs, to avoid setting barriers to the take-up of new EWCs, to take into account as much as possible the views of stakeholders and to balance the interests of workers and companies, the following conclusions may be drawn:

⁶³ Art.1.2 "(...) The arrangements for informing and consulting employees shall be defined and implemented in such a way as to ensure their effectiveness and to enable the undertaking or group of undertakings to take decisions effectively". Art. 8 deals with confidential information



- Even if, under the present conditions, a majority of companies disagree with the assertion that the EWC slows down managerial decision-making (EPEC 2008), the operation of the EWC has to contribute to an efficient decision-making process allowing companies to adapt as necessary. This should be made clear as a general principle in the Directive.
- Reinforcing the role of the select committee may be more cost-effective than increasing the number of plenaries and should therefore be favoured.
- Anticipation, as a key element in the effectiveness and positive economic and social impact of EWCs, should be promoted, so the change in the definition of exceptional circumstances should be supported.
- The right to a reasoned answer to any opinion expressed appears to be a more important element in effective consultation than the imposition of additional meetings with the consequent increase in costs, and should therefore be favoured."

8.3 Other References

Distinction issues for information and for consultation: Art.4.2 of Directive 2002/14/EC

Right to receive a response to opinions: Art.4.4.d of Directive 2002/14/EC

Composition of the EWC: same as for the SNB as per Art.5.2.b of Directive 2009/38/EC, Art.3.2.a of SE Directive 2001/86/EC and of SCE Directive 2003/72/EC

Decisions : Art.4.2.c of Directive 2002/14/EC

8.4 Issues

What are the conditions enabling the select committee to exercise its activities on a regular basis? The ones that enable the committee to consult regularly in order to play the necessary coordinating role and to deal effectively with exceptional circumstances, (Recital 44). According to the specific situations at stake, these conditions could include time off, travel facilities, the possibility of face-to-face meetings several times a year, translation and interpretation, communication facilities and secretariat.

Is the default EWC entitled to follow-up meetings? An expert enquired why the SNB is entitled to meet alone before and after meetings with management as per Art.5.4, whereas the EWC has this right only before them. The Commission replied that the related part of the Annex had remained unchanged from Directive 94/45/EC, without the difference raised being addressed so far.



IV - New framework of Directive 2009/38/EC For the role and capacity of employee representatives

Means to collective representation (Art.10.1)
Information of workforce (Art.10.2)
Training (Art.10.4)

Working document 7 examined on 12 January 2010 and 14 June 2010

9. Means to collective representation (article 10.1)

9.1 Provisions of the Directive

Art. 10.1 : Without prejudice to the competence of other bodies or organisations in this respect, the members of the European Works Council shall have the means required to apply the rights arising from this Directive, to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings.

9.2 Origin and objectives of the provisions

Explanatory memorandum of proposal COM(2008)419 point 37: The competence of the members representing the employees on the European Works Council to represent the employees of the undertaking or group of undertakings is established.

Impact assessment SEC(2008)2166 page 20, 37, 46 and 51: "Capacity of the EWC to represent workers and act in legal proceedings: The European Courts do recognise the competence of European Works Councils to represent employees, which is not restricted to the internal matters of the company in question⁶⁴. However, national court cases highlight legal uncertainties as to the right of employee representatives to pursue complaints, in particular where the EWC includes management representatives⁶⁵."

"Clarifications regarding the protection of rights: In order (...) to address legal uncertainties regarding the capacity of the European Works Council to represent workers' interests (...), the proposal here is to (...) explicitly recognise the European Works Council as the representative of the undertaking's or group's employees"

"As regards the capacity of the EWC to represent workers' interests, this sub-option is likely to help this body express employees' interests more effectively, at cross-border level where necessary. It will be useful in clarifying the legal standing of the EWC in court proceedings in the event of violations of information and consultation rights, so is likely to increase compliance, while potentially increasing legal fees for some companies. It is also likely to bring about legal certainty regarding the role of the EWC in expressing employees'

⁶⁴ For example, the Court of First Instance of the European Communities accepted the intervention of the *Legrand* European Works Council in the dispute over competition law connected with the merger with *Schneider* (CFI, T-77/02, *Schneider Electric*, Judgment of 6.6.2002).

⁶⁵ Preliminary hearing on the issue of court costs, *P&O* (Employment Appeal Tribunal, 28.6.2002); *Panasonic* (Appeal against *Bobigny TGI*, 4.5.1998).



interests in decisions affecting them but where the decision-maker is not only the company itself (such as in insolvency or competition proceedings)."

Joint advice of the European social partners: Art. 10.1 : Without prejudice to the competence of other bodies or organisations in this respect, the members of the European Works Council shall *have the means required to apply the rights stemming from this Directive*, to collectively represent the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings ~~and shall have the means required to apply the rights stemming from this Directive.~~

9.3 Other References

Art. 10.3 : Members of special negotiating bodies, members of European Works Councils and employees' representatives exercising their functions under the procedure referred to in Article 6(3) shall, in the exercise of their functions, enjoy protection and guarantees similar to those provided for employees' representatives by the national legislation and/or practice in force in their country of employment.

This shall apply in particular to attendance at meetings of special negotiating bodies or European Works Councils or any other meetings within the framework of the agreement referred to in Article 6(3), and the payment of wages for members who are on the staff of the Community-scale undertaking or the Community-scale group of undertakings for the period of absence necessary for the performance of their duties.

9.4 Issues

What is meant with "represent collectively the interests of the employees"? The proposal of the Commission, as detailed in the impact assessment, clearly aimed to:

- Clarification in the legal standing of employee representatives in court proceedings in the event of violations of transnational information and consultation rights, in particular where the EWC includes management representatives,
- Legal certainty in the capacity to express employees' interests in decisions affecting them where the decision-maker is not limited to the company (such as in insolvency or competition proceedings), as already recognised by European Courts.

On a comment from an expert, it was indicated that the latter should not lead to introduce new information and consultation obligations in insolvency and competition procedures but rather to recognize the EWC as representing the interests of European employees where such interests are to be heard.

On questions from two experts, it was indicated that a collective representation means a work in college and a majority to take decisions.

The views of the social partners on the intended implications of the changes introduced to the proposal's wording in Council and Parliament upon their suggestion were welcome. As to the collective representation of the employees' interests, the ETUC representative noted that it is dealt with in different ways at national level, a legal personality being granted in some Member States to trade unions or works councils but not in others. She considered that it is up to Member States to determine how members of the EWC will have the means to collectively represent the interests of employees. Even though legal action should be a last resort, this includes the right to take legal action where necessary to apply rights arising from the Directive. The BusinessEurope representative stressed that the intention of the social partners while suggesting a modification to the proposed article was to make clear



that the collective representation is limited to the application of the rights stemming from the directive and that the EWC should not be given a general representation role.

Why referring to "the members" of the European Works Council? To take into account the situations where the EWC includes management representatives (impact assessment)

What are the means required? The means to be considered are the ones "required to apply the rights arising from this Directive", (Art.10.1) going beyond the "protection and guarantees" referred to in Art.10.3. The means include the ones required to enable EWC members to launch court proceedings in the event of violations of transnational information and consultation rights. On a comment from an expert, it was indicated that Brussels I (Regulation 44/2001) and Rome I (Regulation 593/2008) Regulations set rules to determine the competent jurisdiction and the applicable law to any dispute and stressed the rules on conflict of laws in relation to the definition of "controlling undertaking" laid down in Article 3.6 and 3.7 of the Directive. In practice, all jurisdictions need to ensure employee representatives are able to defend their rights, including in Court.

The provisions of Article 4.1 of the Directive on the general responsibility of central management in creating the conditions and means necessary for setting up an EWC were also recalled and it was made clear that the means required may include financial means.

As to the "means required", the ETUC representative noted that the means to be considered are the ones related to the application of the Directive and that a broad view is necessary while identifying them. The EWC should have the financial means to represent employees.

Who is to provide the means? As to the origin of the means, the ETUC representative considered that means are to be provided primarily by management but that other sources are possible, for example joint funds. The BusinessEurope representative noted that the means include travel, accommodation, facilities etc.... While the financing of Court cases is not excluded, he considered that the recast directive does not specify whether these costs are to be considered as "means required". This could be determined at national level as part of the transposition process, taking into account the diversity of situations in Member States and companies. Nevertheless, the possibility that companies could be required to bear the costs related to judicial action of EWCs against them is a clear concern for employers as it would constitute an incentive to litigation.

Are costs linked to legal action to be borne by management? It depends on national law and practice whether the need for EWC members to have the means to enable them to launch court proceedings to defend the rights of employees to transnational information and consultation implies that central management is to bear the costs of legal action taken by employee representatives.

As to the costs linked to legal actions, it was noted that a wide range of different regimes exist for national disputes, for example:

- Each side (trade union and company) bears its costs
- Means to be borne by management include legal costs
- The works council cannot be condemned to any cost in legal procedures
- The party losing the case normally pays both parties' expenses

Some conclusions could be reached after a discussion involving several experts:

- Employee and employers are both to benefit from good conditions and possibility to go to Court; However, out of Court dispute resolution should be promoted;



- Flexibility is needed to determine who is to bear the costs related to legal actions or how they should be shared: national practice is to be taken into account and the EWC agreement may provide for practical arrangements in that area;
- Whatever the rules and arrangements provided as to legal costs, individual responsibility of employee representatives shall never be involved.

10. Information of workforce (Article 10.2)

10.1 Provisions of the Directive

Art.10.2 Without prejudice to Article 8, the members of the European Works Council shall inform the representatives of the employees of the establishments or of the undertakings of a Community-scale group of undertakings or, in the absence of representatives, the workforce as a whole, of the content and outcome of the information and consultation procedure carried out in accordance with this Directive.

Recital (33) In order to perform their representative role fully and to ensure that the European Works Council is useful, employees' representatives must report to the employees whom they represent (...).

10.2 Origin of the provisions

Explanatory memorandum of proposal COM(2008)419 point 37: The obligation on the employees' representatives to report to the employees that they represent has been moved from the subsidiary requirements of the Directive to Article 10, which thus deals with the role of the employees' representatives and their protection.

Impact assessment SEC(2008)2166 page 27, 38 and 51: "The operational objectives that need to be achieved in order to ensure the effectiveness of employees' information and consultation rights include: (...) to increase the circulation of information within the EWC, notably by having representatives report back to their members (...)"

"Clarification of the role and reinforcement of the competence of employees' representatives: In order to allow employees' representatives to perform their duties to the full, a proposal could introduce: an obligation for European Works Council representatives to report to the workers they are representing (...)."

"Clarification of the role and reinforcement of the competence of employees' representatives: An obligation for European Works Council representatives to report back to the workers they represent would increase the quality of dialogue and the EWC's added value, as well as improve the interplay between local/national and European levels, with a major impact on anticipation, adaptability and mobility. It would entail limited costs, mainly related to the potential need for EWC members to travel to local sites in order to report back to the workers. It would meet one of the main employers' concerns relating to the lack of preparation of employee representatives and their dissemination of meeting information (EPEC 2008). The 2005 *Lessons learned* published by the European social partners states that 'ensuring a real sense of ownership of the EWC by the whole workforce (is) a considerable challenge'. Indeed, the obligation to report back would help meet this challenge, and is likely to be welcomed by all stakeholders."



10.3 Other References

Article 8 (Confidential information): 1. Member States shall provide that members of special negotiating bodies or of European Works Councils and any experts who assist them are not authorised to reveal any information which has expressly been provided to them in confidence. The same shall apply to employees' representatives in the framework of an information and consultation procedure. That obligation shall continue to apply, wherever the persons referred to in the first and second subparagraphs are, even after the expiry of their terms of office.

2. Each Member State shall provide, in specific cases and under the conditions and limits laid down by national legislation, that the central management situated in its territory is not obliged to transmit information when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them. A Member State may make such dispensation subject to prior administrative or judicial authorisation.

3. Each Member State may lay down particular provisions for the central management of undertakings in its territory which pursue directly and essentially the aim of ideological guidance with respect to information and the expression of opinions, on condition that, at the date of adoption of this Directive such particular provisions already exist in the national legislation.

Annex 5. of Directive 94/45/EC: Without prejudice to Article 8 of the Directive, the members of the European Works Council shall inform the representatives of the employees of the establishments or of the undertakings of a Community-scale group of undertakings or, in the absence of representatives, the workforce as a whole, of the content and outcome of the information and consultation procedure carried out in accordance with this Annex.

10.4 Issues

Who has the duty to inform? "The members of the European Works Council" (Art.10.2), who are the employee representatives (Rec.33). As members of the EWC represent collectively the interests of the employees (Art.10.1), the duty to inform lies on them jointly. Management has the obligation to provide the means required to allow EWC members to fulfill their duty. On a question from an expert and comments by others, it was indicated that management cannot be considered as responsible for informing employees in case of inertia of EWC members and has not to interfere in this process. However management has to provide for the necessary means enabling employee representatives to perform their duty. In case these are not provided, employees should be able to take the case to Court.

Who is to be informed? "The representatives of the employees of the establishments or of the undertakings of a Community-scale group of undertakings or, in the absence of representatives, the workforce as a whole" (Art.10.2). All workers, through their representatives where they exist, have to be informed, not only the employees working in the activity or establishment from which the EWC members are coming from nor the sole members of the trade unions they may be active in.

How should the information of the workforce take place? The way the workforce is to be informed is an area for "the arrangements for linking information and consultation of the European Works Council and national employee representation bodies" to be defined by the EWC agreement (art.6.2 and Art.12). It depends notably on the way the company and the employee representation are structured. It could entail the need for EWC members to travel to local sites in order to report back to the workers (IA). On a comment from an



expert, it was noted that there is no universal access to sites for employee representatives but that this access should be granted where it is the correct way to inform employees.

What about confidential information? "Without prejudice to Article 8" (relating to confidential information), workforce has to be informed of "the content and outcome of the information and consultation procedure" (Art.10.2). Provisions on confidentiality remain unchanged from Directive 94/45/EC and the provisions on information of workforce while respecting confidentiality already existed in the subsidiary requirements of that Directive (Art.8 and Annex 5.). The method for protecting confidential information depends on the case (type of information at stake) and Member States concerned.

An expert asked about conflicts arising in determining the confidential character of information. It was recalled that provisions on confidentiality have not been modified from Directive 94/45/EC and that protection of confidential information is to be determined by Member states. On comments from other experts, it was noted that information shall not be kept unnecessarily confidential and that national law is to provide for appropriate procedures in case conflicts arise in this area. Article 11.3 (administrative and judicial appeal procedures to be provided in case of disputes) was also recalled to that aim.

11. Training (article 10.4)

11.1 Provisions of the Directive

Art.10.4 In so far as this is necessary for the exercise of their representative duties in an international environment, the members of the special negotiating body and of the European Works Council shall be provided with training without loss of wages.

Recital (33) In order to perform their representative role fully and to ensure that the European Works Council is useful, employees' representatives (...) must be able to receive the training they require.

11.2 Origin of the provisions

Explanatory memorandum of proposal COM(2008)419 point 37: The possibility for employees' representatives' to benefit from training without loss of salary is clarified.

Impact assessment SEC(2008)2166 page 27, 38 and 51: "The operational objectives that need to be achieved in order to ensure the effectiveness of employees' information and consultation rights include:(...) to develop the capacity of EWC through training and support"

"Clarification of the role and reinforcement of the competence of employees' representatives: In order to allow employees' representatives to perform their duties to the full, a proposal could introduce: (...) a right to training for employees' representatives."

"As regards the training of employee representatives, the present situation is as follows (EPEC 2008)

Training	Right to training: 60% of EWCs Training for at least some EWC members in the previous year: 79% of EWCs Where provided, training is offered: to entire EWC, 46%, to 10 or more EWC members, 38% Average length of training where provided: 1.6 day/year Training expenditure where provided: from €1 300 to €150 000, average of €43 800
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Introducing a right to training for employees' representatives would therefore entail extra costs for companies not already providing it, i.e. for one fifth of companies, with an average of €43 800 per company. Introducing a right to training for employee representatives is the envisaged measure with the most direct and significant impact on costs for companies.

However, this measure is not controversial and meets the interests of both workers and companies. All stakeholders have expressed their support, while the 2005 *Lessons learned* published by the social partners states that 'the ability to understand complex issues discussed in the EWC determines the quality in communication. Investing in language as well as technical/content training helps to optimise the functioning of the EWC and to reduce overall functioning costs'.

Provided that the efficiency of such training action is ensured, a right to training is likely to have a positive impact in the 20% of companies not providing EWC members with any training."

Joint advice of the European social partners: Art. 10.4 : In so far as this is necessary for the exercise of their representative duties in an international environment, the members of the special negotiating body and of the European Works Council shall *be provided with* ~~have access to~~ training without loss of wages.

11.3 Other References

Directive 2001/86/EC: Part 2 (g) of Annex "In so far as this is necessary for the fulfillment of their tasks, the members of the representative body shall be entitled to time off for training without loss of wages".

11.4 Issues

What was the intention of social partners on training? At January 2010 meeting, an expert enquired about the views of the social partners as to the meaning of "provided with training" in the joint advice of August 2008. The BusinessEurope representative considered that the intention was to provide employees' representatives with the training necessary for the exercise of their duties, in agreement between the two sides. He recalled that already a lot is done in this area, that there is a large variety both in the types of training and in the companies and that training is not a controversial issue. The ETUC representative referred to the choice of an open formulation for that provision which constitutes an obligation. She considered that training should not restrict to language courses, that the autonomy of the EWC should be respected as to determining the need for training and that arguments are to be given to that respect. The second BusinessEurope representative referred to the autonomy of the parties and considered that the employer is to agree on the necessary training. She added that training should be provided in accordance with national traditions .

At June 2010 meeting, as to new art.10.4, the BusinessEurope representative stressed that training is necessary to support social dialogue and that parties should be able to agree on training. The ETUC representative presented her understanding that the EWC would have to indicate what it needs in terms of training and give the reasons. She considered that the mechanism establishes an incentive to motivate requests and decisions for both the EWC and the employer.

What training are employee representatives to be provided with? The training "necessary for the exercise of their representative duties in an international environment" (Art.10.4). In practice, different types of training may be necessary for employee representatives to



understand the international structure and strategy of the company, the legal and industrial relations background of their duty and to cope with the practical requirements of EWC activity, notably as regards communication and language needs. This training may be necessary for the whole EWC or for some of its members only (Council document 12834/08, meeting of 8 September 2008).

Can management refuse training requests from EWC members? Insofar that a training is "necessary for the exercise of their representative duties in an international environment", EWC members "shall be provided" with it (Art.10.4), which implies that management should in principle not refuse reasonable training requests in this context.

What if parties can't agree? As to the determination of the training content or provider, an expert asked social partners about their views on the situation where parties can't agree. The BusinessEurope representative considered that there is no reason why a company should create problems on a training which is important for employees. He noted that, if parties were to disagree on training, there is little chance a good dialogue on the future of the company could happen. As a result, there should be a commitment to pay for training when it is necessary for EWC members to exert properly their duty. The ETUC representative considered that some freedom and autonomy is needed on the training providers unless the company has major problems with a specific provider. She recommends to deal with training in the EWC agreement and to avoid ending up in Court as far as possible. An expert noted that, even if parties agree in 99% of cases, Member States will need to foresee the cases where they don't.

Who is to give the training? That employee representatives "shall be provided with" training does not imply that management is to give the training. Who will give the training depends on the need and availability of resources. In practice, it could be training providers, trade unions, consultants, academics, company experts or language trainers... at either central or local levels.

Who is to bear the costs of training? It depends on the type and level of training (whole EWC or individual members) as well as, for the training of individual members, on the rules for the training of employee representatives in the concerned Member States. For example, for a technical training of the whole EWC, central management usually bears the direct costs while the distribution in the payment of wages during time off depends on internal company policy. For the training of individual members, the way costs of language or union training are borne may vary across Member States. Whatever the case, it is not for the EWC members themselves to bear the costs of training and the training has to be provided to them "without loss of wages" (Art.10.4 and Council document 12834/08, meeting of 8 September 2008).

As to the financing of training, an expert noted that leaving Member States determining their own rules on who is to bear the costs for training would lead different members of the same EWC being subject to different rules. Other experts noted the risk of discrimination in that context. Experts asked social partners their views on the suggestion that, while it should not be always for management to bear the costs of training, EWC members should in no case having to bear them themselves. The ETUC representative considered that different sources could finance training but stressed that, whatever the situation, there could be no loss of wages for the employees and EWC members could not have to pay the costs of training themselves. The BusinessEurope representative noted that the rules applicable in the Member State where the company has its central management should apply to the training of the whole EWC with all members treated in the same way. National rules should be treated apart.



In addition, experts considered that, if the costs of training are not borne by another entity or party, central management would have to bear them, given its overall responsibility as regards the establishment and functioning of EWCs.

Are national rules on training to be applied in the context of EWCs? As to the relation to existing right to training for employee representatives, some experts enquired on the ceiling in costs or number of days that may be set in national legislation. An expert noted the flexibility provided in the Directive which may contrast with prescriptive national rules in terms of number of days or training providers. Another expert noted that application of Art.10.4 involves a mix between transnational and national levels, as discussions on the need for training may be held at different levels.

The BusinessEurope representative noted the existence of specific national contexts as to the training of employee representatives, which will be assessed by the Commission in its transposition review. He stressed that the indication "in so far that it is necessary" should be sufficient and that common sense should prevail given the variety in national systems and companies' situations. The ETUC representative considered training as an important issue to address in the EWC agreement. She stressed that it is necessary to leave a room for debate in the company and that legislation should not set limitations the nature of which could impede this flexibility and would be contrary to the convergence between national legislations. She noted that only more favorable conditions may be introduced through implementation, as restrictions would be contrary to the Directive.

The Commission noted that a distinction should be made between national and transnational contexts while regulating training of employee representatives.





V – Adaptation and agreements in force

Adaptation clause (Art.13) Agreements in force and applicable obligations (Art.14)

Working documents 6 and 4 examined on 12 January, 15 March and 14 June 2010

12. Adaptation clause (Article 13)

12.1 Provisions of the Directive

Art.13 : Where the structure of the Community-scale undertaking or Community-scale group of undertakings changes significantly, and either in the absence of provisions established by the agreements in force or in the event of conflicts between the relevant provisions of two or more applicable agreements, the central management shall initiate the negotiations referred to in Article 5 on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.

At least three members of the existing European Works Council or of each of the existing European Works Councils shall be members of the special negotiating body, in addition to the members elected or appointed pursuant to Article 5(2).

During the negotiations, the existing European Works Council(s) shall continue to operate in accordance with any arrangements adapted by agreement between the members of the European Works Council(s) and the central management.

Recital (40) Where the structure of the undertaking or group of undertakings changes significantly, for example, due to a merger, acquisition or division, the existing European Works Council(s) must be adapted. This adaptation must be carried out as a priority pursuant to the clauses of the applicable agreement, if such clauses permit the required adaptation to be carried out. If this is not the case and a request establishing the need is made, negotiations, in which the members of the existing European Works Council(s) must be involved, will commence on a new agreement. In order to permit the information and consultation of employees during the often decisive period when the structure is changed, the existing European Works Council(s) must be able to continue to operate, possibly with adaptations, until a new agreement is concluded. Once a new agreement is signed, the previously established councils must be dissolved, and the agreements instituting them must be terminated, regardless of their provisions on validity or termination.

12.2 Origin and objectives of the provisions

Explanatory memorandum of proposal COM(2008)419 point 41: “The agreements pursuant to Article 6 must include provisions for amendments and renegotiation. Where the structure of the undertaking or group of undertakings changes significantly, Article 13 provides for the agreements in force to be adapted in accordance with the provisions of the applicable agreement or, by default and where a request is made, in accordance with the negotiation procedure for a new agreement in which the members of the existing European Works Council(s) are to be associated. These European Works Councils will



continue to operate, possibly with adaptations, until a new agreement is reached. They will then be dissolved and the agreements terminated.(...)"

Impact assessment SEC(2008)2166 page 20 and 50: " Many 'Article 13' and some 'Article 6' agreements do not make any practicable provision for amendment and/or termination, thus reducing the ability to adapt the structure and functioning of EWCs as and where necessary, in particular in cases of merger, acquisition or changes in make-up."

"The introduction of an adaptation clause would ensure legal certainty, with the related benefits; an effective information and consultation process during mergers and acquisitions, diminishing social unrest, allowing the negotiation of appropriate accompanying measures and favouring the emergence of a unified group within the new boundaries. (...) The envisaged clause would indeed enable two EWCs to be merged when the companies merge, so would save on the costs of two EWCs continuing to operate because of the absence of adaptation provisions in one of the pre-existing agreements. As to the composition of the negotiating body, while favouring continuity by involving members of the existing EWCs, all possible changes in make-up should be taken into account, including where some of the workers were not previously represented at transnational level. This would provide for both the setting up of an SNB and bringing together the leaders of the existing EWCs."

"Providing for pre-existing agreements to be maintained in all cases would limit the potential impact of changes in the Directive to new EWCs to be established. This would not allow legal uncertainties to be addressed in the event of changes in make-up. This would also risk preventing the creation of new EWCs while bringing no improvement to those that already exist, and should therefore be avoided. Allowing any request to trigger the renegotiation of a pre-existing agreement may on the other hand risk encouraging 'freerider' actions and destabilising well-functioning EWCs, so should be avoided too. Limiting requests for renegotiating pre-existing agreements to those situations where significant changes in make-up and structure occur (such as mergers, take-overs or acquisitions) should avoid these two opposing risks."

12.3 Other references

Joint letter of ETUC and BusinessEurope of 14 June 2010: " Article 14.1 clarifies that the obligations of the recast directive do not apply to EWCs established under 'old" article 13 (of Directive 94/45/EC) as long as they remain valid and are supported by social partners at company level. These agreements can also be adjusted in case of "changes in the structure of the undertakings or groups of undertakings" without full negotiations in accordance with Article 5-7 of the recast Directive in so far as these changes do not trigger the applicability of Article 13 of the recast Directive (see below).

Moreover, Article 14.2 stipulates that, upon the time of their expiry, and if both sides agree with this, Article 14 agreements – as defined in Articles 14.1.a and 14.1.b- can be renewed or revised when the parties to the agreement jointly decide so. Where this is not the case, the provisions of the recast Directive apply. This is in line with recital 41 in the recast Directive according to which "Unless [the] adaptation clause [Article 13 of the recast] is applied, the agreements in force should be allowed to continue in order to avoid their obligatory renegotiation when this would be unnecessary".

We understand that, according to Article 13 of the recast Directive, three cumulative conditions are necessary to trigger new negotiations in cases in which an Article 14 agreement (one of the two categories of agreements foreseen in Article 14) is involved:

- I. There is a significant change of structure in the company in accordance with Article 13 on the recast Directive;



II. There is no specific provision in the existing EWC agreement in the procedure to follow for an adaptation, or there is a conflict between two or more applicable agreements;

III. Central management initiates negotiations on its own initiative or at the written request of at least 100 employees or their representatives in at least two different Member States.

It is our joint understanding that once these conditions are fulfilled, Articles 5, 6 and 7 of the recast Directive apply to the negotiations. This may lead to the conclusion of a new agreement within the three-year negotiating deadline foreseen in Article 7.1 which would then be subject to the recast Directive."

Art 4.2.h of Directive 2003/72/EC: The agreement shall specify "cases where the agreement should be renegotiated and the procedure for its renegotiation, including, where appropriate, in the event of structural changes (...)".

12.4 Issues

Are some companies "exempted" from this provision of the Directive? No, this provision applies to all companies, even the ones "exempted" from the obligations introduced by the Directive, as it is to be deduced from the use of "without prejudice to Article 13", at the beginning of Article 14 and from the objectives of the adaptation clause (Art.14.1, impact assessment). The aim being to cover all situations where the information and consultation process needs to be adapted to significant changes in structure, the situations where a procedure on information and consultation or an EWC established according to the subsidiary requirements are involved should also be covered. As to the application of the adaptation clause to EWCs established under the subsidiary requirements enquired by two experts, another expert added that the logic of the Directive is that the adaptation clause is to apply every time the composition or operation of the EWC(s) do not correspond to the new structure of the company any more and cannot be adapted, including for EWCs established under the Annex and for old article 13 agreements.

Does the adaptation clause apply to information and consultation procedures as per art.6.3? As to the application of the adaptation clause to information and consultation procedures enquired by two experts, the Commission indicated that agreements on procedures for transnational information and consultation and on EWCs are treated in the same way throughout the Directive and that no reason should prevent from applying the adaptation clause also to procedures.

What is to be meant under significant changes in structure? Changes in make-up such as mergers, acquisitions or divisions are given as examples (Rec.40 and impact assessment).

What happens if the existing agreement(s) does not provide for adaptation to changes? Default rules will apply: the adaptation clause will be applicable in case of significant changes in the structure (Article 13 1st§).

Which conditions are to be met for the renegotiation process under the adaptation clause to be triggered? Three cumulative conditions are to be met (art.13 and Rec.40):

- A significant change in structure
- Absence or conflicting provisions in applicable agreement(s) to carry out the required adaptation
- An initiative of central management or a written request of 100 employees or their representatives of two Member States establishing the need for it.



What is the role of central management? As to the role of central management, an expert enquired about what happens if there is no start in the process. The Commission indicated that Article 13 provides for an obligation to start negotiations only upon initiative of management or request of employees. If nobody requests adaptation, there is no obligation to start negotiations. Should central management however not initiate negotiations following a request of employees, it would be a breach of its obligations under Article 13 and 5 of the Directive and subsidiary requirements would apply after six months (Article 7.1).

How should the three members of the existing EWC(s) be appointed to be included in the new negotiating body? The simplest solution appears to be for the EWC or its select committee to appoint these members among the members of the EWC in accordance with its internal rules. An expert enquired about the situation where several EWCs pre-exist. The Commission indicated that all EWCs have the right to send three representatives, as it stems from the wording "or of each of the existing" EWCs used in Article 13.

How should existing EWC(s) continue to operate during negotiation under the adaptation clause? An expert enquired about the duration and adaptation of the operation of existing EWC(s). The Commission indicated that the duration depends on the time necessary to conclude an agreement over the new EWC, which is not to exceed three years (Article 7.1). Should a new EWC be established according to the subsidiary requirements after six months (refusal to negotiate) or three years (no agreement), the old EWC(s) should end in the same way as if there was an agreement, as the old EWC(s) has(ve) only to be maintained "during the negotiations" (Article 13 last §). As to the adaptation in the operation of the EWC(s) in this period, there is no obligation to do this adaptation (Recital 40 refers to "possibly with adaptations") but any adaptation should be made "by agreement between the members of the EWC(s) and the central management".

What happens if there is no agreement following the renegotiation process? The subsidiary requirements should apply, as it is part of "negotiations referred to in Article 5" (Art.13 §1), Articles 5, 6, 7 and annex form the different steps/aspects of this negotiation. By contrast, the absence of application of the subsidiary requirements would remove the incentive to negotiate which is at core of the Directive and lead to dead-ends. Several experts enquired about the situation where no agreement is reached in the context of the procedure triggered by the adaptation clause in an "exempted" company. The Commission indicated that the Annex provided for in the Directive should apply (see working document 4). The application of the Annex would also bring the company under the rules of the Directive, as no more agreement would be considered in force under Article 14. The latter reasoning should apply in all situations where there is no agreement following a renegotiation.

What will be the situation of companies in which an "exempted" agreement has been renegotiated following the process provided for by the adaptation clause of Article 13? They will be subject to the obligations arising from Directive 2009/38/EC (See article 14 for the discussion and reasoning).



13. Agreements in force and applicable obligations (Article 14)

13.1 Provisions of the Directive

Art.14 : 1. Without prejudice to Article 13, the obligations arising from this Directive shall not apply to Community-scale undertakings or Community-scale groups of undertakings in which, either

- a) an agreement or agreements covering the entire workforce, providing for the transnational information and consultation of employees have been concluded pursuant to Article 13(1) of Directive 94/45/EC or Article 3(1) of Directive 97/74/EC, or where such agreements are adjusted because of changes in the structure of the undertakings or groups of undertakings;

or

- b) an agreement concluded pursuant to Article 6 of Directive 94/45/EC is signed or revised between 5 June 2009 and 5 June 2011.

The national law applicable when the agreement is signed or revised shall continue to apply to the undertakings or groups of undertakings referred to in point (b) of the first subparagraph.

2. Upon expiry of the agreements referred to in paragraph 1, the parties to those agreements may decide jointly to renew or revise them. Where this is not the case, the provisions of this Directive shall apply.

Recitals (39) Special treatment should be accorded to Community-scale undertakings and groups of undertakings in which there existed, on 22 September 1996, an agreement, covering the entire workforce, providing for the transnational information and consultation of employees.

(41) Unless this adaptation clause is applied, the agreements in force should be allowed to continue in order to avoid their obligatory renegotiation when this would be unnecessary. Provision should be made so that, as long as agreements concluded prior to 22 September 1996 under Article 13(1) of Directive 94/45/EC or under Article 3(1) of Directive 97/74/EC remain in force, the obligations arising from this Directive should not apply to them. Furthermore, this Directive does not establish a general obligation to renegotiate agreements concluded pursuant to Article 6 of Directive 94/45/EC between 22 September 1996 and 5 June 2011.

13.2 Origin and objectives of the provisions

Joint advice of the European social partners: Art.13.1⁶⁶ Without prejudice to paragraph 3, the obligations arising from this Directive shall not apply to Community-scale undertakings or Community-scale groups of undertakings in which there was already an agreement on 22 September 1996, *or in which an agreement is signed or an existing agreement is revised during the two years following the adoption of the present text, or in undertakings in which such agreements exist and which are due to negotiate under paragraph 3⁶⁷*, covering the entire workforce, providing for the transnational information and consultation of employees. When these agreements expire, the parties to those agreements may decide jointly to renew them. Where this is not the case, the provisions of this Directive shall apply."

⁶⁶ Now Article 14

⁶⁷ Adaptation clause, now Article 13



Letter of ETUC and BusinessEurope of 2 October 2008⁶⁸: “We also support a clarification, as proposed by the Presidency, regarding the changes to article 13 suggested by the social partners. The text proposed by the Presidency, however does not include all situations envisaged in the joint advice. In order to respect the proposal of European social partners, the Presidency compromise wording for a new article 13 bis⁶⁹ should therefore be modified as follows:

Article 13bis §1 I): an agreement or agreements covering the entire workforce, providing for the transnational information and consultation of employees have been concluded pursuant to Article 13(1) of Directive 94/45/EC or Article 3(1) of Directive 97/74/EC [...], or where such agreements are adjusted because of changes in the structure of the undertakings or groups of undertakings.

Article 13bis §2: When the agreements referred to in paragraph 1 expire, the parties to those agreements may decide jointly to renew or revise them. Where this is not the case, the provisions of this Directive shall apply.”

Explanatory memorandum of proposal COM(2008)419 point 41: “Except where [the] adaptation clause applies, the agreements in force concluded in anticipation will still not fall under the provisions of the Directive (...)”

Impact assessment SEC(2008)2166 pages 50-51.“The controversial point is the renegotiation of existing agreements, whether ‘Article 13’ or ‘Article 6’ agreements. Trade unions and EWCs have asked for the compulsory renegotiation of Article 13 agreements and an obligation to renegotiate all agreements upon request, whereas companies and employers’ organisations consider that the agreements, in particular the pre-existing agreements, should be better protected.

Retaining those EWCs that work to the satisfaction of the parties involved would limit the changes to those EWCs where changes are needed. Disproportionate changes would therefore be avoided and best practices supported. Transitional provisions were proposed to that end in the consultation document.

Providing for pre-existing agreements to be maintained in all cases would limit the potential impact of changes in the Directive to new EWCs to be established. This would not allow legal uncertainties to be addressed in the event of changes in make-up. This would also risk preventing the creation of new EWCs while bringing no improvement to those that already exist, and should therefore be avoided.

Allowing any request to trigger the renegotiation of a pre-existing agreement may on the other hand risk encouraging ‘free rider’ actions and destabilising well-functioning EWCs, so should be avoided too.

Limiting requests for renegotiating pre-existing agreements to those situations where significant changes in make-up and structure occur (such as mergers, take-overs or acquisitions) should avoid these two opposing risks.”

13.3 Other references

Joint letter of ETUC and BusinessEurope of 14 June 2010: “A two-year special period was established in the recast directive at the request of social partners in their joint advice of 29 August 2008. Its scope has been discussed in the Council working Group in autumn 2008. following this, article 14.1.b in the recast directive allows social partners at company level

⁶⁸ As there were uncertainties about the interpretation to give to the provisions of the joint advice, in particular as to the situation of companies having initially concluded agreements pursuant to article 6 of Directive 94/45/EC, the Council Presidency suggested a new wording of these provisions. ETUC and BusinessEurope reacted in this letter to this wording

⁶⁹ Now Article 14



to negotiate new agreements or renegotiate existing article 6 agreements between 2009 and 2011 based on existing national transposition laws under 94/45/EC Directive and without being subject to the new provisions of the recast directive.

Article 14.1 clarifies that the obligations of the recast directive do not apply to EWCs established under 'old' article 13 (of Directive 94/45/EC) as long as they remain valid and are supported by social partners at company level. These agreements can also be adjusted in case of "changes in the structure of the undertakings or groups of undertakings" without full negotiations in accordance with Article 5-7 of the recast Directive in so far as these changes do not trigger the applicability of Article 13 of the recast Directive (see below).

Moreover, Article 14.2 stipulates that, upon the time of their expiry, and if both sides agree with this, Article 14 agreements – as defined in Articles 14.1.a and 14.1.b- can be renewed or revised when the parties to the agreement jointly decide so. Where this is not the case, the provisions of the recast Directive apply. This is in line with recital 41 in the recast Directive according to which "Unless [the] adaptation clause [Article 13 of the recast] is applied, the agreements in force should be allowed to continue in order to avoid their obligatory renegotiation when this would be unnecessary".

We understand that, according to Article 13 of the recast Directive, three cumulative conditions are necessary to trigger new negotiations in cases in which an Article 14 agreement (one of the two categories of agreements foreseen in Article 14) is involved:

- I. There is a significant change of structure in the company in accordance with Article 13 on the recast Directive;
- II. There is no specific provision in the existing EWC agreement in the procedure to follow for an adaptation, or there is a conflict between two or more applicable agreements;
- III. Central management initiates negotiations on its own initiative or at the written request of at least 100 employees or their representatives in at least two different Member States.

It is our joint understanding that once these conditions are fulfilled, Articles 5,6 and 7 of the recast Directive apply to the negotiations. This may lead to the conclusion of a new agreement within the three-year negotiating deadline foreseen in Article 7.1 which would then be subject to the recast Directive."

Art 13 of Directive 94/45/EC: "1. Without prejudice to paragraph 2, the obligations arising from this Directive shall not apply to Community-scale undertakings or Community-scale groups of undertakings in which, on the date laid down in Article 14 (1) for the implementation of this Directive or the date of its transposition in the Member State in question, where this is earlier than the abovementioned date, there is already an agreement, covering the entire workforce, providing for the transnational information and consultation of employees.

2. When the agreements referred to in paragraph 1 expire, the parties to those agreements may decide jointly to renew them. Where this is not the case, the provisions of this Directive shall apply."

13.4 Issues

What is the aim of the two-year window between June 2009 and June 2011? This "window of opportunities" has been established upon the suggestion of the European Social Partners in their joint advice. The aim orally expressed by them in 2008 was to favour the establishment of new EWCs and the improvement of existing ones by giving companies



the same kind of incentive that was particularly successful in 1996 (some 400 EWCs established): exempting companies from legal obligations. At January 2010 meeting, the ETUC representative stressed the convergence of approach with BusinessEurope: no obligation to renegotiate existing agreements, joint interest to promote the establishment of more EWCs, incentive through freeing companies from obligations similar to 1996 but taking into account the existence of a Directive, use of the full two year period. The BusinessEurope representative recalled that the intention of the social partners was to provide for an instrument to initiate social dialogue at local level and that it is up for the two sides to agree in every body's interest and to avoid the use of the subsidiary requirements. An expert asked why providing for an incentive for those who had not already signed. The BusinessEurope and ETUC representatives answered that there is no discrimination between signed or revised agreements.

Who is concerned by the “exemption”? The “exemption” in new Article 14 concerns “Community-scale undertakings or Community-scale groups of undertakings” in which agreement(s) establishing an EWC or a procedure for transnational information and consultation have been concluded, adjusted, renewed or revised at a certain date:

- Old preexisting agreements have been concluded in anticipation of the first Directive 94/45/EC (so-called “article 13” agreements) or of its extension to the UK: agreement(s) “covering the entire workforce, providing for the transnational information and consultation of employees” concluded before 22 September 1996 -or before 15 December 1999 for companies newly covered by the Directive 94/45/EC because of its extension to the UK by Directive 97/74/EC-;
- Where such old preexisting agreements are “adjusted because of changes in the structure of the undertakings or groups of undertakings” (without limitation in time);
- An agreement establishing a new EWC is signed in the two-year implementation period: an agreement concluded pursuant to Article 6 of Directive 94/45/EC signed between 5 June 2009 and 5 June 2011;
- The agreement of an existing EWC (so-called “article 6” agreement) is revised during the two-year implementation period: an agreement concluded pursuant to Article 6 of Directive 94/45/EC revised between 5 June 2009 and 5 June 2011;
- All such agreements are jointly renewed or revised upon expiry (without limitation in time).

It appears important to note that :

- The obligations arising from the Directive apply or don't apply to companies or groups (and not, as it is often said, to EWCs or to agreements as such); this is of particular significance for the rules to be applied further to mergers or acquisitions;
- The adaptation clause of article 13 is not included in the “exemption”, as article 14 starts with ‘Without prejudice to Article 13, the obligations arising from this Directive shall not apply to (...)’ (rationale to be found in explanatory memorandum and impact assessment).

What are companies concerned “exempted” from? Except for the adaptation clause, the obligations arising from the Directive 2009/38/EC shall not apply to the companies in question (Article 14.1). Companies in which old preexisting agreements have been concluded are also “exempted” from the obligations arising from Directive 94/45/EC while companies in which “article 6” agreements have been signed or revised between 5 June 2009 and 5 June 2011 remain subject to the national law applicable at the time of this signature or revision. In other terms, companies with old preexisting agreements are “exempted” from all obligations whereas companies signing or revising agreements in the



two-year period are only “exempted” from the new obligations introduced by the Directive 2009/38/EC.

Which will be the provisions to be maintained by Member States? “The national law applicable when the agreement is signed or revised shall continue to apply” to the companies signing or revising agreements in the two-year period. (Article 14.1) As Directive 94/45/EC will be repealed with effect from 6 June 2011, the aim of this provision is to maintain present obligations after 6 June 2011 to those companies “exempted” from the new obligations introduced by Directive 2009/38/EC. Member States should therefore be able to provide after June 2011 two sets of obligations to companies: one before and one after the implementation of Directive 2009/38/EC.

What happens to companies in which “article 6” agreements have been concluded before June 2009 and not revised in the two-year period? There is a specific treatment for companies where an agreement concluded pursuant to Article 6 of Directive 94/45/EC is revised between 5 June 2009 and 5 June 2011 (Article 14.1.b). A contrario, those companies which “article 6” agreements remain untouched in the two-year period should therefore be bound by the obligations arising from the Directive (2009/38/EC). Should this not be the case, the provisions would be contrary to the announced objectives, as obligations arising from the Directive would only apply to companies with EWCs established after June 2011 and there would be no incentive to a fast improvement of existing EWCs .

What happens if a preexisting agreement is not renewed or revised? As to the terms “the provisions of this Directive shall apply” under Article 14.2, an expert wondered whether they mean that the whole process restarts in the absence of renewal or revision of the agreement. The Commission indicated that these terms remain unchanged from Directive 94/45/EC and that it means indeed that the process then starts from scratch from a formal point of view.

Is there a difference between “adjusted”, “revised” and “renewed” agreements? There are uncertainties about the difference between the terms “adjusted”, “revised” and “renewed” used in the Directive. The term “renewed” was already present in the 94/45/EC Directive and is carried out upon expiry of an agreement. The terms “adjusted” and “revised” have been suggested by the European social partners and experts enquired about the difference between the terms for the social partners. The BusinessEurope representative noted that situations and interests at stake may be very different in concerned companies and that the way a renegotiation takes place is highly dependent on the situation. The ETUC representative considered that the terms used are not so important in this area, as it is primarily of the people involved in the company to take the initiative and to negotiate in view to conclude a new agreement.

What will be the situation of companies in which an existing agreement has been renegotiated following the process provided for by the adaptation clause of Article 13?

The situation of companies in which an existing agreement has been renegotiated following the process provided for by the adaptation clause of Article 13 was considered as the main open issue. An expert recalled the discussions in Council on these issues, which formed the basis for its decision and the need for practical solutions in the implementation. Two experts noted the specific treatment given to the adaptation clause in relation to the exemptions, referring to the first sentences of Article 14.1 and recital 41. Another expert noted that definitions of Directive 2009/38/EC would in any case apply to determine whether a company still falls under article 14 (does it have an agreement covering the entire workforce and providing for the transnational information and consultation of employees?)



It was considered that the situation following the use of the adaptation clause should be distinguished from the others and that three situations should be addressed after negotiations under article 13:

- There is no agreement and the annex is applied: Article 14 forms an exception, exempting companies of obligations according to agreements they have concluded; as there is no agreement in that case, there would be no reason for exemption. Several experts enquired about the situation where no agreement is reached in the context of the procedure triggered by the adaptation clause in an "exempted" company. The Commission indicated that the Annex provided for in the Directive should apply, as article 5,6,7 and annex form the different steps/aspects of the "negotiations referred to in Article 5" and the non-application of the Annex would remove the incentive to negotiate and lead to dead-ends (see working document 6). The application of the Annex would also bring the company under the rules of the Directive, as no more agreement would be considered in force under Article 14.
- There is an agreement and the company has changed after the significant change in structure (for example through a merger or a new holding); as the company is no more the same, the exemption would no more apply.
- There is an agreement and the company has the same corporate identity, even after the significant change in structure;

The latter situation was considered the more complex and the views from the European social partners were welcome. In their joint letter of June 2010, BusinessEurope and ETUC consider that, where negotiations are triggered under the three cumulative conditions of Article 13 of the recast Directive, "the conclusion of a new agreement within the three-year negotiating deadline foreseen in Article 7.1 [...] would then be subject to the recast Directive".

Are companies in which an agreement is concluded during the two-year period obliged to remain outside the provisions of the Directive? An agreement may refer to the Directive.



Which set of obligations apply to a particular company? The obligations arising from the directives on EWCs and their implementing provisions in the Member States apply to companies according to the date of concluding or revising the agreement(s) to establish the EWC(s). As long as the adaptation procedure under Article 13 is not applied, it could be summarised as follows :

Type of agreements concluded in the company	Until 5 June 2011	From 6 June 2011
Agreements concluded before 22/09/96 (art. 13 of 94/45/EC) and under art.3(1) of 97/74/EC (UK)	None	None except Art.13 of 2009/38/EC
Agreements concluded between 22/09/1996 and 5/6/2009 NOT REVISED between 5/6/2009 and 5/6/2011	94/45/EC	2009/38/EC
Agreements concluded between 22/09/1996 and 5/6/2009 REVISED between 5/6/2009 and 5/6/2011	94/45/EC	Maintained national measures of 94/45/EC + Art.13 of 2009/38/EC
New agreements concluded between 5/6/2009 and 5/6/2011	94/45/EC	Maintained national measures of 94/45 +Art.13 of 2009/38/EC
New agreements concluded from 6/6/2011	N/A	2009/38/EC

For the adaptation procedure under Article 13 of Directive 2009/38/EC as from 6 June 2011, it was considered that Articles 5, 6 and 7 of the Directive apply to the negotiations. After the use of the adaptation clause, it was considered that the company will be subject to the obligations arising from Directive 2009/38/EC (for reasons, see above).





VI – General issues on the implementation of Directive 2009/38/EC

Timetable of the transposition
Specificities of the transposition
Application to the European Economic Area
Changes introduced by the Lisbon Treaty
Provision of different sets of rules
Compliance

Working documents 2 examined on 5 October 2009 and 8 examined on
14 June 2010

14. Timetable for the transposition

Transposition

Article 16(1) of Directive 2009/38/EC requires the Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 5 June 2011, or to ensure that management and labour introduce on that date the necessary provisions by way of an agreement, the Member States being obliged to take all necessary steps enabling them at all times to guarantee the results imposed by the Directive.

Importance of meeting the deadline of June 2011

Given the transnational nature of the European Works Councils (EWCs) and special provisions of the directive, a possible divergence between the dates of entry into force of the various national measures transposing Directive 2009/38/EC is likely to cause problems with regard to their effectiveness as well as legal uncertainty for companies.

- **Interdependence of the national laws**

In fact, the national law⁷⁰ to which each entity covered by the Directive is mainly dependent (that of the country where the central management is located) can enter into force at a time when there is not yet a national transposition law in other Member States where are located the controlled undertakings, their subsidiaries or their establishments. In this case, the entirety of the legal framework which is necessary for the rules laid down in the Directive to become fully effective is not yet in place and therefore the national law which has already entered into force remains not easily applicable in an effective way.

⁷⁰For convenience, "the national law" will be referred to, in this and in other working papers, to designate implementation measures, which can, obviously, include non legislative measures (for example, agreements between the social partners – see Article 16.1 of the Directive).



Difficulties may occur in particular:

- o for the responsibility of management in providing information to enable starting negotiations,
- o while linking the national and European levels of information and consultation as required by the directive,
- o for the capacity of employee representatives in a special negotiating body or an EWC,
- o and for the determining the set of obligations for the companies.

- **Specific two-year window for companies between 5 June 2009 and 5 June 2011**

For companies, different dates for the implementation of national laws would introduce major legal uncertainties because of the window of two years is provided for by Article 14 of Directive 2009/38/EC. Companies where agreements to establish new EWCs are concluded between 5 June 2009 and 5 June 2011 or where existing agreements are revised during this period are not bound by the new obligations introduced by the recast directive. Furthermore, the national law applicable when the agreement is signed or revised shall continue to apply to those companies. Companies and workers' representatives need to know whether they conclude or revise an agreement under the old rules of Directive 94/45/EC or under the new rules of Directive 2009/38/EC.

Effect of national transposition laws on 6 June 2011

In conclusion, a possible divergence between the dates of entry into force of the various national laws transposing the Directive would constitute a real problem the only viable solution of which consists in ensuring that all the national transposition laws enter into force with effect on the same date: the 6 June 2011

That does not prevent obviously the various national laws from being adopted at different times (as it is virtually inevitable). It would be enough to envisage co-ordinated periods of "vacatio legis", which ensure that these measures entry into force with effect at the same moment.

15. Specificities of the transposition

Role of the national social partners in the transposition

Directive 2009/38/EC provides that the transposition measures may be introduced by way of a collective agreement. In some Member states, the main provisions for transposing Directive 94/45/EC had already been introduced by this way, with complementary legislative measures. Should the recast Directive 2009/38/EC be implemented in the same way or should social partners be given a particular role in the drafting process of national implementing provisions, Article 16.1 recalls the responsibility of Member states in ensuring that the necessary provisions are introduced timely and that Member states are obliged to take all necessary steps enabling them at all times to guarantee the results imposed by the Directive.



Need to maintain national implementing measures of repealed Directive 94/45/EC

National implementing measures for the repealed directives will have to be maintained after 6 June 2011, to cover the cases where the new obligations introduced by Directive 2009/38/EC do not apply as explicitly provided for per Article 14.1 of the directive: "The national law applicable when the agreement is signed or revised shall continue to apply to the undertakings or groups of undertakings referred to in point (b) of the first subparagraph" (Companies where agreements to establish new EWCs are concluded between 5 June 2009 and 5 June 2011 or where existing agreements are revised during this period).

Attention to recitals

Following a request about the recitals that would need special attention, it was indicated that Recitals 12-15-16 (transnational), 35-36 (sanctions), 37-38 (link national-European) and 40 (adaptation) should particularly be considered, given the clarifications they provide to the aim of the articles or their importance in the adoption process.

16. Application to European Economic Area

16.1 Provisions of the Directive

Title : Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 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 (Recast) (Text with EEA relevance).

16.2 Other References

Annex XVIII of the Agreement on the European Economic Area⁷¹: 27.{102} 32009 L 0038: Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 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 (Recast) (OJ L 122, 16.5.2009, p. 28).

{102} New point 27 inserted by Decision No 54/2010 (OJ No L [to be published] and EEA Supplement No [to be published]), e.i.f. pending.

16.3 Issues

Is the Directive to apply to EEA Member States? As for Directive 94/45/EC, as amended, Directive 2009/38/EC is listed in Annex VIII of the EEA Agreement, which implies that this Act applies to the European Economic Area and that Member States under the Directive include Norway, Iceland and Liechtenstein.

⁷¹ To be found at <http://www.efta.int/~media/Documents/legal-texts/eea/the-eea-agreement/Annexes%20to%20the%20Agreement/annex18.ashx>



17. Changes introduced by Lisbon Treaty

17.1 Provisions of the Directive

In its title and throughout its articles, the Directive refers to "Community-scale" group of undertakings or undertakings which are defined in Article 2.1 :

(a) "Community-scale undertaking" means any undertaking with at least 1000 employees within the Member States and at least 150 employees in each of at least two Member States;

(c) "Community-scale group of undertakings" means a group of undertakings with the following characteristics:

- at least 1000 employees within the Member States,
 - at least two group undertakings in different Member States,
- and
- at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State;

17.2 Other References

Preliminary note of the Legal service of the Commission on Changes to the presentation of legal acts once the Lisbon Treaty enters into force

- The expression 'of the (European) Community' becomes 'of the (European) Union'.
- The adjective 'Community' must no longer be used and should be replaced where possible by 'of the Union' (if this is impossible, try to paraphrase – 'EU' or 'Union' might be more appropriate in English).

Substituting 'Union' for 'Community' is likely to cause many problems. Where existing legislation refers to something relating to the 'Community' (e.g. 'Community vessel' in fisheries), be very careful not to make any abrupt change in terminology without properly preparing the ground first.

17.3 Issues

Does the term "Community-scale" need to be changed following the entry into force of the Lisbon Treaty? Not necessarily, as "Community-scale" undertakings and groups of undertakings are specifically defined in the Directive (Art.2.1) and we are clearly in the case where it is needed to "be very careful not to make any abrupt change in terminology" (Note of Commission's Legal Service).



18. Provision of different sets of rules

18.1 Provisions of the Directive

Art.14.1 Without prejudice to Article 13, the obligations arising from this Directive shall not apply to Community-scale undertakings or Community-scale groups of undertakings in which (...) b) an agreement concluded pursuant to Article 6 of Directive 94/45/EC is signed or revised between 5 June 2009 and 5 June 2011.

The national law applicable when the agreement is signed or revised shall continue to apply to the undertakings or groups of undertakings referred to in point (b) of the first subparagraph.

18.2 Issues

Which are the provisions to be maintained by Member States? “The national law applicable when the agreement is signed or revised shall continue to apply” to the companies signing or revising agreements in the two-year period. (Article 14.1) As Directive 94/45/EC will be repealed with effect from 6 June 2011, the aim of this provision is to maintain present obligations after 6 June 2011 to those companies “exempted” from the new obligations introduced by Directive 2009/38/EC. Member States should therefore be able to provide after June 2011 two sets of obligations to companies: one before and one after the implementation of Directive 2009/38/EC.

How to provide for two sets of obligations? It depends on the structure and methods in national legislation.

The Commission invited experts to share their views on the methods applicable in this regard:

- An expert indicated that the Member State kept old rules alive while introducing a new set of rules. Regulations adopted are organized in 3 separate sections, with a clear indication of the scope and exempted companies for each of them.
- An expert indicated that the Member State intends to adopt a law that will amend old legislation as from June 2011. Derogations would apply to certain provisions, but not to all. Where derogations apply, companies will have to refer to the old legislation.
- An expert indicated that the law to be adopted should describe the situation when the new obligations apply, while reference to the old set of rules would be made when existing obligations apply.
- An expert indicated that exemptions would be introduced in the application of the new law.

The Commission thanked the experts for sharing their experience and referred to the sending of implementing provisions to the Commission under Art.16.



19. Compliance

19.1 Provisions of the Directive

Art. 11 (unchanged from Directive 94/45/EC): Compliance with this Directive

1. Each Member State shall ensure that the management of establishments of a Community-scale undertaking and the management of undertakings which form part of a Community-scale group of undertakings which are situated within its territory and their employees' representatives or, as the case may be, employees abide by the obligations laid down by this Directive, regardless of whether or not the central management is situated within its territory.

2. Member States shall provide for appropriate measures in the event of failure to comply with this Directive; in particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.

3. Where Member States apply Article 8, they shall make provision for administrative or judicial appeal procedures which the employees' representatives may initiate when the central management requires confidentiality or does not give information in accordance with that Article. Such procedures may include procedures designed to protect the confidentiality of the information in question

Recital (35) (unchanged from Directive 94/45/EC) The Member States must take appropriate measures in the event of failure to comply with the obligations laid down in this Directive.

Recital (36) (new) In accordance with the general principles of Community law, administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations arising from this Directive.

19.2 Origin and objectives of the provisions

Impact assessment SEC(2008)2166 page 16, 27, 37 and 46: "The problems are not primarily caused by shortcomings in enforcement. The Commission has verified that the Directive is properly implemented by Member States and has carried out in-depth studies to that end. The results indicate that all Member States have adopted national implementing measures that are close to the text of the Directive and put in place sanctions in the event of infringements. As a general rule, the competent national authorities, including courts, have taken measures to ensure the correct and effective application of the national transposing rules and to ensure that companies meet their obligations."

"The operational objectives that need to be achieved in order to ensure the effectiveness of employees' information and consultation rights include (...) To clarify sanctions in cases of non-compliance".

"Clarifications regarding the protection of rights: In order to improve compliance by making clear to company actors the existence of sanctions in the event of violations of information and consultation rights and to address legal uncertainties regarding the capacity of the European Works Council to represent workers' interests (...), the proposal here is to: reiterate the general principle according to which, in the event of infringements, sanctions must be effective, proportionate and dissuasive (...)"

"As regards the clarification on sanctions, it is likely to make clearer to company actors the existence of sanctions in the event of violations of information and consultation rights, and



therefore increase compliance. However, this would not necessarily require adding anything to the present Directive, as the need for Member States to provide for appropriate, dissuasive and proportionate sanctions is already a general principle in Community law.

Trade union and EWC contributions as well as Parliament resolutions have insisted on the need for sanctions, given the numerous breaches of the right of workers to be informed and consulted at transnational level. However, AmCham EU considers the sanctions are already provided for and CEEP that they should remain national. In addition, a further reinforcement or more detailed prescription of sanctions would not be in conformity with the subsidiarity principle, as the responsibility for establishing appropriate, dissuasive and proportionate sanctions lies, as a general principle, with the Member States."

Informal Triologue December 2008: Recital (36) was, with the transnational competence, one of main topics for discussion between Council, Parliament and Commission in the search for a first reading agreement. It was agreed to add the recital without changes in the body of the Directive, as the article on sanctions was not covered by the recast and as the recital recalls general principles of Union Law.

19.3 Other references

Art.27 of Charter of Fundamental Rights of the European Union "Workers' right to information and consultation within the undertaking: Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices."

Art 8 of Directive 2002/14/EC: Protection of rights

1. Member States shall provide for appropriate measures in the event of non-compliance with this Directive by the employer or the employees' representatives. In particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.

2. Member States shall provide for adequate sanctions to be applicable in the event of infringement of this Directive by the employer or the employees' representatives. These sanctions must be effective, proportionate and dissuasive.

19.4 Issues

Have sanctions to be changed? Not necessarily, but they may have to be updated with new obligations (such as principles, information of social partners of new negotiations, training) and checked by Member States in order to ensure they are "effective, dissuasive and proportionate in relation to the seriousness of the offence".

The Commission invited experts to share their views on this issue and some examples and areas were discussed :

- Review the respective roles of junior Court and senior Court on EWC-related disputes
- Adapt enforcement to new obligations; it was noted in this regard that the most difficult is to enforce the duty for EWC members to report back to employees while not deterring employees to stand for a representative mandate. A solution found was to take into account the need for employers to provide for the means required and not to order fines.



- Examine the possibility to add legal or judicial sanctions to the existing administrative ones.



Annex: European works councils in 2009

Annex to working document 1 presented on 5 October 2009

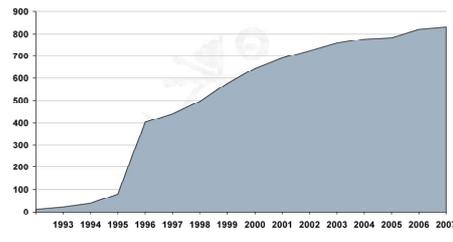
The framework for establishing EWCs

Directive adopted in 1994 (94/45/EC), extension to UK in 1997 (97/74/EC), technical update in 2006 (2006/109/EC)

The objectives

- Give employees access to information and consultation at relevant level
- Establish a dialogue at European level in relation to completion of the EU internal market and decision making/restructuring increasingly at EU level

Companies with EWCs



Source: EWC database, ETUI-REHS 2007

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The situation in 2009

Some 2350 companies in scope with 24 million workers

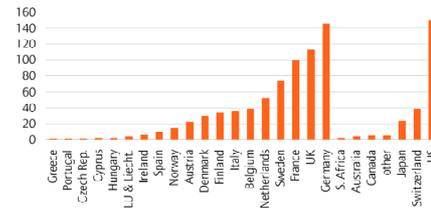
908 EWCs are active in 885 companies
 Some 16 million employees represented by 20 000 employee representatives

Some 1470 companies in scope without EWC

Negotiations on-going in 46 companies

(source: ETUI EWC database 2008-2009 & EPEC survey 2008)

Active EWCs by country of headquarters



Data source: European Trade union Institute, EWC database, July 2009

etui.

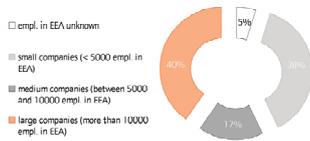
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Size of companies with active EWCs



Data source: European Trade union Institute, EWC database, July 2009

etui.

A company with EWC has on average:
 •49 000 employees, including 29 000 in the EEA
 •A turnover of €20 billion
 (source: EPEC survey 2008)

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European dimension in active EWCs

Activities of the company in the EEA



Data source: European Trade union Institute, EWC database, July 2009

etui.

The members of an EWC come on average:
 •From 9 countries
 •One third from host country
 (source: EPEC survey 2008)

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EWC agreements

- Over half of EWCs under “article 6” agreements
- Still over 40% of EWCs under “Article 13” agreements
- Just under half of active EWCs have modified their agreement since it was first signed

(source: EPEC survey 2008)

- A total of 1125 EWCs have ever been created
- 172 companies had an EWC dissolved or merged into another

(source: ETUI EWC database 2009)

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A « typical » EWC today

- 23 members, increasing number
- 5 management representatives involved
- A select committee of 5 members
- 2 plenary meetings a year (ordinary + extraordinary) over two days
- 3 select committee one-day meetings a year
- 3 out of 10 EWCs have mixed working groups on specific issues
- Annual ordinary costs €272 000 including time (varies from €7 500 to €2.3 million)

(source: EPEC survey 2008)

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The benefits of EWCs

For companies

- Ability to communicate information on company strategy and rationale for certain decisions, particularly in times of change
- Contributes to the building of an integrated corporate culture at European level

For employees

- Structured information on company strategies
- Understanding of decisions
- Contact with group management
- Sharing knowledge with representatives from other countries and building of European dimension

Labour Law



The problems with EWCs

For companies

- Cost
- Increased bureaucracy
- Raises the employee expectations
- Attempts to use the EWC to address national concerns
- Lack of preparation and dissemination

For employees

- Lack of decision-making powers
- Lack of international solidarity

For both

- Legal uncertainties, particularly in M&As
- Disputes over link national/European in 40% of cases

Labour Law



Preliminary rulings on EWCs

• Three German cases on information to be given to workers in order to enable them to request the opening of negotiations:

- Bofrost* C-62/99
- Kühne & Nagel C-440/00
- ADS Anker C-349/01

• Same line in the rulings: the obligation to provide information encompasses information that is essential to the opening of negotiations for the establishment of an European works Council

Labour Law



National courts on EWCs: main cases

• Information and consultation:

Renault Vilvoorde FR 1997, Beiersdorf FR 2006, Gaz de France FR 2006-2008

• Transnational character & link National-European:

Marks & Spencers FR 2001, Alstom and Altadis FR 2003, British Airways BE 2006, Alcatel Lucent FR 2007, Continental FR 2009

• Selection and capacity of representatives:

Fabricom NO 1997, Interbrew FR 2002, Schneider DE 2007, Dell FR 2009 / P&O UK 2006

• Validity, amendments and renegotiation of agreements:

Equant NL 2004, Cemex UK 2006, Bouygues FR 2006-2008

Labour Law



Restructuring and EWCs

• Most companies have carried out a transnational restructuring in the last three years, high profile cases

• EWC: a tool for better anticipation of change and management of restructuring

• Problems in timing of information-consultation and link National-European

• Some involvement in hearings and competition procedures regarding Mergers & Acquisitions

• Problems for adaptation, renegotiation and transition periods when change of scope

Labour Law



Transnational information and consultation

A learning process

Issues: not only economic/employment, also strategic, health & safety, training, mobility,..

Importance of continuity

Importance of the link to National and local representations

Examples of informal or formal negotiation, notably on fundamental rights, H&S, restructuring

Labour Law





The context: Community framework on workers' information and consultation

At National level

- General framework for informing and consulting employees (2002/14/EC)
- Collective redundancies 98/59/EC
- Transfers of undertakings 2001/23/EC
- Health & Safety framework 89/391/EC

At Transnational level

- Employee Involvement in the European Company (2001/86/EC), in the European Cooperative Society (2003/72/EC), in cross border mergers (2005/56/EC)

A fundamental right - Art. 27 EU Charter

"Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time .."

Links

European Commission - Labour law

http://ec.europa.eu/labour_law/

ETUI – EWC database – quantitative & texts

<http://www.ewcdb.eu>

SDA – EWC database - analytical

<http://www.sda-asbl.org>



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