
European Works Councils: a trade union guide to Directive 2009/38/EC

Séverine Picard

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european trade union institute

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Foreword

On the offensive for more and stronger European Works Councils

European Works Councils (EWCs) are bodies representing employees of companies operating across borders in different Member States. As such, they are a key element of the European social model, reflecting the importance attached to worker representation and social dialogue in what is called, since the new EU Treaties have entered into force, a ‘social market economy’.

EWCs increasingly can also be seen as essential instruments for good corporate governance. As the financial and economic crisis is hitting the real economy, the pace of restructuring is accelerating. Efficient and effective information and consultation procedures through active worker participation mechanisms at all relevant levels, including the European level, make the difference when it comes to the support – or lack of support! – of workers and their representatives for processes of change.

The ETUC has long been asking for a revision of the existing EWC Directive, adopted in 1994, to make it better able to respond to the new challenges.

The ETUC was especially concerned about the application of the Directive in practice. Timely and extensive information on management decisions was rarely given to EWCs, and too often restructuring and relocation decisions were taken by management without an active role for the EWC concerned.

Since its Seville congress in 2007 ETUC, together with its European Industry Federations (ETUFs), has campaigned for stronger EWCs. In the revision process, in 2008, the trade union voice was clearly heard. When political deadlock seemed inevitable, the European social partners were addressed to help solve the main problem by giving ‘joint advice’ on it, which was then taken on board at the political level. We therefore look at the results with some satisfaction.

Of course, every legislative process involves compromises, and there was certainly more that we would have wanted to achieve. However, the revision has led to useful improvements, and now is the time to make them work in practice.

The final ‘recast’ Directive was adopted on 6 May 2009, and Member States will have until 5 June 2011 to transpose its provisions into national law.

Therefore, ETUC has developed a guide to help trade unionists and practitioners in the area of information and consultation around Europe to play an active role in this process and to make the most of the new provisions in the Directive.

This is a legal commentary, which has benefited very much from the legal expertise and advice of the Transnational Trade Union Rights Experts Group, which is a group of legal academics coordinated by the European Trade Union Institute. It is written in an accessible style, so that it can be used by everybody with an interest in EWCs and their functioning.

The ETUC is convinced that the EWC Directive, in its new form, has the potential to provide a better framework for advancing information and consultation rights in transnational companies. Now it must be transposed and implemented in a proper manner, to really provide EWCs with the tools they need to give workers stronger information and consultation rights in practice. This book is a very welcome instrument to support that process.

Catelene Passchier
Confederal Secretary ETUC
March 2010

How to use the guide

The first European Works Council Directive (94/45/EC), which was adopted on 30 September 1994, was amended on 6 May 2009 by the Recast Directive (2009/38/EC).

This guide is an article-by-article legal commentary on the entire European Works Council Directive, as amended by Directive 2009/38/EC. Part I contains general remarks on objectives and principles. Part II and Part III follow, as far as possible, the same structure as the Directive itself.

At the start of each chapter, the recitals (that is, the preambles) and the articles of the Directive to which the subsequent comments refer are presented.

The provisions highlighted by a grey bar in the margin correspond to the amendments introduced by the new Recast Directive. The other provisions are those which already existed under Directive 94/45/EC and which have been retained in the Recast. The comments relating to the new amendments are also highlighted by means of a grey bar in the margin. In this way, the reader can easily identify the changes introduced by the new Directive.

Part I

Objectives and principles

Chapter 1 The objectives of the European Works Council Directive

Whereas (...)

(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, increasing the proportion of European Works Councils established while enabling the continuous functioning of existing agreements, resolving the problems encountered in the practical application of Directive 94/45/EC and remedying the lack of legal certainty resulting from some of its provisions or the absence of certain provisions, and ensuring that Community legislative instruments on information and consultation of employees are better linked. (8) Pursuant to Article 136 of the Treaty, one particular objective of the Community and the Member States is to promote dialogue between management and labour.

(8) Pursuant to Article 136 of the Treaty, one particular objective of the Community and the Member States is to promote dialogue between management and labour.

(10) The functioning of the internal market involves a process of concentrations of undertakings, cross-border mergers, take-overs, joint ventures and, consequently, a transnationalisation of undertakings and groups of undertakings. If economic activities are to develop in a harmonious fashion, undertakings and groups of undertakings operating in two or more Member States must inform and consult the representatives of those of their employees that are affected by their decisions.

(11) Procedures for informing and consulting employees as embodied in legislation or practice in the Member States are often not geared to the transnational structure of the entity which takes the decisions affecting those employees. This may lead to the unequal treatment of employees affected by decisions within one and the same undertaking or group of undertakings.

(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.

(45) Since the objective of this Directive, namely the improvement of the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(46) This Directive respects fundamental rights and observes in particular the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right of workers or their representatives to be guaranteed information and consultation in good time at the appropriate levels in the cases and under the conditions provided for by Community law and national laws and practices (Article 27 of the Charter of Fundamental Rights of the European Union).

Article 1 Objective

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.

2. To that end, a European Works Council or a procedure for informing and consulting employees shall be established in every Community-scale undertaking and every Community-scale group of undertakings, where requested in the manner laid down in Article 5(1), with the purpose of informing and consulting employees. 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.

Article 15 Report

No later than 5 June 2016, the Commission shall report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive, making appropriate proposals where necessary.

The European Works Council Directive (hereafter ‘the EWC Directive’) was originally adopted on 22 September 1994 (Directive 94/45/EC).¹ The Directive imposes a works council or an information and consultation procedure in Community-scale companies, on the basis of an agreement negotiated between employees’ representatives and the central management. The Directive also defines the procedures for the operation of this body.

Fourteen years on from the adoption of Directive 94/45/EC, approximately 800 EWCs are active, representing 14.5 million employees.²

The EWC Directive has its origins in the need to promote information and consultation at the workplace. Employees’ involvement in strategic decision-making is an indispensable tool for a good company, from the standpoints of both social democracy and competitiveness.

Following repeated demands from the European trade union movement, on 7 February 2008 the Commission published the long awaited proposal for a Recast Directive, amending the provisions of the 1994 Directive. It was acknowledged that there are serious problems with the practical application of the Directive and that, too often, EWCs are not sufficiently informed and consulted on important matters affecting the interests of the workforce. The Recast Directive was adopted on 6 May 2009, with a view to strengthening the right to information and consultation.

1.1 Genesis

The purpose of the EWC Directive is to improve the right to information and consultation of employees in Community-scale undertakings and groups of undertakings (Article 1.1).

As recalled in Recital 46 of the Recast Directive, information and consultation is recognised and protected as a Fundamental Right in EU law (Article 27 of the Charter of Fundamental Rights, which the Lisbon Treaty has made legally binding).

The right to information and consultation allows the establishment of a dialogue between representatives of the workforce and the management of the company for the purpose of reaching agreement. It is therefore an essential element of social democracy. In this regard, Recital 8 of the Directive recalls that the promotion of dialogue between management and labour is a particular objective of the Community.

1. Directive 97/74/EC extended the obligations of the EWC Directive to the United Kingdom, which initially opted out. Directive 2006/109/EC adapted Directive 94/45/EC by reason of the accession of Bulgaria and Romania.

2. COM (2008) 419 final, p. 2.

Procedures for informing and consulting employees are indispensable for good corporate governance. Workers should be able to have their voice heard by top managers, in particular where structural changes in the company may be at stake. As the economic landscape is deteriorating, with the crisis hitting companies worldwide, the pace of restructuring is accelerating rapidly. It has become more important than ever to have efficient information and consultation procedures in place to allow the social partners to play an active role in anticipating and managing change responsibly.

Strengthening information and consultation at the workplace also makes sense as a means of supporting companies in a competitive economic environment. Research suggests a correlation between employees exercising influence and a high degree of competitiveness.³ The great advantage of employees' involvement is its contribution to maintaining social harmony and high productivity through partnership-based working relations. In other words, a meaningful consultation process leads companies into more careful decision-making.

In this context, the first European Works Council Directive was adopted on 22 September 1994. The intervention of the European legislator was deemed justified because the objective of the Directive – namely the improvement of the right to information and consultation – could not be adequately achieved by the Member States. As business goes global, the right to information and consultation must also be transnational in nature. Key aspects of the working lives of a growing number of people who work for multinationals are often decided by management located outside the country where they are employed. Recitals 10 and 11 of the Directive highlight that, while companies are increasingly taking advantage of their mobility rights in the single market, national regulations on employees' involvement are often not geared to the transnational structure of the entity which takes the decisions affecting employees.

The 1994 EWC Directive was not the first EU instrument dealing with information and consultation. The first step towards the establishment of a representation structure at the workplace for the purpose of informing and consulting was achieved in 1975 with the Collective Redundancies Directive.⁴ In 1977, the Acquired Rights Directive⁵ was adopted, followed by the Health and Safety Framework Directive in 1989.⁶ These Directives insisted on the establishment of information and consultation procedures in relation to their specific issues.

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3. See European Participation Index in *Benchmarking Working Europe 2009*, p. 55.
 4. Directive 75/129/EC on the approximation of the laws of the Member States relating to collective redundancies (now 98/59/EC).
 5. Directive 77/187/EC 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 businesses (now 2001/23/EC).
 6. Directive 89/391/EC on the introduction of measures to encourage improvements in the safety and health of workers at work.

The 1994 EWC Directive was an innovation in the sense that, for the first time, a permanent representation structure was foreseen, thereby systematising the right to information and consultation.

The EWC Directive obliges European-scale companies to establish permanent representation bodies (the 'EWC'), with the purpose of informing and consulting employees on transnational matters. The aim of the EU legislator is to promote voluntary agreements between the parties on the constitution and operation of EWCs. Negotiations, however, have to respect minimum requirements spelt out in the Directive in order to ensure high quality agreements. Fallback rules (subsidiary requirements) are also foreseen in case employees' representatives and management cannot reach agreement. Employees' representatives and management may favour the introduction of a written procedure for information and consultation instead of an EWC.

EWCs have been playing an increasing role in the promotion of sustainability and corporate responsibility. Already in 2004, European social partners jointly acknowledged that EWCs are a useful tool in helping management and workers to build a corporate culture and adapt to change in a fast-evolving environment.⁷ However, serious problems in the practical application of the EWC Directive have jeopardised the objectives of this instrument. It appears that best practices of early and extensive information on management decisions are rare and an active role on the part of EWCs in accompanying restructuring and relocation remain the exception rather than the rule, the norm being for EWCs to be 'consulted' after the decision has been finalised.⁸

The Recast Directive therefore revisited the 1994 Directive with a view to increasing the effectiveness of information and consultation arrangements.

1.2 The objectives of the Recast Directive

Recital 14, which has been introduced by the Recast Directive, mentions two essential elements, which should govern the functioning of an EWC. First, information and consultation must occur at the level at which strategic decisions are taken. Second, employees' representatives must be involved early enough in the decision-making process to be capable of meeting the need to anticipate and accompany change.

Accordingly, the Recast Directive has introduced a number of improvements. The objectives of the Recast Directive are spelt out in Recital 7:

7. 'Lessons learned on European Works Councils', joint exercise between ETUC, UNICE, CEEP and UEAPME, 01/03/2005. Available at: <http://www.etuc.org/a/1122>.

8. Benchmarking Working Europe 2009, p. 60.

- ensuring the effectiveness of employees’ transnational information and consultation rights
- increasing the number of EWCs
- enabling the continuous functioning of existing agreements
- increasing legal certainty
- ensuring that Community legislative instruments are better linked

Time and practice will tell if these objectives have been fulfilled. No later than 5 June 2016, the Commission will have to assess the implementation of the Directive with regard to its objectives. Appropriate proposals for further adjustments of the legislation may then have to be envisaged (Article 15).

A particularity of this Directive is that the mechanisms put in place leave a lot of room for party autonomy. Such flexibility may open the way to several interpretations of certain provisions of the Directive. However, Article 1.2 of the Recast now stipulates that 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 effectively. This means that where several readings of the same provisions may conflict with each other, the emphasis must be on the improvement of the right to information and to consultation.

Chapter 2 Principles of interpretation

(46) This Directive respects fundamental rights and observes in particular the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right of workers or their representatives to be guaranteed information and consultation in good time at the appropriate levels in the cases and under the conditions provided for by Community law and national laws and practices (Article 27 of the Charter of Fundamental Rights of the European Union).

Article 16 Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Article 1(2), (3) and (4), Article 2(1), points (f) and (g), Articles 3(4), Article 4(4), Article 5(2), points (b) and (c), Article 5(4), Article 6(2), points (b), (c), (e) and (g), and Articles 10, 12, 13 and 14, as well as Annex I, point 1(a), (c) and (d) and points 2 and 3, no later than 5 June 2011 or shall ensure that management and labour introduce on that date the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them at all times to guarantee the results imposed by this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the directive repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 17 Repeal

Directive 94/45/EC, as amended by the Directives listed in Annex II, Part A, is repealed with effect from 6 June 2011 without prejudice to the obligations of the Member States relating to the time limit for transposition into national law of the Directives set out in Annex II, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex III.

Article 18 Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 1(1), (5), (6) and (7), Article 2(1), points (a) to (e), (h) and (i), Article 2(2), Articles 3(1), (2), (3), (5), (6) and (7), Article 4(1), (2) and (3), Article 5(1), (3), (5) and (6), Article 5(2), point (a), Article 6(1), Article 6(2), points (a), (d) and (f), and Article 6(3), (4) and (5), and Articles 7, 8, 9 and 11, as well as Annex I, point 1(b), (e) and (f), and points 4, 5 and 6, shall apply from 6 June 2011.

Article 19 Addressees

This Directive is addressed to the Member States.

2.1 The notion of 'recast'

Directive 2009/38/EC is a 'recast' Directive. This means that the old Directive 94/45/EC and the changes introduced by the new Directive are brought together into a single instrument. Once the new Directive is transposed into national law (on 5 June 2011 at the latest), the old Directive 94/45/EC will technically have ceased to exist. In other words, there is only one EWC Directive which has legal effect. Where it is necessary to refer to the provisions of Directive 94/45/EC, the national law in force at the time of the conclusion of the agreement is applicable.

The new legislation technically replaces and cancels previous provisions. But in practice, the new Directive relies very much on the mechanism and standards which have been established by Directive 94/45/EC. The new Article 18 lists the provisions which have been changed in comparison to the earlier Directive and must therefore also be changed in national law, in so far as the existing national provisions are not already in line with the new requirements.

2.2 Contractual freedom with limits – relationship between Directive and subsidiary requirements

A key feature of the recast is that the mandatory requirements contained in the body of the Directive have been significantly strengthened. From June 2011 at the latest, an increased number of principles and obligations will have to be respected by EWC agreements, regardless of the content and outcome of the negotiations.

Contractual freedom is key to the EWC Directive. Employees' representatives and central management are encouraged to negotiate the details of their EWC's operation so as to best accommodate local needs. However, having regard to the unequal balance of power between the employers' and employees' sides, the Community legislator introduced essential safeguards into the Directive in order to ensure that the fundamental character of the right to information and consultation is preserved in the course of the negotiations.

The EWC Directive is divided into two parts, each of them with a different status. The body of the Directive lays down in its Articles mandatory requirements, which must be respected by the negotiating parties. The mandatory requirements take the form of principles and definitions, which have a direct impact on the conduct of the negotiations. These principles and definitions guide the relations between the parties. They cannot be altered in the course of negotiations nor be negotiated away. They also govern the functioning of EWC agreements. Indeed, the role of the negotiating parties is not to define principles but to establish operating mechanisms for the implementation of the rules contained in the EWC Directive.

The Annex of the Directive, on the other hand, contains subsidiary requirements, which only apply in the absence of negotiated agreement between the parties. The standards laid down in the subsidiary requirements serve as an encouragement to negotiate.

A key feature of the recast is that the mandatory requirements in the body of the Directive have been significantly strengthened. From June 2011 at the latest, more principles and obligations will have to be respected by EWC agreements, regardless of the content and outcome of the negotiations.

The new mandatory requirements are as follows:

- A general principle of effectiveness has been introduced in Article 1.2 of the new Directive. The negotiations and the operation of the EWC agreement must be read in light of this general principle.
- The notion of transnationality, which defines the competence of the EWC, has been moved from the Annex to Article 1.4 of the Directive. In parallel, a new principle relating to the repartition of competences between national and European levels of employees' representation has been introduced in Article 12 of the Directive. Without prejudice to the prerogatives of the Member States in transposing these minimum standards, different definitions of transnationality can no longer be negotiated, as was the case under the old Directive. Nonetheless, Directive 2009/38/EC clearly encourages the negotiating parties to devise implementing measures for these principles.⁹

9. See 'When is the European Works Council competent?', p. 47.

- A new definition of ‘information’ and a strengthened definition of ‘consultation’ have been introduced in Article 2 of the Directive. The parties can no longer devise their own definitions for these concepts. In addition, both definitions imply that precise requirements are to be respected during the operation of the EWC.¹⁰
- A number of procedural obligations have been added to Articles 4 and 5 of the Directive so as to secure good quality negotiations.¹¹
- The new Directive has added a few points to the list of topics which the negotiating parties must address, as a minimum, in their agreement. In parallel, the standards contained in the subsidiary requirements have been made more complete.¹²
- The new Directive contains a specific reference to the applicable procedure in case of the renegotiation of an existing agreement due to a significant change of company structure. While the negotiating parties are encouraged to find a solution which would best fit their needs, it is not possible to waive this issue by agreement. It is also significant that this adaptation clause is applicable to all agreements, regardless of the date of signature. Even old Article 13 agreements (that is, Agreements that were signed before 22 September 1996 or 15 December 1999 in the case of the UK and Ireland) have to abide by this provision.¹³
- Minimum standards on the role and protection of employee representatives have been introduced in Article 10 of the new Directive. These standards should be considered as an absolute minimum, which cannot be weakened or derogated from by agreement.¹⁴

2.3 Principles for national transposition laws

The fact that information and consultation is a Fundamental Right means that the provisions relating to information and consultation should be given the widest content possible and that potential exemptions or restrictions on the exercise of this right should be strictly defined.

Before it can acquire legal effect which can be relied upon by private parties, the new Directive must be transposed into national law. Member States have until 5 June 2011 to do so. It is primarily for the European Commission to monitor whether Member States have fulfilled this obligation. Should it appear that a national transposition law has still not entered into force at the required date, or that the content of the national legislation fails to fulfil the

10. See ‘Definitions of information and consultation’, pp. 41ff.

11. See ‘The negotiating parties: central management and special negotiating body’, pp. 67ff, and ‘Conduct of the negotiations’, pp. 77ff.

12. See ‘Negotiated agreements’, pp. 83ff, and ‘Subsidiary requirements’, pp. 95ff.

13. See ‘Adaptation in case of change of structure’, pp. 119ff.

14. See ‘Role and protection of employees’ representatives’, pp. 113ff.

minimum standards prescribed by the Directive, infringement proceedings should be initiated by the Commission, in accordance with the rules of the European Treaties.

EU Directives impose upon the national legislator obligations with regard to the result to be achieved, but leave some margin of discretion as to the means of achieving the prescribed objectives. The new Directive, as a result, leaves a number of questions to be addressed by the Member States themselves. Nonetheless, a number of guiding principles must be followed by the legislator in its transposition work.

Recitals as interpretative guidance

Member States are under an obligation to transpose the Articles of the Directive into national law, but not the Recitals. Although they are not legally binding as such, the importance of the Recitals should not be underestimated, however. They provide useful guidance on how the provisions of the Directive should be interpreted and help to remove potential ambiguity, and are often relied upon by the European Court of Justice. The EU legislator uses these Recitals to specify the reason why an Article has been adopted. The national legislator should therefore refer to these justifications in order to better place the provisions of the Directive in their context. Furthermore, where the meaning of a specific provision is clarified by more extensive recitals in the new Directive, national law must be adjusted accordingly.

A *minimum* standard Directive

The Directive lays down minimum standards for protection below which the Member States are not allowed to go. These standards of protection, however, only constitute a floor of rights. Directive 2009/38/EC is based on Article 153 of the Treaty on the Functioning of the EU (ex Article 137 of the EC Treaty), which refers to the improvement of living and working conditions and explicitly allows for more protective national transposing legislation.

A Member State is therefore free to provide for more detailed and more protective provisions. In particular, the fact that the right to information and consultation is a Fundamental Right¹⁵ means that the provisions relating to information and consultation should be given the widest content possible and that potential exemptions or restrictions to the exercise of this right should be very strictly defined.

15. Article 27 of the Charter of Fundamental Rights reads: '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 Union law and national laws and practices'.

It should also be noted that the European and national judges apply a teleological interpretation of the EU Directives. This implies that, in case of ambiguity, maximum effect should be given to the provisions of Directive 2009/38/EC, having regard to the objective of the instrument, namely the improvement of the right to information and consultation.

Examples of key points for transposition

The following points merit careful examination by the national legislator so as to ensure the implementation of the spirit of the Directive:

– **Definition of transnationality**

In line with the new Recital 16, the national legislator should bring as much clarity as possible to the notion of transnationality so as to prevent central management from challenging EWC competence with regard to situations which, at first glance, do not seem formally to affect at least two Member States but which are in fact transnational in scope (for example, a decision affecting the whole undertaking but implemented in one state after the other should be considered as transnational).

– **Articulation between national and European level**

The new Directive expressly requires that the national legislator devise concrete arrangements for the articulation of national and European levels of employees' representation. It must be ensured that each level can play its role without undermining the roles of the others.

– **The undertakings affected by the application of the Directive**

Member States are entitled to introduce lower thresholds than those foreseen in the Directive. The national legislator can also envisage laying down specific rules on the notion of controlling undertaking, for instance having regard to the specific cases of joint ventures and franchises.

– **Confidentiality**

Confidentiality restrictions are loosely defined in the Directive. The national legislator should take all necessary steps to define in detail the circumstances which may justify confidentiality requirements and the applicable procedures.

– **Adaptation clause in case of significant change of structure**

The legislator is under the express duty to devise the appropriate arrangements for an adaptation of the EWC agreement in case of a significant change of structure in the company.

– **Sanctions**

The Directive does not contain specific provisions on the type of sanctions that should be applied in case of violations of the provisions of the Directive. In this regard, the role of the national legislator is key. Recital 35 and the new Recital 36 specify that the national legislator must provide for effective, dissuasive and proportionate sanctions in case of violation of the Directive.

...

- ...
- There are several other provisions in the Directive which the national legislator can improve. For instance, a Member State may envisage increasing the number of meetings of the EWC from one to two a year. A more complete list of topics for information and consultation may also be drawn up.

Principle of non-regression

The EWC Directive does not aim at full harmonisation of national legislations but at creating a level of convergence between the Member States. Whilst the new Directive is an overall improvement compared to the provisions of Directive 94/45/EC, some of the new standards may still not meet the higher level of protection already provided for under national legislation.

The principle of non-regression means that the national legislator should not use the provisions of the new Directive to lower existing standards of protection. Such action would be contrary both to the spirit of the Directive and to the social objectives of the Treaty. Article 151 of the Treaty on the Functioning of the EU (ex Article 136 EC) indeed provides that the Community has the objective of improved living and working conditions, so as to make possible their harmonisation while any improvement is maintained.

2.4 Private international law principles

The negotiating parties should carefully reflect on the issue of applicable law. By drafting an appropriate choice of law clause, the parties can ensure that the most favourable legal regime is applicable to their EWC.

The standards and obligations contained in the EWC Directive cannot exist without corresponding transposition laws. Because the laws vary from one Member State to another, the question of the applicable legal regime is a key issue for the enforcement of the obligations contained in the Directive.

As a general principle, a company is subject to the law of the country in which it has its seat. In the context of the EWC Directive, one would therefore have to look at the law of the Member State in which the central management is established. However, other regimes may also govern specific issues.

The general rule: the law of the central management

Central management is responsible for establishing an EWC. For example, if a central management situated in Cyprus refuses to start negotiations, the steps required to establish an EWC under the terms of the subsidiary requirements would have to be taken, in line with the Cypriot transposition law.

The law of the country in which central management is situated will also, in principle, govern the negotiations on the establishment of an EWC. This would be the case, in particular, with regard to the budgetary rules which the Member State of the central management is free to impose, in line with the provisions of the Directive.

The applicable national law on subsidiary requirements is also the law of the country in which the central management is established.

In the case of a group of undertakings, central management is the management of the controlling undertaking. Article 3 of the new Directive contains some guidance on determining which is the controlling undertaking in the case of a group of undertakings but Member States have a certain latitude in laying down the details of this Article. In principle, the applicable regime is the law of the presumed controlled undertaking. It may be that several national laws would then have competence to regulate the determination of a controlling undertaking. In such cases, the Directive foresees that the law which must be taken into account is, in principle, that of the country of the undertaking which can appoint more than half of the members of the group's administrative, management or supervisory body.

Specific rules

On the EWC agreement

The negotiating parties can clarify, in a choice of law clause, to which legislation they wish to subject their agreement. In the absence of such an express clause, the judge will apply the law of the country with which the agreement is mostly connected.¹⁶ This country will often be the place of establishment of the central management.

The negotiating parties should carefully reflect on the issue of applicable law. By drafting an appropriate choice of law clause, the parties can ensure that the most favourable legal regime is applicable to their EWC.

On the status of employees and their representatives

Specific rules apply to the status of employees and their representatives, regardless of the law which would otherwise be applicable to the EWC agreement:

- the rules concerning the calculation of the number of employees, including the notion of 'employee', are those of the Member State in which the employees are situated;

¹⁶. See Article 3 of EC Regulation 593/2008 on the law applicable to contractual obligation (Rome I).

- the designation or appointment of employees' representatives to the Special Negotiating Body is governed by the law of the country in which the representatives are supposed to be elected or appointed;
- the rules concerning the protection of employees' representatives are those of their country of origin. Employees' representatives have, as a result, different statuses within the same SNB or EWC.

Chapter 3 Impact of the Directive on existing and future agreements

(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 [7] 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.

(46) This Directive respects fundamental rights and observes in particular the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right of workers or their representatives to be guaranteed information and consultation in good time at the appropriate levels in the cases and under the conditions provided for by Community law and national laws and practices (Article 27 of the Charter of Fundamental Rights of the European Union).

Article 14 Agreements in force

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.

3.1 Impact on future agreements

Before individuals can rely on the provisions of the new Directive, it will have to be transposed into national law. Article 16 stipulates that Member States have until 5 June 2011 to do so. All negotiations and conclusions of EWC agreements should be covered by the provisions of the new Directive from this date, at the latest.

Should a Member State fail to transpose the provisions of the new Directive into national law before 5 June 2011, infringement proceedings would have to be started by the Commission against that Member State without delay.

3.2 Impact on existing agreements: no obligation to renegotiate but no immunity from the new rules

The general ‘no renegotiation’ principle does not mean that existing agreements are immune from the new rules. The date of signature of the agreement conditions the extent to which the new rules will apply to existing EWCs.

If, after the entry into force in national law of the new Directive, the company experiences a significant change of structure within the meaning of Article 13 and the existing agreement does not contain specific provisions in this regard, a negotiation under the terms of the new Directive is compulsory – regardless of the date of signature of the existing agreement.

No obligation to renegotiate existing agreements

The new EWC Directive does not call into question EWC agreements that were negotiated and signed under the old regime. Directive 2009/38/EC did not create an obligation to renegotiate existing agreements in light of the new

rules, either. Such retroactive effect could harm the legitimate expectations of the negotiating parties and would not always serve the objective of the Directive – that is, the improvement of the right to information and consultation. Well-functioning agreements should not be called into question unnecessarily. Recital 41 unequivocally states that: ‘the agreements in force should be allowed to continue in order to avoid their obligatory renegotiation when this would be pointless’.

A major exception to the general no renegotiation principle is the adaptation clause contained in Article 13. If, after the entry into force in national law of the new Directive (5 June 2011 at the latest), the company experiences a significant change of structure within the meaning of Article 13 and the existing agreement does not contain specific provisions in this regard, a negotiation under the terms of the new Directive is compulsory – regardless of whether or not the obligations arising from the new Directive would otherwise apply to the agreement(s) in question.

A tailored application of the new rules to existing agreements

The general no renegotiation principle does not mean that existing agreements are immune from the new rules. The date of signature of the agreement conditions the extent to which the new rules will apply to existing EWCs.

Existing agreements can be classified in three categories:

- Agreements signed under the old law, that is, between 22 September 1996 and 5 June 2009. These are the so-called ‘old Article 6 agreements’. This category is the most important one in terms of the number of agreements (around 462 EWCs were active in November 2009¹⁷).
- Agreements signed before 22 September 1996. These are commonly known as ‘Article 13 agreements’. This period corresponds to the general derogation clause provided for under Article 13 of Directive 94/45/EC. In 1996, 514 EWC Article 13 agreements were established. In November 2009, around 380 were still active. In addition, 57 EWCs based on the UK derogation period were active in November. These agreements are now dealt with under Article 14.1 (a) of the new Directive.
- Agreements signed or revised between 5 June 2009 and 5 June 2011. These agreements can be referred to as ‘interim agreements’. They are now dealt with under Article 14.1 (b) of the new Directive.

17. A regularly updated database of EWC agreements is available at: <http://www.ewcdb.eu/>

Agreements signed between 22 September 1996 and 5 June 2009 (the 'old Article 6 agreements')

The first EWC Directive was the only applicable regime between the moment it entered into force in national law (22 September 1996 at the latest; 15 December 1999 in the case of the UK and Ireland) and the date of entry into force in European law of the new Directive (5 June 2009). This situation will change from the moment the new EWC Directive enters into force in national law (that is, on 5 June 2011 at the latest).

According to the European Court of Justice, new Community rules can apply to the effects of a situation which arose under the old rules. One should be able to deduce such effects from the terms, the objectives and the general scheme of the new law.¹⁸ Such is clearly the case for the new EWC Directive, which includes among its objectives 'resolving the problems encountered in the practical application of Directive 94/45/EC and remedying the lack of legal certainty resulting from some of its provisions or in the absence of certain provisions' (Recital 7). More than 900 EWCs were active in 2009. If these EWCs were not able to benefit from the improvements of the new Directive, the overall objective of the revision would be seriously compromised. Furthermore, it should be underlined that, while the EWC Directives delegate to the negotiating parties the responsibility to arrange the working methods of the EWC or information and consultation procedure, the definitions and principles contained in the body of the Directives are the prerogative of the legislator. As such, they already eluded the competence of the negotiating parties at the time of the conclusion of the agreement.

While agreements signed between 22 September 1996 and 5 June 2009 do not, in principle, have to be renegotiated under the terms of the second Directive, the new provisions relating to the operation of the existing EWCs must be taken into account. In other words, the new Directive will, from 5 June 2011, govern the functioning of EWCs established under the old regime.

In practice, this means that an increased number of mandatory requirements will apply to EWCs established between 22 September 1996 and 5 June 2009. These requirements will apply, irrespective of whether or not the EWC agreements had negotiated otherwise. The provisions which, from 5 June 2011 at the latest, will affect existing agreements are as follows:

Applicable requirements to the operation of EWCs from 5 June 2011 include:

- Principle of effectiveness and effective decision-making (Art 1.2).
- Definition of transnationality (Art 1.3, 1.4) and articulation between national and European levels of representation (Art 12).

18. C-334/07 Commission v Freistaat Sachsen

The new definition of transnationality, which determines the competence of the European Works Council, must be regarded as the reference even if differing definitions were negotiated at the time of the signature of the agreement. This definition is without prejudice to implementing mechanisms that may have been agreed upon between the parties.

The EWC must have pre-established mechanisms for the articulation of information and consultation procedures between the European and national levels of employees' representation. As such a requirement is absent from Directive 94/45/EC, it is likely that a number of EWCs will not contain negotiated mechanisms on this specific issue. In such cases, the new Directive foresees that it is up to the national legislator to devise the appropriate arrangements. Management will therefore have to carry out information and consultation at both levels, in accordance with the provisions of the relevant national law(s).

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

Directive 94/45/EC did not contain a definition of information, and consultation was defined merely as 'the exchange of views and establishment of dialogue between employees' representatives and central management or any more appropriate level of management'. The new Directive's detailed definitions will govern the functioning of existing EWCs. If the agreement contained different definitions, they will have to be discarded.

- Collective representation of employees' interests (Article 10.1).
- Obligation to report to the workforce (Article 10.2).
- Right to training (Article 10.4).
- Adaptation in case of significant change of structure (Article 13).

This obligation did not exist under the old Directive, so it may be that some EWC agreements do not have specific mechanisms for adaptation of the EWC in case of significant change of structure. In such cases, a negotiation under the terms of the new Directive is mandatory, in accordance with Article 13.

When the existing agreements do contain specific provisions for the adaptation of the EWC, careful attention must be paid as to whether the requirements of the new Directive are fulfilled. The adaptation requirement cannot be waived or watered down in a way which would deprive this obligation of any practical effect. Such would be the case, for instance, if the definition of the change of structure requiring adaptation was laid down in unduly restrictive terms. Where the agreement does not contain adequate provisions, negotiations under the terms of the new Directive should be triggered following a valid request from employees' representatives in accordance with Article 13.

Article 14.1 (a): Agreements signed before 22 September 1996 (the so-called 'old Article 13 agreements')

Article 13 of Directive 94/45/EC stipulated that the agreements concluded before the implementation of the Directive – that is, before 22 September 1996 (or 15 December 1999 in the case of the UK and Ireland) – would be protected as acquired rights.¹⁹ The new Directive preserves those agreements (Article 14.1 (a)). This means that 'old Article 13' EWCs will be allowed to continue functioning after 5 June 2011 under the terms contained in their agreements.

Although the obligations arising from the two EWC Directives do not, in principle, apply to agreements signed before 22 September 1996, a number of requirements had to be fulfilled. The new Directive reiterates the three conditions that are necessary for the validity of such agreements:

(1) The term 'agreement' implies that a convention has been concluded between the parties, resulting from negotiations between management and an employees' representative body, which provides sufficient guarantee of representativity in accordance with the applicable national law.

(2) The agreement must cover the entire workforce.

(3) The agreement must provide for the 'transnational information and consultation of employees'. These are the core elements of the agreement and they cannot be negotiated away. The correct understanding of the notions of information, consultation and transnationality must be found in the Directive itself. It follows that, from 5 June 2011, the transnational information and consultation procedures carried out in application of 'old Article 13 agreements' must necessarily fulfil the criteria implied by the definitions contained in the new Directive.

If any of these three requirements is not fulfilled, employees' representatives have the right to request the start of negotiations under the new Directive.

If the agreement expires and the parties decide jointly to renew or adjust it, the provisions of the new Directive – other than the definitions of information, consultation and transnationality – still do not apply. If, however, the parties fail to jointly agree to prolong the agreement new negotiations should be started, in compliance with the new Directive (Art 14.2).

19. Article 13 of Directive 94/45/EC states:

'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.'

There is a fundamental difference between the mere adjustment of such agreements in order to adapt them, for instance, to the changing size of the workforce and an adaptation of agreements in case of a significant change in the structure of the company. The wording of Article 14 is unequivocal ('without prejudice to Article 13'). The adaptation clause of the new Directive applies to agreements that were signed before 22 September 1996. The application of the adaptation clause involves the negotiation of an entirely new agreement, which will come under the terms of the new Directive. As the business environment is constantly changing – involving important operations such as mergers and acquisitions – one can logically expect that old 'Article 13 agreements' will over time have to be renegotiated, thereby unifying the applicable regimes with regard to EWCs throughout Europe.

Article 14.1 (b): applicable regime to 'interim agreements' (signed or revised between 5 June 2009 and 5 June 2011)

The new EWC Directive came into force in European law on 5 June 2009. The old EWC Directive 94/45/EC will be repealed from 6 June 2011. Article 14.1 (b), which is the result of a joint advice between BusinessEurope and the ETUC, gives some precision on the status of the agreements which are signed or revised during this two-year period.

Article 14.1 (b) cannot be assimilated to the derogation provided for by Article 13 of Directive 94/45/EC. It is very clear that Article 14.1(b) does not create a derogation period during which negotiations could be conducted outside any legal framework. There is no discontinuity between the application of Directive 94/45/EC and Directive 2009/38/EC, as the second instrument immediately replaces the first. In other words, all the negotiations which will be conducted up to 5 June 2011 must be subject to the relevant provisions of Directive 94/45/EC. From 5 June 2011 onwards, all new negotiations will be subject to the provisions of Directive 2009/38/EC.

Nonetheless, the two-year period of Article 14.1 (b) is often referred to, including by the European Commission, as a 'window of opportunity'. This provision has been designed as an incentive for employers to conclude agreements during this 'interim period'. Indeed, the obligations arising from Directive 2009/38/EC shall not apply to undertakings where agreements to establish new EWCs are concluded during this two-year period or where existing agreements are revised during this period.

There are some question marks as to whether these interim agreements are entirely excluded from the application of the new rules or whether the term 'obligations arising from this Directive' should be read in a restrictive manner. Total exclusion means that the interim agreements will permanently have to be interpreted in light of the old law only. A literal reading of Article 14.1 (b) implies, on the other hand, that the functioning of interim agreements after 5 June 2011 cannot escape the application of the definitions and principles clarifying the meaning of obligations which already existed under Directive 94/45/EC. Such would be the case in particular of the definitions of information and consultation.

At the time of the discussions on the joint advice with BusinessEurope, it was not the ETUC's intention to weaken the fundamental right to information and consultation by implying that there could be different definitions of the same concept. A fundamental right should apply equally to all workers.

Nonetheless, it is very clear that agreements signed or revised during this two-year period will suffer from a less favourable status than those concluded after 5 June 2011. New obligations, such as the right to training or the provisions relating to the role and protection of employees' representatives, could be permanently excluded for those interim agreements.

Therefore, extreme caution must be displayed in the negotiations or revision of agreements during the two-year period. If there are clear reasons to sign or revise an agreement before 5 June 2011, the agreement should be signed or revised in full awareness and knowledge of the new EWC Directive 2009/38/

Table 1 Application of the new Directive

	Until 5 June 2011	From 6 June 2011	In case of renegotiation procedure under adaptation clause	After renegotiation under adaptation clause
Old Article 13 agreements (signed before 22 September 1996)	None	<ul style="list-style-type: none"> - Definitions of information and consultation (Art 2.1.f and g) - Definition of transnationality (Art 1.4) - Adaptation in case of significant change of structure (Art 13) 	Art 13 + 5, 6, 7	Total recast
Old Article 6 agreements (signed between 22 September 1996 and 5 June 2009)	None (Directive 94/45/EC only)	<ul style="list-style-type: none"> - Principle of effectiveness and effective decision-making (Art 1.2) - Definition of transnationality (Art 1.3, 1.4) + articulation between national and European levels of representation (Art 12) - Definitions of information and consultation (Art 2.1.f and g) - Collective representation of employees' interests (Art 10.1) - Obligation to report to the workforce (Art 10.2) - Right to training (Art 10.4) - Adaptation in case of significant change of structure (Art 13) 	Art 13 + 5, 6, 7	Total recast
Interim agreements (signed or revised between 6 June 2009 and 5 June 2011)	None (Directive 94/45/EC only)	<p>At least:</p> <ul style="list-style-type: none"> - Principle of effectiveness and effective decision-making (Art 1.2) - Definition of transnationality (Art 1.4) - Definitions of information and consultation (Art 2.1.f and g) - Adaptation in case of significant change of structure (Art 13) 	Art 13 + 5, 6, 7	Total recast
Other agreements (signed after 6 June 2011)	N/A	Total recast	Total recast	Total recast

EC. The agreement should set out to define the rights and obligations of parties to the agreement, as intended by that Directive. So as to avoid any confusion, the negotiating parties should clearly express their intention to read their agreement in light of the new Directive. The vast majority of the improved provisions of the new Directive have been agreed upon by the ETUC and BusinessEurope in their joint advice. Therefore, there is no reason to further delay their integration into ongoing negotiations or renegotiations, or to limit their application to existing EWC agreements. Furthermore, in order to reaffirm the intention to apply the new law, the agreement could contain a short-term renegotiating clause so that the agreement can be put in line with the new Directive as soon as it enters into force in national law.

Part II

Parties affected by the application of the Directive

Chapter 1 The European Works Council: role and competence

The role of the European Works Council (EWC) is to ensure that, within its areas of competence, the employees' point of view is heard and taken into account in the central management's decision-making through an appropriate decision-making procedure.

1.1 Definitions of information and consultation

Conducting 'information' and 'consultation' procedures at a single meeting would constitute a violation of the Directive if essential criteria of timing and quality have not been fulfilled. It should also be kept in mind that 'information' is an essential prerequisite of 'consultation'.

'Consultation' within the meaning of the Directive cannot be conducted if the information phase has not been properly completed. In other words, a violation of the information phase automatically constitutes a violation of the consultation obligation.

(21) It is necessary to clarify the concepts of information and consultation of employees, in accordance with the definitions in the most recent Directives on this subject and those which apply within a national framework, with the objectives of reinforcing the effectiveness of dialogue at transnational level, permitting suitable linkage between the national and transnational levels of dialogue and ensuring the legal certainty required for the application of this Directive.

(22) The definition of 'information' needs to take account of the goal of allowing employee 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.

(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.

Article 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;

(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.

An important achievement of the 2009 revision is the introduction of precise definitions of information and consultation. The first EWC Directive did not define the concept of information. Consultation was merely referred to as ‘the exchange of views and establishment of dialogue’. The 2009 Directive lays down definitions in greater detail, which should prevent conflicting interpretations.

The definitions of information and consultation are now in line with other Community instruments.²⁰ They are designed to clarify the role and the effectiveness of EWCs. In accordance with the general principle of ‘useful effect’, the 2009 Directive makes it clear that the information and consultation procedure is not a simple formality but, with the value of a fundamental social right, is fully part of the decision-making process. The procedure must therefore fulfil essential criteria of timing and quality.

Although ‘information’ and ‘consultation’ are inextricably linked, they are also distinct procedures. The conduct of each of these procedures should respect the specific requirements described below. Carrying out ‘information’ and ‘consultation’ procedures at a single meeting would constitute a violation of the Directive if essential criteria of timing and quality have not been fulfilled.

20. See in particular Article 2 of Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (‘the SE Directive’)

It should also be kept in mind that ‘information’ is an essential prerequisite of ‘consultation’. Article 2.1 specifies that information enables employees’ representatives ‘to prepare for consultation’ and that consultation is carried out ‘on the basis of the information provided’. ‘Consultation’ within the meaning of the Directive cannot be conducted if the information phase has not been properly completed. In other words, a violation of the information phase automatically constitutes a violation of the consultation obligation.

Information

Mere oral communication by management – for example a Powerpoint presentation containing basic information on the activities of the company – at the annual meeting of the EWC will not meet the required criteria of timing and quality.

The definition of information is aligned to the one contained in the Directive supplementing the Statute for a European company with regard to the involvement of employees. In addition, Recital 22 stipulates that the information must be provided at ‘such time, in such fashion, and with such content as are appropriate without slowing down the decision-making process in companies’. The Directive emphasises two criteria: the timing and quality of the information.

Concerning the timing, the information must be transmitted sufficiently early so that employees’ representatives can acquaint themselves with the subject matter and examine it before a final decision is made. This may include sufficient time to take expert advice. Central management must therefore ensure that it transmits the information well in advance.

Secondly, the information must be accurate and complete. It must be of sufficient quality to enable the EWC to assess the potential impact of the measure, if it was to be implemented as such. Again, with a view to avoiding any slowing down of the decision-making process in companies, it is important for management to transmit data which are complete and accurate, so that the EWC does not need to make additional inquiries.

In concrete terms, a meaningful information procedure would meet at least the following requirements:

Transmission of data

Information is ‘the transmission of data by the employer to the employees’ representatives’. The Directive stipulates that it is the ‘employer’ who provides the information. This means that the responsibility to communicate data to the EWC is not exclusive to the central management but is shared by all managements at the various levels of the enterprise. As time and quality are of the essence in the process of information, it is only logical that the party possessing first-hand information should also be required to communicate directly with the EWC.

As for the recipients, information can be transmitted to all the employees' representatives of the EWC, or to the members of the select committee, depending on the provisions of the EWC agreement. Transmission of information implies that all the employees' representatives have access to means of communication, such as telephones, fax machines and computers with e-mail and Internet facilities. This is important if they are to be able to actually receive the information but also to disseminate it to all employees' representatives in the EWC, for example if only the members of the select committee receive the information in the first place.

Sufficient time and resources must be allocated for translation into the necessary languages so that the documents can be fully understood by all the EWC members.

The Directive requires that the information enables employees' representatives 'to acquaint themselves with the subject matter and to examine it'. It must be given at 'such time, in such fashion and with such content' as are appropriate for an in-depth assessment by the employees' representatives. In other words, employees' representatives must be able to understand the relevant data easily and to be in a position where they can critically assess the possible impact of the information provided to them. This implies that the information provided by the employer should contain a description of the possible impact of the relevant issues. This description must rely on transparent, accurate and complete data, and contain an explanation of the methods used by the management to assess these data.

It follows that mere oral communication by management – for example a Powerpoint presentation containing basic information on the activities of the company – at the annual meeting of the EWC will not fulfil the required criteria of timing and quality. A comprehensive written report must be drawn up by the management and transmitted to the employees' representatives, well in advance of an EWC meeting.

The subsidiary requirements give a useful indication of the topics that should at least be included in the information procedure.

In-depth assessment of possible impact and preparation for consultations

The Directive foresees that 'employees' representatives undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultation with the competent organ of the company'. The words 'where appropriate' reflect the fact that consultation is only possible for topics involving a business decision by management. By contrast, information must be provided on all matters relating to the activities of the company in general and affecting employees' interests in detail, even if they are not linked to the decisions of the management.

Once data are transmitted to the employees' representatives in accordance with the criteria explained above, sufficient time must be allowed before the formal consultation procedure can start. The EWC should be able to take all

the necessary steps to be in a position to develop an in-depth understanding of the issues at stake and to prepare the formulation of an opinion. This entails, in particular:

- that communication take place between the EWC members and the workforce they represent, either to pick up issues that should be raised at European level and/or to receive ‘parallel’ information from other employees’ representatives on the possible impact;
- that members of the EWC have the time and the resources necessary to have recourse to an expert, where this is appropriate, to develop an in-depth understanding of the subject matter. It should be kept in mind that employees’ representatives will be expected to deal with issues such as fiscal reporting regulations, legal provisions and microeconomic analysis. EWC employees’ representatives should therefore be able to use experts to assist them on such issues. In order to carry out their tasks effectively, such experts should be able to attend EWC meetings if this is deemed necessary by employees’ representatives;
- that members of the EWC have an exchange of views between themselves without the management being present. Such an exchange of views should take the form of a preparatory meeting before the meeting with management and the subsequent debriefing meeting. It may be that consultation with management takes place over several meetings (see below for the consultation procedure).

Time required for the information procedure

Recital 22 provides that 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 ‘without slowing down the decision-making process in companies’. This means that the employees’ representatives have to be informed at the earliest stage possible in the decision-making procedure. If management slows down the process of information by not providing the necessary data in time, however, it is not entitled to refer to a possible slowing down of its own decision-making process in order to put pressure on employees’ representatives.

Consultation

A consultation which leaves little or no flexibility as to the type of decision that may eventually be taken intervenes too late in the decision-making procedure and thus violates the provisions of the Directive. In other words, the consultation procedure cannot be equated with mere disclosure by management of its final decision.

The first EWC Directive referred to consultation as ‘the exchange of views and establishment of dialogue’ between employees’ representatives and management. Already at that time, consultation should have been understood as implying the active involvement of employees’ representatives in decisions

affecting employees' interests. However, the rather poor definition of consultation contained in Directive 94/45/EC has led to the failure of some EWCs to be consulted in the spirit of the Directive. Experience shows that consultation is too often limited to a mere disclosure of final decisions and that EWCs are not integrated into the decision-making of the company. Building on the existing provision, the new Directive brings the necessary clarification to secure the correct interpretation of the consultation obligation, in line with the useful effect principle.

Timing

It is clear from the new formulation of Article 2.1(g) that information and consultation are two distinct procedures, which must be carried out one after the other. Consultation takes place based on the earlier information procedure.

Nonetheless, both procedures share similar characteristics as advance timing is also emphasised for consultation. The Directive underlines that the consultation must necessarily occur before a final decision is taken (*'proposed measures'*) and that the opinion expressed by employees' representatives may be taken into account within the enterprise. EWCs must therefore be consulted in the early stages of decision-making within the enterprise, at a point in time at which employees' representatives can still have an influence on the desirability, shape and contents of the decision which is the subject of the consultation. A consultation which leaves no or little flexibility as to the type of decision that may eventually be taken intervenes too late in the decision-making procedure and therefore violates the provisions of the Directive. In other words, the consultation procedure cannot be equated with the mere disclosure by management of its final decision.

Procedure

Consultation means 'the establishment of dialogue and an exchange of views between employees' representatives and central management or any more appropriate level of management'. Such exchange of views is not just a formal requirement. The Directive insists on the interactive nature of this procedure. Consultation implies a two-way process. It is not sufficient that employees' representatives merely express an opinion. This opinion must also be seriously considered and therefore lead to a response by management stating to what extent and why it may agree, or not, with the opinion expressed.

The Directive stipulates that the consultation procedure must take place within 'a reasonable time'. This responsibility is shared between employees' representatives and management: a constructive dialogue and smooth procedure must take place in a spirit of cooperation so as not to unnecessarily obstruct decision-making within the enterprise. The consultation procedure should last for as long as is necessary for a constructive exchange of views. It will often be the case that one meeting is not enough for a meaningful dialogue. An additional meeting should be envisaged so that management can provide a response to the opinions expressed by employees' representatives and the reasons for that response. Several rounds may then follow until an appropriate outcome is achieved.

Outcome

The Directive stipulates that the opinion expressed by employees' representatives about proposed measures 'may be taken into account' within the enterprise. The outcome of a consultation procedure is therefore an agreement between management and employees' representatives on the desirability and design of a decision. Employees' representatives should be fully involved in the running of the enterprise. The EWC should be a place for constructive dialogue rather than power struggles. When an EWC becomes a respected partner for discussion and an important actor in negotiations, it generates social harmony and has a positive impact on innovation and productivity.

The Directive says that consultation should occur 'without prejudice to the responsibilities of the management'. This is a reminder of the basic difference between consultation and codetermination. While the EWC is meant to be fully involved in enterprise decision-making, it is not formally part of the supervisory or administrative board. Nonetheless, it is clear from the Directive that the responsibilities of management also include an obligation to conduct a meaningful information and consultation procedure. Consultation cannot be bypassed or shortened to the point that a constructive dialogue can no longer take place. In the same way as management has a responsibility to provide adequate information at an early stage so as not to slow down the decision-making process, management cannot rely on its competence to take decisions to ignore its responsibility under the EWC Directive to respect workers' rights to involvement. Such an interpretation would be in breach of the general spirit of cooperation provided for under this Directive (Article 9).

1.2 When is the European Works Council competent?

(12) 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.

(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.

(18) The mechanisms for informing and consulting employees in such undertakings or groups must encompass all of the establishments or, as the case may be, the group's undertakings located within the Member States, regardless of whether the undertaking or the group's controlling undertaking has its central management inside or outside the territory of the Member States.

Article 1 Objectives

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.

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.

(...)

6. Unless a wider scope is provided for in the agreements referred to in Article 6, the powers and competence of European Works Councils and the scope of information and consultation procedures established to achieve the purpose specified in paragraph 1 shall, in the case of a Community-scale undertaking, cover all the establishments located within the Member States and, in the case of a Community-scale group of undertakings, all group undertakings located within the Member States.

Material competence of the EWC: the notion of transnationality

A matter becomes transnational whenever it exceeds local management competence. It should be up to central management to reverse this presumption by demonstrating that the decision in question is a purely local issue.

The area of competence of the EWC is 'European'. In that sense, it must be distinguished from that of national works councils. The competence of the EWC is therefore limited to transnational issues, which are defined in Article 1.4 as 'matters which concern the Community scale undertaking or group of undertaking as a whole, or at least two undertakings or establishments situated in two different Member States'. Recitals 12 and 16 provide further clarifications for a better understanding of the notion of transnationality.

Recital 12 – which already existed under the old Directive – specifies that the EWC must be ‘properly informed and consulted when decisions are taken in a Member State other than that in which they are employed’. This Recital introduces the presumption that every decision taken in another Member State than where it will be implemented is part of a transnational strategy affecting the global conduct of the enterprise. For instance, a decision to close a plant in a given country implies a decision to continue activity in another country. That is, a matter becomes transnational when it exceeds local management competence. It should be up to central management to reverse this presumption by demonstrating that the decision in question is a purely local issue.

The new Recital 16 illustrates the definition of transnationality by citing ‘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’. Whilst Art 1.4 refers to decisions affecting at least two Member States, this Recital clarifies that it is not so much the number of Member States formally affected which should be taken into account but the potential effect of the decision. For instance, a decision affecting the whole company but in practice implemented in different stages will formally affect one Member State after another, that is, one at a time. But it is undeniable that the EWC is entitled to be informed and consulted about such decisions, as these are part of a global strategy.

According to Recital 16, a transfer of activities between Member States will be considered a transnational matter. Such a transfer does not necessarily need to take place between establishments of the same enterprise. Matters such as outsourcing an activity to another Member State also come within the notion of transnationality.

It should also be underlined that the EWC is entitled to be informed and consulted about decisions which do not necessarily adversely affect employees’ interests. What matters is that the decisions at stake are of ‘importance for the European workforce in terms of the scope of their potential effects’, regardless of their alleged positive or negative effect for employees. The EWC must be involved in any matter which is relevant to the life of the enterprise.

A similar definition to Article 1.4 was already present in the subsidiary requirements of the first EWC Directive. The new Directive did not bring a change of substance but the definition of transnationality has been moved from the subsidiary requirements to the body of the Directive. This can be explained by the fact that the new Directive has also introduced a new provision on the relationship between the European Works Council, on the one hand, and information and consultation bodies provided for under national law, on the other hand.²¹ The principle of the relevant level according to the subject under discussion now also applies to EWCs established by agreement.

²¹. See ‘Linking the different levels of information and consultation’, pp. 51ff.

Nonetheless, as the EWC Directive is a minimum standards Directive, this reshuffle does not affect the capacity of a Member State to lay down more detailed provisions concerning the notion of transnationality. Indeed, this notion has on several occasions been a disputed issue between employees' representatives and management. Member States should therefore consider introducing as much clarity as possible in order to prevent such conflicts of interpretation from arising in future. In particular, the national legislator should, where necessary, adjust national law to the new Recital 16, emphasising that the potential effect of a decision is a determining factor.

The British Airways judgment

In the British Airways judgment,²² the EWC heard informally about a transfer of customer services at Vienna airport. Central management, based in the UK, argued that this was not a transnational issue since only one country (Austria) was involved. This transfer, however, was part of a global restructuring programme which was to be handled in several phases. Similar transfers of undertakings in Prague and Geneva had already been carried out. The judge therefore ruled that restructuring in one country can have a transnational character if the decision was taken in another Member State.

Examples of the implementation of the notion of transnationality

GDF Suez European Works Council agreement (2009)

The EWC 'is consulted on transnational issues of concern to the Community-wide company, or the group of Community wide companies or establishments of the company or the Group located in two different Member States.

Also considered as transnational issues are questions concerning a subsidiary located outside France [for example, the headquarters of GDF Suez] falling within the scope of a decision of the dominant company, or which are a direct consequence of one of the strategies of the Group and which are significant for the European personnel in terms of the scope of their potential impacts, or which involve a transfer of activities between Member States'.

Air France KLM EWC agreement (13.02.2006)

'A transnational decision is one taken at Air France KLM Group level concerning two Air France KLM group undertakings or companies operating in two different countries or restructuring concerning one or more subsidiaries located outside France and the Netherlands, or a decision involving one country only, but whose scale is such that it will, by its very nature, impact the Air France KLM Group as a whole.'

22. 6 December 2006, Brussels Labour Court.

Geographical competence of the EWC

The powers of the EWC extend to all establishments or group undertakings located within the Member States, even if the controlling undertaking is established outside the EU. An Article 6 agreement may provide for a wider scope of territorial competence (1.6). (37)

Example

The 2005 Veolia EWC agreement allocated one observer's seat to Morocco. In addition to its European competence, the 2008 Veolia EWC agreement foresees that the EWC shall also be informed and consulted on the international strategy of the group.

1.3 Linking the different levels of information and consultation

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.

Article 12

Link between this Directive and 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.

Co-existence with national bodies

Managerial tactics aimed at playing one level of representation against another must be prevented at all costs.

The issues of EWC competence and the competence of information and consultation bodies at various levels are intertwined. The relevant level should be determined according to the subject in question.

Following the adoption of Directive 2002/14/EC, establishing a general framework for informing and consulting employees, workers throughout the Union have a right to appoint employees' representatives who will be informed and consulted on key matters affecting the undertaking (provided that the prescribed threshold is exceeded). In the majority of Member States, such workplace representation can take the form of a works council. The general

principle contained in Article 12.1 of the EWC Directive is that the EWC exercises its competence without prejudice to the national procedures for information and consultation. Two possibilities can be envisaged:

- (i) The issue at stake is not a transnational issue. The EWC is then not competent and the information and consultation procedure has to be conducted at the national level of representation, in accordance with the applicable national provisions.
- (ii) The issue at stake is a transnational issue. The EWC must therefore be informed and consulted. But its involvement is without prejudice to the competence of national levels of representation. As a result, the national level(s) of representation must also be informed and consulted. The Directive encourages the negotiating parties to devise, in the EWC agreement, concrete arrangements laying down the procedure for coordination between both levels. Such an agreement has to remain within the limits of what is permitted by the relevant national law. For instance, the negotiating parties to the EWC cannot agree that the competences of the EWC and those of the national works council should be merged, if the national legislator does not expressly offer such a possibility.

Example

The 2007 PFW European Works Council agreement stipulates: ‘national employee representatives shall always be informed at least at the same time as the EWC and provided with all documents required. This is aimed at facilitating communication between the EWC and the national employee representatives. This shall not affect rights of national interest representatives going beyond this. The employees shall be notified at an assembly at those sites at which there are no employee representatives. At least one representative of the EWC shall be invited to such an assembly.’

In the absence of pre-established arrangements, the Directive foresees that the procedure must be conducted at both levels where ‘decisions likely to lead to substantial changes in work organization or contractual relations are envisaged’. It is up to the national legislator to lay down the circumstances in which both levels should be involved and to devise concrete arrangements for the articulation of the information and consultation. The Directive leaves a lot of discretion to the Member States to devise the most suitable arrangements in the transposition legislation. Nonetheless, Member States cannot use their discretion in a way which would adversely affect employees’ rights. A number of key elements should therefore be contained in the transposition law:

- Recital 37 suggests that the EWC can be informed earlier or at the same time as the national level but not later.
- The processes of informing and consulting are conducted in the EWC as well as in the national bodies (Art 12.3). This Article must be understood as meaning that the content of information and con-

sultation should be complete for both levels. It cannot be presumed that, since one level of representation has received the information, the other level is automatically informed. Managerial tactics aimed at playing one level of representation against another must be prevented at all costs.

- The general level of protection afforded to employees must not be lowered by the application of the Directive (Art 12.5). For instance, in determining the type of decisions that should be subject to information and consultation at both levels, the national legislator cannot reduce the existing prerogatives of the employee representation bodies.

It should also be kept in mind that information and consultation are two distinct procedures. The national legislator may, as a result, consider that, while information is to be provided to all the relevant levels at the same time, concrete consultations may follow a different schedule.

Co-existence with the European level

The EWC Directive is not the only EU instrument dealing with employees' involvement. Other EU instruments also provide for a right to information and consultation on concrete topics of strong relevance for workers. Directive 2002/14/EC establishing a general framework for informing and consulting employees has introduced minimum requirements for employees' involvement throughout the Union. Directive 98/59/EC related to collective redundancies provides for a specific right to information and consultation, with the clear objective of avoiding, reducing or mitigating the consequences of collective redundancies. Finally, Directive 2001/23/EC related to the safeguarding of employees' rights in the event of transfers of undertakings provides for the right to information and consultation on proposed transfers (for example, sales, merger) and their implications for the employees.

The EWC Directive shall be without prejudice to the information and consultation procedures referred to in these Directives (Art 12.4). Even the undertakings which have established an EWC are under the obligation to conduct specific information and consultation procedures in line with the requirements of these EU instruments. This does not mean, however, that the specific topics foreseen in other EU instruments are removed from the competence of the EWC. The EWC must also be informed and consulted on collective redundancies and transfers of undertakings when such decisions are transnational in nature. It should also be noted that these three Directives do not lay down rules concerning the practical arrangements for the exercise of the right to information and consultation. This means that EWC employees' representatives may, in principle, be entitled to rely on their specific provisions to request the information/consultation they need.

The EWC Directive, however, is not in principle compatible with the two EU instruments that establish a works council for information and consulta-

tion. This is the case of Directive 2003/72/EC related to the involvement of employees in the European Cooperative Society ('the SCE Directive') and of Directive 2001/86/EC related to the involvement of employees in European companies ('the SE Directive'). These two Directives stipulate that companies which have established a works council in accordance with their provisions do not need to establish an additional EWC. Information and consultation in European Cooperative Societies and European Companies will be governed only by their respective Directives. It is only if the negotiating parties have decided not to set up a works council in line with the SE/SCE requirements that the EWC Directive applies.

Chapter 2 Undertakings affected by the application of the Directive

2.1 In which companies should an EWC or information and consultation procedure be established?

The ETUC encourages smaller sized companies and their employees' representatives to establish an EWC as part of good governance and corporate social responsibility policies.

Article 2

1. For the purposes of this Directive:

- (a) 'Community-scale undertaking' means any undertaking with at least 1,000 employees within the Member States and at least 150 employees in each of at least two Member States;
- (b) 'group of undertakings' means a controlling undertaking and its controlled undertakings;
- (c) 'Community-scale group of undertakings' means a group of undertakings with the following characteristics:
 - at least 1,000 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;

(...)

2. For the purposes of this Directive, the prescribed thresholds for the size of the workforce shall be based on the average number of employees, including part-time employees, employed during the previous two years, calculated according to national legislation and/or practice.

Article 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 2 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).

Definition of 'undertaking'

The Directive applies to all Community-scale undertakings. There is no definition of the term 'undertaking' in the EWC Directive. Other instruments of Community law and the case law of the European Court of Justice use the following definition: every entity, in the public or private sector, carrying out an economic activity, regardless of the way it is financed and whether or not it is operating for gain.²³

The notion of 'undertaking' is understood broadly. It does not exclude public undertakings and other non-profit bodies, provided that they are engaged in economic activities. Undertakings owned by private individuals are also covered, provided that they are engaged in economic activities, regardless of the gainful character of the activities.

Thresholds

An EWC or a procedure for informing and consulting employees should be established in undertakings exceeding the following thresholds:

- 1,000 employees within the Member States and
- 150 employees in each of at least two different Member States.

Both thresholds must be exceeded simultaneously.

In case of a group of undertakings – that is, a controlling undertaking and its controlled undertakings – the following criteria must be met:

- at least 1,000 employees within the Member States;
- at least two group undertakings in different Member States; and
- at least 150 employees in each of these two groups.

The nature of these thresholds means that companies benefiting from the provisions of the Directive are usually quite large. However, the right to information and consultation is a fundamental one, recognised and protected

23. See, for example, Höfner C-41/90.

in particular by EU law. It is questionable that a large number of workers throughout Europe are excluded from the benefits of the EWC Directive solely on the ground of enterprise size. Experience has shown that smaller companies are not spared the challenges of European integration and globalisation. Member States should therefore consider introducing in their national transpositions lower thresholds so that smaller sized undertakings can also establish an EWC. Since the Directive establishes minimum standards, it is possible for the national legislator to provide, for instance, that controlling undertakings established in their territory and employing a total workforce of 500 employees, with at least 100 employees in two different Member States, should be subject to the requirements of the EWC legislation.

Even if the legislator does not introduce lower thresholds, the ETUC encourages smaller sized companies and their employees' representatives to establish an EWC as part of good governance and corporate social responsibility policies.

How are the thresholds calculated?

In order to better reflect reality, the thresholds used to determine the size of a workforce are based on the 'average number of employees, including part-time employees, employed over the previous two years' (Article 2.2). The two years in question are those preceding the date on which a request to initiate negotiations under the Directive was launched in accordance with Article 5.1.

Community law provides that part-time workers must not be treated less favourably than full-time workers.²⁴ Part-time workers must therefore be taken into account in the calculation of the workforce, at least on a pro rata basis.

Similarly, temporary agency workers should be taken into account when calculating the threshold, either in the temporary work agency itself or in the undertaking using the workers. The national legislator must define the conditions under which temporary agency workers should be taken into account.²⁵

The term *employee* itself is not defined in the Directive. Therefore it is necessary to turn to the definition normally used in the Member States.

How is information obtained on the number of employees?

Article 4.4 of the new EWC Directive obliges the management of every undertaking belonging to the company to obtain and transmit to the parties concerned information concerning the structure of the undertaking or the group and its workforce, in particular information on the number of employees. The 'parties concerned' with regard to the application of the Directive include at least the employees themselves, as well as their representatives.

24. Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work, concluded by UNICE, CEEP and the ETUC.

25. Directive 2008/104/EC of 19 November 2009 on temporary agency work, Article 7.

2.2 Who is responsible for establishing an EWC? The notion of 'controlling undertaking'

The controlling relations may turn out to be complicated. It may be envisaged that more precision can be achieved with regard to the specific case of joint ventures (involving two controlling undertakings), franchise companies (which are very much dependent on the franchisor) and monopsonies (that is, where a company is entirely dependent on a single customer).

(17) It is necessary to have a definition of the concept of controlling undertaking related solely to this Directive and not prejudging definitions of the concepts of group or control in other acts.

Article 3: definition of 'controlling undertaking'

1. For the purposes of this Directive, 'controlling undertaking' means an undertaking which can exercise a dominant influence over another undertaking ('the controlled undertaking') by virtue, for example, of ownership, financial participation or the rules which govern it.

2. The ability to exercise a dominant influence shall be presumed, without prejudice to proof to the contrary, when an undertaking, in relation to another undertaking directly or indirectly:

- a) holds a majority of that undertaking's subscribed capital; or
- b) controls a majority of the votes attached to that undertaking's issued share capital; or
- c) can appoint more than half of the members of that undertaking's administrative, management or supervisory body.

3. For the purposes of paragraph 2, a controlling undertaking's rights as regards voting and appointment shall include the rights of any other controlled undertaking and those of any person or body acting in his or its own name but on behalf of the controlling undertaking or of any other controlled undertaking.

4. Notwithstanding paragraphs 1 and 2, an undertaking shall not be deemed to be a 'controlling undertaking' with respect to another undertaking in which it has holdings where the former undertaking is a company referred to in Article 3(5)(a) or (c) of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

5. A dominant influence shall not be presumed to be exercised solely by virtue of the fact that an office holder is exercising his functions, according to the law of a Member State related to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings.

6. The law applicable in order to determine whether an undertaking is a 'controlling undertaking' shall be the law of the Member State which governs that undertaking.

Where the law governing that undertaking is not that of a Member State, the law applicable shall be the law of the Member State within whose territory the representative of the undertaking or, in the absence of such a representative, the central management of the group undertaking which employs the greatest number of employees is situated.

7. Where, in the case of a conflict of laws in the application of paragraph 2, two or more undertakings from a group satisfy one or more of the criteria laid down in that paragraph, the undertaking which satisfies the criterion laid down in point (c) thereof shall be regarded as the controlling undertaking, without prejudice to proof that another undertaking is able to exercise a dominant influence.

The definition of a controlling undertaking is important in the context of a group of undertakings because the formal conditions governing the establishment of the EWC should, as a general principle, be those of the Member State where the controlling undertaking is established. In addition, it is the management of the controlling undertaking – 'the central management' – which shall be responsible for creating the conditions and means necessary for the setting up of an EWC (Article 4.1). Finally, the EWC is in principle established at the level of the controlling undertaking, keeping in mind, however, that the negotiating partners may prefer to form an EWC at another level (branch, product line and so on).

It may be difficult to identify the correct controlling undertaking in the context of a complex corporate structure. It is nonetheless crucial for employees' representatives to be able to have a full picture of the power structure of a group as the decisions of controlling undertakings have a decisive influence over the strategy of the whole enterprise. It is therefore vital that controlling undertakings are fully involved in the information and consultation procedure, even when the EWC(s) is not formally established at their level.

What is a controlling undertaking?

Article 3.2 of the Directive identifies three criteria for establishing when an undertaking is a controlling undertaking, that is, whether it exercises a dominant influence over another undertaking, either directly or indirectly:

- it holds a majority of another undertaking's subscribed capital; *or*
- it controls a majority of the votes attached to that undertaking's issued share capital; *or*
- it can appoint more than half of the members of that undertaking's administrative management or supervisory body.

These three criteria are not cumulative. An undertaking is presumed to be the controlling undertaking if it fulfils one of the conditions. A management may reverse this presumption by bringing evidence that, although one of the three conditions is fulfilled, it is not in fact the controlling undertaking.

The controlling relations may turn out to be complicated. An undertaking can delegate voting rights and appointment rights to other controlled undertakings or to people in an attempt to veil a true situation of dependency. The Directive also provides for this very case. Article 3.2 refers expressly to the power to exercise a dominant influence 'directly or indirectly', and Article 3.3 stipulates that 'a controlling undertaking's rights as regards voting and appointment shall include the rights of any controlled undertaking and those of any person or body acting in his or its own name on behalf of the controlling undertaking or any other controlled undertaking'.

It must be kept in mind that the rules of Article 3 are presumptions or indications. There are a number of scenarios which the European legislator did not envisage and the laying down of concrete rules for identifying the controlling undertaking belongs to the Member States. The ETUC therefore recommends that during the process of transposition the minimum standards of the Direc-

Example: Irish transposition of Directive 94/45/EC: the case of joint ventures

The Irish legislation ensures that both owners are held accountable in the case of a joint venture where neither owner can be deemed to exercise a dominant influence. It can be agreed that only one undertaking should be considered as the controlling undertaking, but only to the extent that such choice does not prejudice workers' rights to information and consultation. Section 5 of the transnational information and consultation of employees bill of 10 July 1996 provides:

(...)

(4) Where an undertaking (in this section referred to as a 'joint venture'), wherever in the Community located, is carried on by two undertakings in the State neither of whom can exercise a dominant influence over the joint venture, it shall be regarded as a controlled undertaking of each of them unless they agree that it is a controlled undertaking of one only of them for the purposes of this Act, in which case, but subject to subsection (5), that undertaking shall be regarded as the controlling undertaking of the joint venture.

(5) If being the controlled undertaking of one undertaking would result in employees of a joint venture being deprived of an entitlement to be informed and consulted under this Act they would have if the joint venture were a controlled undertaking of the other undertaking, that other undertaking shall be regarded as the controlling undertaking of the joint venture.

tive are adapted and further elaborated in accordance with the national situation. It can, for instance, be envisaged that more precision may be achieved with regard to the specific case of joint ventures (involving two controlling undertakings), franchise companies (which are very much dependent on the franchisor) and monopsonies (that is, where a company is entirely dependent on a single customer).

Such precision may also be introduced by the parties themselves in their EWC agreement.

Example: DAF Trucks EWC agreement 17.06.1996

‘A branch of DAF Trucks N.V. is considered to be every company over which DAF Trucks N.V. can exercise a predominant influence because DAF Trucks N.V.:

- a. can appoint more than half of the members of the executive, managerial or supervisory body of the company;
- b. possesses the majority of votes attributed to shares issued by the company, or
- c. possesses the majority of the company’s subscribed capital.

In case DAF Trucks N.V. sets up a joint venture, in which DAF Trucks N.V. has the largest participation or can effectively determine policy, this company shall also be considered to be a company subject to EURODAF, including companies that fail to meet one of the criteria defined above.

Are there exceptions to the definition of controlling undertaking?

Neither credit institutions, other financial institutions or insurance companies, nor financial holding companies, the sole object of which is to acquire and manage holdings in other undertakings, without involving themselves directly or indirectly in the management of those undertakings, can be considered as controlling undertakings within the meaning of the EWC Directive (Art 3.4). This is not to say, however, that the decisions of such undertakings should not be subject to the scrutiny of the EWC. The decisions of credit institutions and other financial institutions which manage holdings with a view to turning them into profit can have a decisive influence over the global strategy

of the company. They must as such be the subject of information and consultation procedures.

What happens when several undertakings can be considered controlling undertakings?

If a group of undertakings contains several undertakings fulfilling one or several of the criteria established by Article 3.2, the principle of free choice does not apply. Article 3.6 stipulates that it is the relevant national law – that is, the law of the Member State where the presumed controlling undertaking is registered – that should determine whether the undertaking exercises a dominant influence. It therefore cannot be left to the undertakings themselves to decide which of them should be considered as the controlling undertaking.

In the event of several national laws being applicable – where the undertakings which can equally be considered controlling undertakings are located in different Member States – Article 3.7 stipulates that the undertaking which is able to provide more than half of the members of the administrative, management or supervisory body shall be considered the controlling undertaking. Here again, if the management of that undertaking considers it is wrongly defined as the controlling undertaking, it may provide proof that another undertaking exercises the dominant influence.

2.3 At what level should the EWC be established?

Article 1.5

5. Notwithstanding paragraph 2, where a Community-scale group of undertakings within the meaning of Article 2(1)(c) comprises one or more undertakings or groups of undertakings which are Community-scale undertakings or Community-scale groups of undertakings within the meaning of Article 2(1)(a) or (c), a European Works Council shall be established at the level of the group unless the agreements referred to in Article 6 provide otherwise.

The negotiating partners can decide to form an EWC at the level of the group. Alternatively, they may prefer to set them up in subgroups, following product lines, divisions, branches and so on, depending on how the enterprise is organised. In such cases, the negotiating parties should consider whether the subgroups operate autonomously and whether the EWC(s) will be informed and consulted at the top level of the decision-making process. Another possibility is to do both, having one EWC at the level of the group and another, or several others, in the different sectors of the group. In any case, the principal rule is that the EWC must cover all employees of the group.

Example: EADS NV 23/10/2008

‘A European Committee derived from the European Works Council of EADS N.V. is established within each Community-scale division: the European Committee AIRBUS, the European Committee ASTRIUM, the European Committee EUROCOPTER and the European Committee DEFENCE & SECURITY.

Each European Committee comprises at least one member of the European Works Council of EADS N.V. working in the division he/she represents, as well as further members who are elected or appointed in accordance with the law of the Member State in which they work. All regular and deputy members must be employed by the companies of the division in question. The number of members of the European Committee is defined by agreement between the Management and the employees’ representatives of each division, consistent with the number of members of the European Works Council of EADS N.V.

The European Committee of the division has the same competences as the European Works Council of EADS N.V. (...) in so far these issues relate to of members of the European Committee is defined by agreement between the Management and the employees’ representatives of each division, consistent with the number of members of the European Works Council of EADS N.V.

The European Committee of the division has the same competences as the European Works Council of EADS N.V. (...) in so far these issues relate to the transnational scope of consolidation of the division.

The operating procedures of each European Committee are determined by agreement between the Management and the employees’ representatives of each division. They must ensure that the provisions of their agreement are consistent with those of the European Works Council of EADS N.V.

The European Committee of the division must transmit its draft agreement to the European Works Council of EADS N.V. which ensures that its provisions comply with the basic principles of the present Agreement.’

2.4 An exception for merchant navy crews

Article 1.7

7. Member States may provide that this Directive shall not apply to merchant navy crews.

Member States have the possibility of providing that the directive does not apply to ‘merchant navy crews’. This dispensatory measure does not refer to the merchant navy as a whole but to seagoing crews, that is, the maritime activities of the merchant navy. All activities that are located on land are regarded as land-based activities and are covered by the provisions of the directive.

Chapter 3 The negotiating parties: central management and the special negotiating body

Negotiations with a view to concluding an agreement establishing a European Works Council have to be carried between central management, on the one hand, and a special negotiating body (SNB), on the other. The SNB represents the interests of the employees of the company as a whole and is set up for the specific purpose of negotiating an EWC agreement or an information and consultation procedure.

3.1 Who to negotiate with whom? Identifying 'central management'

(24) The information and consultation provisions laid down in this Directive must be implemented in the case of an undertaking or a group's controlling undertaking which has its central management outside the territory of the Member States by its representative agent, to be designated if necessary, in one of the Member States or, in the absence of such an agent, by the establishment or controlled undertaking employing the greatest number of employees in the Member States.

Article 2

e) 'central management' means the central management of the Community-scale undertaking or, in the case of a Community-scale group of undertakings, of the controlling undertaking;

Article 4

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.

2. Where the central management is not situated in a Member State, the central management's representative agent in a Member State, to be designated if necessary, shall take on the responsibility referred to in paragraph 1.

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.

3. For the purposes of this Directive, the representative or representatives or, in the absence of any such representatives, the management referred to in the second subparagraph of paragraph 2, shall be regarded as the central management.

(...)

The Directive lays down as a principle that ‘central management’ – that is, the management of the Community scale undertaking or, in the case of a group of undertakings, of the controlling undertaking – shall be responsible for the establishment of an EWC or information and consultation procedure.

Where the controlling undertaking of the company is registered in a non-EU Member State, for example in the USA or Japan, the company nonetheless remains bound by the obligations of the Directive if the thresholds set out in Article 2 are exceeded. In such cases, the representative agent of the central management in the EU, to be designated if necessary, shall take on the responsibility of establishing an EWC or information and consultation procedure. It is only when there is no manager of business activities in Europe and no appointed agent – for instance, because the activities in Europe are directly managed by the central management of the group in a non-EU/EEA Member State – that another principle applies. The management of the establishment or group undertaking employing the most employees in any one Member State is regarded as the representative agent of the company in question.

In summary, the following steps should be followed to determine the negotiating partner on the employer’s side. These steps should be followed in chronological order. For instance, there is no need to look at the company employing the greatest number of employees (step 3) if a controlling undertaking can be identified in the EU (step 1).

Step 1: Central management is situated in the EU

Determine whether a central management can be identified in the EU in accordance with the criteria set out in Article 3 – that is, identify the controlling undertaking. If the central management is established outside the EU, proceed to step 2.

It should be noted, however, that if the parent company is established outside the EU but has an affiliate company within the EU, which itself controls all establishments/undertakings within the Member States within the meaning of Article 3, the affiliate company should logically be regarded as the genuine central management for the purpose of the EWC Directive.

Step 2: Central management is situated outside the EU

If the controlling undertaking is not established in an EU Member State, the company nonetheless remains bound by the Directive if the thresholds set out in Article 2 are fulfilled. Central management can then appoint a representative agent established within the EU who will take on the responsibility of establishing an EWC or information and consultation procedure.

The representative agent must be capable of assuming the obligations stemming from this function, as well as bearing the consequences of his or her actions. In 1995, the Commission-convened working party for the transposition of Directive 94/45/EC recommended that only establishments or part-undertakings of the company may be designated as a representative agent by central management. Third parties should not be so designated.

Where central management fails to designate a representative agent, proceed to step 3.

Step 3: Central management is situated outside the EU and has no representative agent in the EU

The establishment employing the greatest number of employees will then be regarded as the central management for the purpose of the EWC Directive.

3.2 Responsibilities of central management: facilitating the start of negotiations

Central management is not in a position to delay starting negotiations by simply arguing that essential information has not been received.

Employees' representatives must be able to communicate with one another with a view to discussing possible negotiations.

(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.

Article 4

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.

(...)

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 2 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).

Article 5.2.c

(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.

Providing information necessary for commencing negotiations

Article 4.4 is an important addition to the Directive and confirms the case law of the European Court of Justice.²⁶ This provision establishes the responsibility of central and local managements to provide the necessary information for negotiations to be opened.

Experience has shown that employees' representatives can experience difficulties in establishing whether an undertaking is covered by the Directive, and whether the national workforces are aware of the possibility of requesting the establishment of an EWC. Some local managements of Community-scale undertakings have been in a position to obstruct the start of negotiations by acting as if they were under no obligation to communicate essential information related to their workforce. The new Directive establishes a clear obligation of good faith and cooperation between all levels of management and employees' representatives. Central management is not in a position to delay the start of negotiations by simply arguing that essential information has not been received.

The required information relates in particular to the structure of the business unit and its workforce. The number of employees and their distribution in the Europe-wide company are indeed indispensable elements for ascertaining whether thresholds established by the Directive have been attained. It should also be noted that the European Court of Justice considers that information

²⁶. Bofrost C-62/99 of 29 March 2001 and Kühne & Nagel C-440/00 of 13 January 2004.

related to the identity and addresses of employee representative bodies which might participate in the setting up of a special negotiating body is also essential information for the purpose of commencing negotiations.

Central management and local managements are jointly responsible for transmitting the necessary information to 'the parties concerned by the application of the Directive'. 'Parties concerned' should be understood as including all employees' representatives of the Community-scale undertaking or group of undertakings since they have a central role to play in the establishment and functioning of the EWC. Where there are no employees' representatives, the employees themselves must receive the information directly. The relevant European industry federation may also be regarded as a 'party concerned' by the application of the Directive as they are to be informed of the composition of the SNB and the start of negotiations (Article 5.2.c).

Creating the conditions and means necessary for establishing an EWC

Article 4.1 imposes upon central management an obligation to create the conditions and means necessary for the setting up of an EWC or information and consultation procedure. This means that central management is responsible for providing the necessary means of communication between the relevant actors, in particular employees' representatives, already in the phase preceding the negotiations. Such means of communication should be understood to include access to e-mail, telephones, meetings of employees' representatives, translation and interpreting costs.

If employees' representatives are not able to communicate with a view to discussing possible negotiations, the useful effect of the Directive would be greatly undermined.

Notifying the social partners of the beginning of new negotiations

Article 5.2.c provides that the competent European workers' and employers' organisations shall be informed of the composition of the SNB and of the start of the negotiations. Establishing contact between the negotiating parties and the relevant workers' federation enables exchanges of good practices and better traceability of EWC agreements.

'Competent European workers' organisations' should be understood to be the trade union organisations consulted by the European Commission under Art. 154 TFUE (ex Art. 138 EC). The Commission publishes and regularly updates

a list of European Social Partners' organisations which meet the required criteria of representativity.²⁷

Management should be regarded as being responsible for notifying the competent European workers' organisation(s) of the composition of the SNB and of the start of the negotiations. In order to guarantee efficient monitoring of this obligation, the European Trade Union Confederation will put in place a simple system of notification, consisting of a single point of contact at European level which will then forward the information to the relevant industry federation(s).

Management's obligation should be considered as fulfilled when the relevant workers' organisation has acknowledged that the information has been received.

3.3 Composition of the Special Negotiating Body (Art. 5.2)

The SNB is composed of a minimum of 10 members. No maximum number is envisaged.

In practice, representatives of European Industry Federations are often regarded as members of the SNB and co-sign the final agreement with the employees' representatives.

Particular attention must be paid to the composition of the Special Negotiating Body (SNB), as it must be in a position to defend the interests of the entire workforce in a balanced fashion. According to the key repartition introduced by the new Directive, the seats in the SNB are allocated proportionally among the Member States in which the company has employees. For every 10 per cent of the total workforce, the Member State has the right to send one representative to the SNB. Therefore, the Member States employing the largest proportions of employees are able to send additional representatives.

This key repartition means that the SNB is composed of a minimum of 10 members. No maximum number is envisaged.²⁸

It is up to the Member States to decide how the representatives to be sent to the SNB are elected or appointed. The Directive assumes that the designation of SNB members is normally carried out by national employees' representa-

²⁷. See Annex I for the 2009 list of competent organisations.

²⁸. The rules of the new Directive differ significantly from Directive 94/45/EC, as amended by Directive 2006/109/EC following enlargement to include Bulgaria and Romania, according to which the SNB had a minimum of three members and a maximum of members equal to the number of Member States.

Table 1 Composition of the SNB

% of EU workforce	Number of seats
10% or less	1
Over 10% but less than 20%	2
Over 20% but less than 30%	3
Over 30% but less than 40%	4
Over 40% but less than 50%	5
Over 50% but less than 60%	6
Over 60% but less than 70%	7
Over 70% but less than 80%	8
Over 80% but less than 90%	9
Over 90%	10

tives. It is clear that the representatives are designated by the workforce and not by the management of each country. In all EU/EEA Member States, employees have the right to establish an interest representative body in establishments employing at least 20 employees or undertakings employing at least 500 employees.²⁹ Nonetheless, the Directive foresees that, where there are ‘no employees’ representatives through no fault of their own’, the employees themselves have the right to designate members of the SNB.

The Directive does not require that members of the SNB be employees of the company. A representative from a European Industry Federation or a trade union official from a national trade union could therefore be a member of the SNB, in accordance with the applicable national law. In practice, representatives of European Industry Federations are often regarded as members of the SNB and co-sign the final agreement with the employees’ representatives.

3.4 The role of trade unions

The new Directive explicitly recognises the special role of European trade unions in supporting the negotiations by providing support to the SNB and monitoring the establishment of new EWCs, thereby promoting best practice. The Directive promotes the role of trade unions on four separate occasions:

- a. The SNB may request assistance with its work from experts of its choice, which can include representatives of competent Community-level trade union organisations (Art. 5.4 subpara 3).
- b. Representatives of the competent Community-level trade union have the right to participate in negotiation meetings, at the request

²⁹. See Article 3 of Directive 2002/14/EC on a general framework for informing and consulting employees in the European Community.

of the SNB and in an advisory capacity. This participation is without prejudice to the role that these trade union representatives may also play as experts for the SNB (Art. 5.4 subpara 3).

- c. Article 5.2.c provides that the competent European workers' and employers' organisations shall be informed of the composition of the SNB and of the start of the negotiations. It is clearly in the interest of the SNB to alert the competent workers' organisations as their experience can prove vital in securing good quality agreements and promoting best practice. In addition, such notification will allow for the recording of agreements and enable interested parties to verify whether or not a company is covered by an EWC. Member States may enhance transparency in this regard by compelling central managements established in their territory to register the EWC agreements in a public register.
- d. Article 4.4 of the Directive stipulates that the management of every undertaking concerned 'shall be responsible for obtaining and transmitting to the parties concerned by the application of this Directive the information required for commencing negotiations (...)'. The term 'parties concerned' logically includes the competent workers' organisations since the Directive explicitly gives them a monitoring and supporting role in the negotiations.

Part III

Establishment of a European Works Council or an information and consultation procedure

Chapter 1 Conduct of the negotiations

(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.

(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 Treaty. The list of those organisations is updated and published by the Commission.

Article 2.1.i

i) 'special negotiating body' means the body established in accordance with Article 5(2) to negotiate with the central management regarding the establishment of a European Works Council or a procedure for informing and consulting employees in accordance with Article 1(2).

Article 5 Special negotiating body

1. In order to achieve the objective in Article 1(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.

2. For this purpose, a special negotiating body shall be established in accordance with the following guidelines:

(a) The Member States shall determine the method to be used for the election or appointment of the members of the special negotiating body who are to be elected or appointed in their territories.

Member States shall provide that employees in undertakings and/or establishments in which there are no employees' representatives through no fault of their own, have the right to elect or appoint members of the special negotiating body.

The second subparagraph shall be without prejudice to national legislation and/or practice laying down thresholds for the establishment of employee representative bodies.

(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;

(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.

3. The special negotiating body shall have the task of determining, with the central management, by written agreement, the scope, composition, functions, and term of office of the European Works Council(s) or the arrangements for implementing a procedure for the information and consultation of employees.

4. With a view to the conclusion of an agreement in accordance with Article 6, the central management shall convene a meeting with the special negotiating body. It shall inform the local managements accordingly.

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.

For the purpose of the negotiations, the special negotiating body may request assistance with its work 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.

5. The special negotiating body may decide, by at least two-thirds of the votes, not to open negotiations in accordance with paragraph 4, or to terminate the negotiations already opened.

Such a decision shall stop the procedure to conclude the agreement referred to in Article 6. Where such a decision has been taken, the provisions in the Annex shall not apply.

A new request to convene the special negotiating body may be made at the earliest two years after the abovementioned decision unless the parties concerned lay down a shorter period.

6. Any expenses relating to the negotiations referred to in paragraphs 3 and 4 shall be borne by the central management so as to enable the special negotiating body to carry out its task in an appropriate manner.

In compliance with this principle, Member States may lay down budgetary rules regarding the operation of the special negotiating body. They may in particular limit the funding to cover one expert only.

1.1 When should the negotiations start?

Negotiations for the establishment of an EWC or an information and consultation procedure can be launched in two ways:

- at the initiative of central management
- at the written request of 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.

For example, two employee representation bodies in two different countries which together represent at least 100 employees are sufficient to initiate the negotiating procedure. A request signed by the employees themselves is sufficient. In both cases, the application must be made in writing.

1.2 What is the task of the SNB?

The SNB has the task of negotiating with central management a written agreement determining the scope, the composition, the functions and term of office of an EWC. The SNB can also agree with management to set up an information and consultation procedure instead of an EWC, in which case a written agreement must still determine the necessary arrangements for implementing such a procedure.

Once they have started, the negotiations between the SNB and central management can have three different outcomes:

- a. The negotiations lead to the conclusion of a written agreement. Such an agreement must respect the standards laid down in Article 6.

- b. The negotiations fail to lead to the conclusion of an agreement after three years. In such cases, the provisions of the Annex shall apply. The SNB and central management may also decide of their own accord to refer directly to these subsidiary requirements before the three-year period expires.
- c. The SNB decides by a special majority of at least two-thirds of the votes not to open negotiations or to terminate ongoing negotiations. Where an SNB breaks off the negotiations or decides not to open them, all the rights contained in the Directive are lost. A fresh application can only be submitted again two years later.

1.3 What are the practical arrangements for the functioning of the SNB?

The possibility of having preparatory meetings and debriefings allows the SNB to prepare for and manage the negotiations effectively, for instance by going into the negotiations with its own proposals. Management cannot oppose the presence of experts as long as they have been invited by the SNB. Any sharing of the costs between the SNB and central management would contravene the Directive.

The meetings

As soon as the SNB has been formed, the central management must call a meeting. The Directive does not fix a deadline for this first meeting. However, if central management refuses to convene a meeting within 6 months of the first request, the subsidiary requirements automatically apply (Article 7.1). The first request to open negotiations is the request to launch negotiations, which is made by at least 100 employees from two Member States (Article 5.1).

The Directive does not specify how many meetings have to be convened. It goes without saying that more than one meeting will be required to achieve anything. Otherwise, the long period of three years stipulated in the Directive would make no sense.

The SNB is entitled to meet on its own before and after any meeting with central management (Art. 5.4 subparagraph 2). The possibility of having preparatory meetings and debriefings allows the SNB to prepare for and manage the negotiations effectively, for instance by going into the negotiations with its own proposals.

Experts

The SNB can be assisted by experts, which they can choose freely (Art. 5.4 subparagraph 3). Experts could be specialists – lawyers, economists and so on – depending on the subject matter. Experts can also play a monitoring and

supporting role. In this regard, the new Directive clarifies that experts can be trade union representatives from a competent recognised Community-level trade union organisation.³⁰

The Directive stipulates that such experts shall have access to the negotiations, at the request of the SNB. This means that management cannot oppose the presence of experts as long as they have been invited by the SNB.

Expenses

The Directive stipulates that ‘expenses relating to the negotiations are to be borne by central management so as to enable the SNB to carry out its tasks in an appropriate manner’ (Art. 5.6). These expenses can reflect, among other things, travel and accommodation costs and the costs of translation. The SNB must also be able to use the necessary means of communication when it meets on its own before and after any meeting with central management (Art. 5.4 subparagraph 2). Under the terms of the Directive, the costs incurred by the expert(s) called upon should also be borne by central management. This does not mean, however, that central management may select the experts. The Directive stipulates clearly that the choice is to be made freely by the SNB itself.

The Member States can lay down rules regarding the financing of the SNB (Art. 5.6 second subparagraph), but must adhere to the principle that expenses are to be borne by the central management. Any sharing of the costs between the SNB and central management would contravene the Directive. One exception, however, concerns the financing of experts. Member States may limit the funding to cover one expert only. This does not affect the right of the SNB to have recourse to more than one expert.

The decision to limit funding to one expert only cannot be taken by the central management but must be the result of an express choice by the national legislator.

30. For a list of competent recognised trade union organisations see Annex I.

Chapter 2 Negotiated agreements (‘Article 6 agreements’)

19) In accordance with the principle of autonomy of the parties, it is for the representatives of employees and the management of the undertaking or the group’s controlling undertaking to determine by agreement the nature, composition, function, mode of operation, procedures and financial resources of European Works Councils or other information and consultation procedures so as to suit their own particular circumstances.

(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.

(31) Employees’ representatives may decide not to seek the setting-up of a European Works Council or the parties concerned may decide on other procedures for the transnational information and consultation of employees.

Article 2.1.(h) ‘European Works Council’ means the council established in accordance with Article 1(2) or the provisions of the Annex, with the purpose of informing and consulting employees.

Article 6 Content of the agreement

1. The central management and the special negotiating body must negotiate in a spirit of cooperation with a view to reaching an agreement on the detailed arrangements for implementing the information and consultation of employees provided for in Article 1(1).

2. Without prejudice to the autonomy of the parties, the agreement referred to in paragraph 1 between the central management and the special negotiating body shall determine:

a) the undertakings of the Community-scale group of undertakings or the establishments of the Community-scale undertaking which are covered by the agreement;

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

d) the venue, frequency and duration of meetings of the European Works Council;

(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;

f) the financial and material resources to be allocated to 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.

3. The central management and the special negotiating body may decide, in writing, to establish one or more information and consultation procedures instead of a European Works Council.

The agreement must stipulate by what method the employees’ representatives shall have the right to meet to discuss the information conveyed to them.

This information shall relate in particular to transnational questions which significantly affect workers' interests.

4. The agreements referred to in paragraphs 2 and 3 shall not, unless provision is made otherwise therein, be subject to the subsidiary requirements of the Annex.

5. For the purposes of concluding the agreements referred to in paragraphs 2 and 3, the special negotiating body shall act by a majority of its members.

2.1 Content of the agreement

Central management and the SNB are autonomous and work out the agreement they wish. Negotiating parties are free to find optimal and tailor-made solutions, which can go beyond the minimum legal requirements. The Directive imposes few concrete obligations. Article 6.2 merely draws up a list of points to be resolved in the negotiations, without saying what form the solution should take. However, the negotiating parties can use the Annex of the Directive as guidelines. Whenever they choose to do so, they can improve the subsidiary requirements.

The SNB and central management must negotiate in a 'spirit of cooperation' (Art 6.1). In other words, they must negotiate in good faith and with a willingness to reach an agreement.

The agreement must be concluded in writing. For the purpose of concluding such an agreement, the SNB acts by a majority of its members (Art. 6.5).

If an agreement is reached, the subsidiary requirements of the Annex do not apply (Art. 6.4). Subsidiary requirements are, however, usually recognised as being the basis for negotiations both for the SNB when negotiating clauses of an acceptable standard and for judges when they are called on to fill the possible gaps of an agreement, if it does not solve a particular issue.

2.2 One or more EWC?

Article 6.2.a stipulates that 'the undertakings of the Community-scale group of undertakings or the establishments of the Community-scale undertaking which are covered by the agreement' must be named in the agreement. This article can easily give rise to misunderstandings. It goes without saying that an agreement is valid only if it covers employees. Article 6.2.a becomes important only if several EWCs are established within an undertaking, following product lines, in which case it must be clearly stipulated which Works Council is competent for which undertakings, so as to avoid any conflict of competence. Where more than one EWC is established, all the EWCs together must cover the entire workforce of the company.

2.3 What is the agreement about?

Composition of the EWC (Art 6.2.b)

It is possible for an EWC to be composed of both employees' representatives and full-time trade union experts, in accordance with the applicable national law.

Article 6.2.b invites the negotiating partners to reach an agreement on the composition of the EWC, the allocation of seats and the term of office.

Although the Directive does not impose formal requirements in this respect, Art. 6.2.b stipulates that the composition must 'take into account where possible the need for balanced representation of employees with regard to their activities, category and gender'. Employees' representatives themselves are given the responsibility of securing an appropriate representation of the company in its diversity, by choosing which women and men, and which white-collar and blue-collar workers from which undertaking will be delegated to the EWC. Nonetheless, it is clear from Recital 20 that the legislation in Member States may strengthen these recommendations.

Example: Elanders AB EWC agreement (27.01.2009)

'If possible, the number of women and men should respect their respective numbers among employees.'

The negotiating partners may reach an agreement on the composition of the EWC as they see fit. Article 6 does not require that the EWC members be employed by the undertaking. It is therefore possible for an EWC to be composed of both employees' representatives and full-time trade union officials, in accordance with the applicable national law. In the case of ad hoc experts, it should also be possible for employees' representatives to request their presence at EWC meetings.

Examples:

Airbus EWC agreement (26.01.2001)

'The European Committee of Airbus is assisted by two experts, with recognised experience on aeronautics and employees of Airbus. They participate in the European Committee. The company will pay for travel expenses and time spent.'

For specific matters and when justified the European Committee may be assisted by one technical expert to be paid for by the company.'

Cereol EWC agreement (30.04.2002)

‘The Cereol EWC is composed of:

- (...)
- one trade union representative in the European Works Council, appointed by one of the two European trade union organisations representing the group enterprises included in the scope of the present agreement, that is, either EFFAT or EMCEF’.

Size, allocation of seats and term of office (Art 6.2.b)

The size of the EWC can be agreed freely. When negotiating the agreement, the SNB will keep in mind that the subsidiary requirements foresee a minimum of 10 members. The same freedom applies to the allocation of seats and the term of office.

‘Term of office’ should be understood as the mandatory period of appointment of an employee representative. Ideally, the EWC agreement should also include provisions on objective reasons which may call for early termination of a mandate, with a view to preventing arbitrary removals by management.

The functions and procedure for information and consultation of the EWC, including linking between various levels (Art. 6.2.c)

Art. 6.2.c covers two dimensions:

i) the repartition of competences between the EWC and national levels of employees’ representation, in line with the requirements of Article 12;³¹

ii) the type of decisions on which the EWC must be informed and consulted.

The list contained in the subsidiary requirements should be used as an indication of the basic preconditions. The negotiating partners are free to go beyond this and to choose other subjects with regard to which the committee is to be informed and consulted.

31. See ‘Linking the different levels of information and consultation’, pp. 51ff.

Rules on the functioning of the EWC

Venue, frequency and duration of meetings (Art. 6.2.d)

Normally, meetings are held at the undertaking's headquarters (unless outside the European Union). However, it should also be possible to hold meetings at other establishments belonging to the undertaking in question. As a rule this will make no difference to the costs incurred by holding the meeting, but it can be highly beneficial as regards communications with national employees' representatives. Indeed, under Article 10.1 of the Directive, the members of the EWC must have the means they need to collectively represent the interests of the employees of the Community-scale undertaking. This implies that the necessary means of communication, including access to national work sites, are put in place.

Example: AKER ASA Group (24.05.2005)

3. Working methods

- a. EWC meetings will take place at least twice a year, of which at least one meeting will be coordinated with other relevant meetings. Normally, the meetings will last for two days, including preparatory and follow-up meetings for employees' representatives. According to 3(e), meeting days can be exceeded if meetings in accordance with 3(d) are to be held.
- b. The date and agenda of EWC meetings are set out in an annual plan prepared by the EWC chair and agreed jointly by the working committee [the select committee] and the Group management. Except in exceptional circumstances, notice for the meeting and relevant documents will be sent to every member of the European Works Council, as standard, four weeks in advance. If this standard notification is applied, then proposals for agenda items should be sent to the management or the working committee at least three weeks before the meeting, otherwise at the latest 10 days after notification.
- c. At these meetings, the EWC will meet with Group management or representatives designated by the Group management. The Group President and CEO and the Executive Vice President HR will participate in the EWC meetings. The subsidiary Group Presidents and HR managers will meet the EWC representatives from their subsidiary at least twice a year, either in the EWC plenary meetings or in separate meetings, to ensure good dialogue between management and employees' representatives in the specific subsidiary.
- d. The EWC chair and secretary are entitled to take part in such specific subsidiary meetings. The Works Council and management can also agree to call for extra representatives from the relevant subsidiaries in connection with such meetings.

- e. In connection with EWC meetings, the employee representatives are given the possibility of holding internal discussions before and after the meeting with management, without management representatives being present.
- f. (...)
- g. In extraordinary situations of great significance to the Group's joint European operations, or where the employees' interests are affected to a considerable extent, the Works Council and the management each have the right to take the initiative to instigate additional meetings. This is particularly relevant with regard to the relocation or closure of operations, collective redundancies and so on, affecting more than one country. EWC members representing the operations/country directly affected by the planned measures may be present at such meetings, in addition to the Works Council. A meeting of this kind shall be held as soon as possible on the basis of a management report. At the end of the meeting, or as soon as possible thereafter, the Works Council is entitled to make a statement on the report. This statement shall be included in the documents for the further processing of the case, unless there are particular reasons why they should not be included.

The negotiating partners should be able to agree on flexible solutions with regard to the frequency of meetings, with a view to ensuring the effectiveness of the information and consultation procedure. One meeting a year with management is the absolute minimum laid down in the subsidiary requirements. However, as one meeting alone is not sufficient, the subsidiary requirements also foresee additional meetings in case of exceptional circumstances, as well as to allow management to provide a reasoned response to the opinions expressed by employees' representatives.

In addition, it is useful for employees' representatives to be able to meet on their own before and after each meeting with management. Such meetings allow the EWC to prepare and manage more effectively discussions in full meetings. The subsidiary requirements foresee such preparatory and debriefing meetings.

Concerning duration, the agenda will decide how the meeting is organized. Employees' representatives and the management should fix agenda items jointly.

The select committee (Art. 6.2.e)

Practice has shown that the select committee plays a very important role in ensuring EWC activities between regular meetings with management. A select committee should be informed and consulted between annual meetings whenever circumstances arise affecting employees' interests.

Just as important as the formal EWC meetings is the coordination work done between meetings. The new Article 6.2.e therefore stipulates that the negotiating parties can agree to establish a smaller committee than the full EWC. The new Directive gives a clear incentive to the negotiating partners to reach agreement on the setting up and functioning of a select committee. Indeed, the subsidiary requirements lay down precise rules on this issue.

The role of the select committee is to ‘permit coordination and greater effectiveness of the regular activities of the EWC, together with information and consultation at the earliest opportunity where exceptional circumstances arise’ (Recital 30). Practice has shown that the select committee plays a very important role in ensuring EWC activities between regular meetings with management. A select committee should be informed and consulted between annual meetings whenever circumstances arise affecting employees’ interests.

In order to perform their role, the members of the select committee shall be provided with all the facilities they need to meet and communicate, not only with each other, but also with the larger EWC and the employees’ representatives of the establishments or undertakings of the group.

Example: Arcelor Mittal EWC agreement (9.07.2007)

‘The select committee is a body mandated by the EWC to carry out its duties. It ensures the continuity of the work of the EWC and coordinates the activities of the EWC employees’ group. The select committee ensures the circulation of information between the bodies that represent the employees.

The select committee is elected by the EWC employees’ group from which it emanates. (...) The select committee is composed of 25 members, including the secretary, assistant secretary and chair of the employees’ group (...).

When the select committee believes that new problems are arising, it can request a meeting with the General Management in order to obtain information and engage in dialogue with it.

(...)

In the event of exceptional circumstances that considerably affect employees’ interests, (...) the select committee after exchanging views with the General Management and after having taken a decision by a majority of two-thirds, will assess:

- whether it is the most appropriate dialogue forum for the purposes of information and/or consultation;

- whether an enlarged meeting should take place for the purposes of information and/or consultation. In this case, the members of the EWC employees' group directly concerned by the measure – that is, the subject of the information – shall participate in the meeting of the select committee. Failing adequate representation at this level and after obtaining the agreement of the General Management, one or more members elected by the national representative body directly concerned, which best represents the interests of employees, shall participate in the meeting. Similarly, the General Management will appoint one of its members or its representatives;
- whether it should call for an extraordinary plenary meeting to be convened, if the circumstances of the information and consultation so require.

Financial and material resources (Art. 6.2.f)

As clearly stated in the subsidiary requirements, central management bears the operating expenses of the EWC. Art. 6.2.f calls upon the negotiating partners to reach agreement on the 'financial and material resources to be allocated to the EWC'. This can be done in various ways. For instance, it can be stipulated that the central management will bear the costs arising in the context of meetings and from the necessary secretarial work associated with an EWC. Alternatively, agreement may be reached on a fixed amount to be made available to the EWC each year.

In any case, it is important to find a solution that allows employees' representatives of the EWC to carry out their functions, in accordance in particular with the requirements of Art. 10. Employees' representatives must be able to collectively represent the interests of employees, which implies in particular communication with the workforce and the possibility to take legal action to enforce the rights of the EWC. Training is also a central issue.

Duration of the agreement (Art. 6.2.g)

Careful attention should be paid to the definition of cases requiring simply revision/adjustment of the agreement as they must be distinguished clearly from cases necessitating a full renegotiation because they involve a significant change in company structure.

The new Article 6.2.g puts the emphasis on expiry clauses. It is important to include such a clause in the agreement because it allows the EWC to update the agreement. Employees' representatives should be given the opportunity to assess on a regular basis whether the agreement is still achieving its objectives or whether it needs to be renegotiated, taking into account its dysfunctionality, new legal developments and structural changes in the company itself. If both parties agree that the agreement is satisfactory, the same arrangements should obviously be allowed to continue until the next expiry date.

Example: Convertteam EWC agreement (24.01.2007)

‘This Agreement may be amended by agreement between central management and a qualified majority of the EWC. Any changes or modifications to the current EWC Directive will be incorporated in this Agreement in a timely manner.

This Agreement can be terminated by central management or a qualified majority of the European Works Council, with three months notice in writing to the other party.

Should notice of termination of this agreement be given, the employee representatives on the EWC and the central management shall commence negotiations on a new agreement without delay and in good faith,. The EWC shall remain in operation and this agreement shall remain effective until the agreement is renewed or replaced, up to the end of the current mandate (four years).

Should notice of termination be given in the last year of the mandate and no new agreement is reached before the end of this mandate, the current agreement and mandate will be extended for a period of 15 months after the date of notice.

If no agreement has been reached within this period, a new SNB will be convened in accordance with the EC Directive.

It may also be that an agreement needs to be amended in order to adjust to small changes in the company (for example, changes in the size or a reallocation of the workforce). The Directive encourages the negotiating parties to include a clause laying down the procedure to be applied for a revision of the agreement which does not necessitate a full renegotiation.

Example: Arcelor-Mittal EWC agreement (9.7.2007)

‘Every two years, by mutual consent (...) the signatory parties shall adapt the number of seats, the composition of the EWC and the Select Committee and the distribution of seats by country, if the development of the Arcelor Mittal Group results in a significant increase or reduction in the number of workers employed in one or more European Union Member State(s), particularly in the context of acquisition or disposal operations.

Moreover, the signatories declare their desire to review the conditions for welcoming the representatives of undertakings in the Arcelor Mittal Group situated in a State that has become a member of the European Union and achieved the threshold of 1,000 employees.

Changes in the workforce in a Member State occurring during the last year of the mandate shall have no effect on the distribution of seats and the number of employees' representatives. They will be taken into account at the next appointment of members of the employees' group.'

Moreover, the new Directive encourages the negotiating parties to lay down the details of the procedure to be applied in case of significant changes in the structure of the company. For such changes, Article 13 requires that a full renegotiation takes place but leaves to the parties some flexibility to determine in advance the arrangements that would suit them best.³²

Careful attention should be paid to the definition of cases which simply require revision/adjustment of the agreement, as they must be clearly distinguished from cases necessitating a full renegotiation because they involve a significant change in the structure of the company. Whilst compliance with Article 13 must be secured, the applicable provisions in case of a significant change in the structure of the company should not be abused for the purpose of calling into question well-functioning agreements when this is not necessary.

It should also be noted that the abrupt termination of an agreement, for instance after a merger, is no longer possible. The new Article 13 foresees that the agreement must remain in place during the negotiations and until the new agreement enters into force.

Examples: Copeland/Alco Europe (22.06.2004)

'If the Group merges with another group of companies, in which procedures regarding transnational information and consultation of the employees according to the Directive 94/45/EC already exist or if a company enters a Group in which such procedures already exist, the participating EWCs or other body established for the transnational information and consultation of the employees shall establish a Special Negotiating Body which shall immediately commence negotiations with the central management with regard to the conclusion of a new EWC agreement. Until the conclusion of the negotiations, the bodies already dealing with the transnational information and consultation of the employees represented by them shall be maintained.

PFW Aerospace AG (6.09.2007)

'If an EWC agreement exists in the undertaking which merges with PFW Aerospace, the agreement of the undertaking which had the largest number of employees before the merger shall apply to the entire merged entity.

32. See 'Adaptation of the EWC in case of change of structure', pp. 119ff.

The EWC which continues to exist in accordance with the aforementioned provisions shall have a transitional term of office until the new EWC agreement is concluded and employee representatives from the other entity are added.'

(Author's note: such clauses do not prejudice the right of employees and/or their representatives who are no longer represented by the European Works Council to initiate a written request to initiate new negotiations, in accordance with Article 13 of Directive 2009/38/EC.)

2.4 An EWC or an information and consultation procedure? (Art. 6.3)

Central management and the SNB can also decide not to set up an EWC, but rather to establish one or more information and consultation procedures. Any such decision must be made in writing.

This possibility has its origin in the employer's initial claim that it would not be necessary to establish a European Works Council in so far as the company already uses information and consultation procedures, for example, by e-mail, letter, staff general meetings and so on. Such arguments have not entirely convinced the European legislator, which considers that the establishment of an EWC should remain the norm. Nonetheless, the Directive admits that, under certain conditions, the negotiating parties may decide to set up one or several information and consultation procedures instead.

Such procedures must meet a number of essential criteria:

- the employees' representatives still have the right to meet to discuss the information conveyed to them;
- central management shall provide information related to transnational questions significantly affecting workers' interests;
- information and consultation must be understood in the way they are defined in Art. 2.1.f and g, including in particular the requirement of quality and advance timing.

However, such procedures may not achieve consultation of the same quality as the EWC. Direct dialogue between employees' representatives and central management is possible only during the meeting of an EWC. Opinions and reasoned answers can be exchanged directly there.

Practice has shown that the negotiating partners have so far largely favoured the establishment of an EWC over information and consultation procedures. In 2009, approximately seven information and consultation procedures were active, four of which are 'old Article 13 agreements' (that is, signed before Directive 94/45/EC came into force).

Chapter 3 Subsidiary requirements

(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.

(32) Provision should be made for certain subsidiary requirements to apply should the parties so decide or in the event of the central management refusing to initiate negotiations or in the absence of agreement subsequent to such negotiations.

(42) Without prejudice to the possibility of the parties deciding otherwise, the European Works Council set up in the absence of agreement between the parties must, in order to fulfil the objective of this Directive, be kept informed and consulted on the activities of the undertaking or group of undertakings so that it may assess the possible impact on employees' interests in at least two different Member States. To that end, the undertaking or controlling undertaking must be required to communicate to the employees' appointed representatives general information concerning the interests of employees and information relating more specifically to those aspects of the activities of the undertaking or group of undertakings which affect employees' interests. The European Works Council must be able to deliver an opinion at the end of that meeting.

(43) Certain decisions having a significant effect on the interests of employees must be the subject of information and consultation of the employees' appointed representatives as soon as possible.

(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.

Article 7 Subsidiary requirements

1. In order to achieve the objective in Article 1(1), the subsidiary requirements laid down by the legislation of the Member State in which the central management is situated shall apply:

- where the central management and the special negotiating body so decide; or
- where the central management refuses to commence negotiations within six months of the request referred to in Article 5(1); or
- where, after three years from the date of this request, they are unable to conclude an agreement as laid down in Article 6 and the special negotiating body has not taken the decision provided for in Article 5(5).

2. The subsidiary requirements referred to in paragraph 1 as adopted in the legislation of the Member States must satisfy the provisions set out in the Annex.

Subsidiary requirements (referred to in Article 7)

1. In order to achieve the objective in Article 1(1) of the Directive and in the cases provided for in Article 7(1) of the Directive, the establishment, composition and competence of a European Works Council shall be governed by the following rules:

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

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;

(b) The European Works Council shall be composed of employees of the Community-scale undertaking or Community-scale group of undertakings elected or appointed from their number by the employees' representatives or, in the absence thereof, by the entire body of employees.

The election or appointment of members of the European Works Council shall be carried out in accordance with national legislation and/or practice.

(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 per cent, or a fraction thereof, of the number of employees employed in all the Member States taken together;

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

It shall adopt its own rules of procedure;

(e) The central management and any other more appropriate level of management shall be informed of the composition of the European Works Council.

(f) Four years after the European Works Council is established it shall examine whether to open negotiations for the conclusion of the agreement referred to in Article 6 of the Directive or to continue to apply the subsidiary requirements adopted in accordance with this Annex.

Articles 6 and 7 of the Directive shall apply, *mutatis mutandis*, if a decision has been taken to negotiate an agreement according to Article 6 of the Directive, in which case 'special negotiating body' shall be replaced by 'European Works Council'.

2. The European Works Council shall have the right to meet with the central management once a year, to be informed and consulted, on the basis of a report drawn up by the central management, on the progress of the business of the Community-scale undertaking or Community-scale group of undertakings and its prospects. The local managements shall be informed accordingly.

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.

This information and consultation meeting shall take place as soon as possible on the basis of a report drawn up by the central management or any other appropriate level of management of the Community-scale undertaking or group of undertakings, on which an opinion may be delivered at the end of the meeting or within a reasonable time.

This meeting shall not affect the prerogatives of the central management.

The information and consultation procedures provided for in the above circumstances shall be carried out without prejudice to Article 1(2) and Article 8 of this Directive.

4. The Member States may lay down rules on the chairing of information and consultation meetings.

Before any meeting with the central management, the European Works Council or the select committee, where necessary enlarged in accordance with the second paragraph of point 3, shall be entitled to meet without the management concerned being present.

5. The European Works Council or the select committee may be assisted by experts of its choice, in so far as this is necessary for it to carry out its tasks.

6. The operating expenses of the European Works Council shall be borne by the central management.

The central management concerned shall provide the members of the European Works Council with such financial and material resources as enable them to perform their duties in an appropriate manner.

In particular, the cost of organising meetings and arranging for interpretation facilities and the accommodation and travelling expenses of members of the European Works Council and its select committee shall be met by the central management unless otherwise agreed.

In compliance with these principles, the Member States may lay down budgetary rules regarding the operation of the European Works Council. They may in particular limit funding to cover one expert only.

The Annex of the Directive contains detailed standard provisions on the establishment, competence and functioning of an EWC. Priority is given to the autonomy of the parties, but the standard provisions contained in the Annex help to guarantee the good conduct of negotiations. As the content of the subsidiary requirements will apply in the absence of an agreement, they serve as a reference in the negotiations.

3.1 When do the subsidiary requirements apply?

According to Art. 7, the subsidiary requirements apply under the following circumstances:

- when the central management refuses to commence negotiations within six months of the request lodged in accordance with Art 5.1;
- when the central management and the SNB agree to comply with the subsidiary requirements – during the course of the negotiations, these two bodies may reach the conclusion that the subsidiary requirements represent the best solution for their undertaking;
- when the negotiations have not led to an agreement within three years of the request lodged in accordance with Art. 5.1. In practice, this situation is rare as it involves lengthy legal battles which may adversely affect the reputation of the company.

3.2 The standards contained in the subsidiary requirements

The powers of the EWC

The subsidiary requirements refer to the notion of transnationality, as defined in Article 1.3 of the Directive to determine the competence of the EWC.

Point 1 (a) of the Annex lists the concrete topics for information and consultation. A distinction is drawn between fields where information is required and those where consultation is required. Information involves transmission of data by the employer to the EWC. Consultation is a dialogue, with employees' representatives being able to express an opinion on proposed measures.

The last sentence of point 1 (a) introduces the possibility of obtaining a response from central management, and the reasons for that response, to any opinions in the process of consultation.

Topics for information relate in particular to:

- the structure of the company;
- the economic and financial situation;
- probable development and production and sales.

Topics for information and consultation include:

- 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;
- collective redundancies.

The relevance of the distinction between topics for information and topics for information and consultation should not be overstated. It is, indeed, very clear from Article 2.1 (f) of the Directive that information is provided with a view to preparing for consultation, where appropriate. The reason for establishing two distinct lists of topics is probably a pragmatic one. Where central management does not have influence over factors which are external to the decision-making of the company, a consultation process is not meaningful. However, employees' representatives must still be informed about the general context in which the company is developing. On the other hand, consultation becomes relevant for topics involving business decisions by the management.

The topics listed in point 1 (a) of the Annex should be considered as the strict minimum. The formulation used by the legislator means that these lists are by no means exhaustive ('shall relate *in particular* to'). The first sentence of point 1 of the Annex stipulates that the EWC's competence should be read in light of the Directive's general objective. The list of topics of point 1.a should therefore be considered as sufficiently flexible so as to allow the EWC to be informed and consulted on any matter of relevance to the life of the undertaking.

According to point 2 of the Annex, information and consultation is to take place 'on the basis of a report drawn up by central management'. The choice of words suggests a written report. This written report must deal with 'the progress of the business of the Community-scale undertaking or group of undertakings and its prospects'. This report shall also be passed on to local managements, who may be just as interested as employees in the subjects discussed with the EWC.

Composition and method of appointment

The EWC will be composed of employees of the Community-scale undertaking or Community-scale group of undertakings. Only employees of the undertaking can be elected to the European Works Council, not trade union officials, as is the case for voluntary negotiated agreements. However, the EWC can be assisted by experts of its choice (point 5 of the subsidiary requirements). These experts can include trade union officials.

The members of the EWC will be elected or appointed by the employees' representatives in the individual countries in accordance with national legislation or standard practice. In the absence of employees' representatives, the members of the EWC shall be elected or appointed by the entire body of employees. Point 1.e of the Annex stipulates that management shall be informed of the result of these elections or appointments.

The composition of the EWC will be identical to the composition of the SNB.³³ An EWC shall have a minimum of 10 members and no upper limit.

Select committee

Point 1.d of the Annex stipulates that a select committee shall be set up. While Directive 94/45/EC left the parties some discretion as to when the size of the EWC requires the establishment a smaller group, setting up a select committee is now an obligation under the subsidiary requirements of the new Directive. This committee shall be composed at most of five members, who are to be elected by the EWC. Only members of the EWC can be elected members of the select committee.

The role of the select committee is to coordinate the activities of the European Works Council. Central management will provide the conditions enabling the select committee to perform its activities on a regular basis. This involves providing the members of the select committee with all the necessary facilities to meet and communicate, not only with each other but also with the larger EWC and the employees' representatives of the establishments or undertakings of the group.

The select committee will adopt its own rules of procedure, determining in particular who calls the meetings and within what time limits, if appropriate, how decisions are taken and so on.

Term of office

The EWC's term of office is four years. At the end of these four years, the first question to be asked is whether the model of the EWC should be maintained in accordance with the subsidiary requirements, or if the negotiation of an alternative is deemed desirable. If negotiations are chosen there is no need to repeat the procedure provided for by the Directive and establish an SNB in addition to the EWC. The EWC will then assume two functions. On the one hand, it will continue to function as an EWC while, on the other hand, it will assume the functions of the SNB and negotiate with the central management.

33. See 'Composition of the Special Negotiating Body', pp. 72ff.

However, point 1(f) of the Annex should be without prejudice to the adaptation clause contained in Article 13 of the Directive. Where a significant change of structure intervenes, renegotiation may have to be initiated in accordance with Articles 5, 6 and 7 of the Directive, even if the four years have not yet elapsed.

Number of meetings

Annual meetings

Point 2 stipulates that the EWC will meet with central management once a year to be informed and consulted. The date of this meeting can be agreed between the EWC and management, but there must be at least one meeting a year. This annual meeting should of course be without prejudice to the meetings of the select committee.

Meetings in case of exceptional circumstances or decisions

When 'exceptional circumstances or decisions affecting employees' interest to a considerable extent' arise between the annual EWC meetings, the select committee swings into action (point 3). The right to information and consultation of the EWC is transferred to the select committee for the period between annual meetings. Point 3 also provides that, where no such committee exists, the EWC shall have the right to be informed. Under the new Directive, the establishment of a select committee is mandatory. Therefore, as a matter of principle a select committee should always be the recipient of information and consultation procedures between annual meetings. This formulation serves nonetheless as a powerful incentive for management not to obstruct the establishment and the functioning of a select committee, as this represents a significant cost saving compared to the full EWC.

Point 3 of the Annex gives examples of what might count as exceptional circumstances or decisions affecting the employees' interests to a considerable extent: relocations, the closure of undertakings or establishments or collective redundancies. But these are only examples ('exceptional circumstances or decisions ... *particularly* in the event of ...'). The only determining factor is that a measure can be deemed to considerably affect employees' interests, this being reason enough to demand a meeting with central management.

If the committee has asked for such a meeting it must take place as soon as possible, again 'on the basis of a report drawn up by the central management or any other appropriate level of management'. 'As soon as possible' means that the central management may not delay such a meeting.

The select committee must be able to deliver an opinion 'within a reasonable time'. Point 3 of the Annex stipulates that this meeting 'shall not affect the prerogatives of the central management'. But employees' representatives have the right to be informed and consulted as soon as possible and to be given a chance to submit their opinion within a reasonable time. This requires a minimum period of time. The definition of consultation contained in Art 2.1(g) of

the Directive makes it clear that the employee representatives' point of view must be incorporated into the decision-making process of the management, otherwise its opinion would be meaningless.

Apart from the select committee itself, 'those members of the EWC 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 in it, even if they are not members of the select committee.

Concerning the frequency of the meetings of the select committee on the grounds of exceptional circumstances or decisions, the Directive remains flexible and avoids strict regulations. The number of meetings depends on the frequency with which central management envisages measures that considerably affect employees' interests.

If, after urgent consultations of this nature, a select committee thinks that its members should first consult among themselves, call in experts and meet again before submitting an opinion, then this must be made possible. Point 3 of the Annex states, indeed, that the opinion may be delivered at the end of the meeting or within a reasonable time.

The last sentence of Point 3 stipulates that the information and consultation procedures shall be carried out without prejudice to the confidentiality provisions contained in Art. 8. But this sentence also refers to the principle of useful effect of the arrangements for informing and consulting employees contained in Article 1.2. The use of confidentiality prerogatives should therefore be kept to a strict minimum.

Additional meetings

Before any meeting with central management, the EWC or the select committee shall be entitled to meet without management being present. In other words, the EWC has the right to hold preliminary discussions.

Chairing of the meetings

Point 4 of the Annex allows the Member States to lay down rules on the chairing of information and consultation meetings. This power concerns the chairing of the meetings only and does not make the chair a member of the EWC. In order to avoid confusion, the agreement should stipulate this distinction clearly.

Resources

Point 5 gives the EWC and the select committee the possibility to call on the assistance of experts of their choice, in so far as it is necessary for them to carry out their tasks.

The central management must make available the necessary resources for the completion of the tasks of the EWC. Member States can lay down rules governing this financing. They may in particular limit funding to cover one expert only. However, this can only be understood to mean that the Member States may limit the number of experts to one per item of the agenda. Indeed, the nature of the expertise required varies according to the subject matter.

The supreme criterion is that the EWC must be able to ‘perform its duties in an appropriate manner’.

Part IV

Functioning of the European Works Council or information and consultation procedure

Chapter 1 General spirit of cooperation

Article 6 Content of the agreement

1. The central management and the special negotiating body must negotiate in a spirit of cooperation with a view to reaching an agreement on the detailed arrangements for implementing the information and consultation of employees provided for in Article 1(1).

(...)

Article 9 Operation of the European Works Council and the information and consultation procedure for workers

The central management and the European Works Council shall work in a spirit of cooperation with due regard to their reciprocal rights and obligations.

The same shall apply to cooperation between the central management and employees' representatives in the framework of an information and consultation procedure for workers.

The Special Negotiating Body, the EWC and employees' representatives in the framework of an information and consultation procedure have to work in a spirit of cooperation with central management. 'Spirit of cooperation' is a broad notion that can be difficult to enforce legally. It means that a climate of mutual trust has to be built. As the Directive leaves a lot of flexibility to the parties themselves to determine the arrangements that would suit them best, the obligation to act in a cooperative way is a core element of an optimal application of the rights and obligations deriving from the text.

Many of the provisions of the Directive must therefore be read in light of the general spirit of cooperation. For instance, the Directive provides that the arrangements for informing and consulting employees are to be implemented to ensure their effectiveness, and to enable the company to take decisions effectively (Art. 1.2). This objective presupposes the existence of a constructive dialogue at the workplace and that the EWC is able to perform its tasks responsibly thanks to the transmission by central management of complete information at an early stage.

Chapter 2 Confidentiality

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.

This 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 ... 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.

Article 11 Compliance with this Directive

(...)

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.

2.1 Prohibition on disclosing information to third parties

The confidentiality requirement has to be carefully balanced with the clear obligation to report to the national employees' representatives or the workforce, provided for under Art. 10.2. In any case, the confidentiality requirement does not affect in any way the consultation procedure, which must still go ahead at EWC level.

Article 8.1 begins by imposing an obligation of confidentiality on members of the EWC and the SNB and their experts, who are not authorised to reveal any information which has expressly been provided to them in confidence. This provision does not apply to all the information received by the EWC, but only to the information which has been expressly classified as confidential.

Whilst Art 8.1 provides that confidential information must not be revealed to third parties, it does not specify what type of information can be considered 'confidential' for the purpose of this Article nor who these third parties are. It may be that under certain circumstances EWC members are not allowed to disclose certain sensitive information to the general public but does this prohibition extend to the national employees' representatives as well? Such an interpretation would have to be carefully balanced with the clear obligation to report to the national employees' representatives or the workforce, as provided for under Art. 10.2.

It will therefore be up to the national legislator to define in detail the circumstances which may justify a confidentiality requirement. This provision must be read strictly in the light of the useful effect principle. The objective of the EWC Directive would be inverted if the EWC became a secret club whose members were sworn to secrecy.

A situation which is likely to have reason to apply under Art 8.1 is the prohibition of insider dealing. In fact, the insider dealing Directive already prohibits the disclosure of inside information – that is, information which may have a significant effect on the price of transferable securities if it was made public – to any third party, unless such disclosure is made in the normal course of the exercise of a person's employment, profession or duties.³⁴ The European Court of Justice has confirmed that the confidentiality requirement does not apply where there is a close link between the disclosure and the exercise of employment or the duties of the person receiving the information and where the disclosure is strictly necessary for the exercise of that employment or duties.³⁵ An EWC or SNB member informing employees in his capacity as their representative would clearly be acting in the exercise of his employment, ful-

34. Article 3a, Directive 89/592/EC.

35. Gronggaard and Bang, 22.11.2005, C-384/02.

filling the duty imposed upon him by Art. 10.2. Consequently, the national legislator would have to define very strictly under which circumstances – if at all! – national employees’ representatives may be considered as third parties for the purpose of avoiding insider dealing.

The parties themselves may also include in the agreement an obligation upon management to provide objective reasons for a confidentiality requirement.

Example: Huhtamäki Van Leer Oyj EWC agreement (22.06.2000)

‘Information for employees’ representatives is normally intended for general communication within the Huhtamäki Van Leer Group. There may, however, be occasions when discussions in the EWC must be kept confidential under securities market regulations or for commercial or other reasons.

Should this occur, Group Vice President, Human Resources shall define the information that is confidential, and also specify why such confidentiality is required, and the period of time during which such information shall remain confidential.’

In any case, this confidentiality requirement does not affect in any way the consultation procedure, which must still go ahead at EWC level.

2.2 Withholding information

Article 8.2 gives the central management the possibility of not passing certain information to the EWC if, according to objective criteria, the nature of that information would seriously harm the functioning of the undertakings or would be prejudicial to them. Here again, the national legislator must define in detail the circumstances which may entitle central management to suspend its obligations of information and consultation under the Directive. The principle of useful effect in the Directive means that Art. 8.2 must be interpreted restrictively by the legislator. Central management cannot of its own accord classify all information as confidential and then not communicate it to the EWC. The application of Art. 8.2 is limited to ‘specific cases’ where ‘objective criteria suggest that information, once revealed to the EWC, would seriously harm the functioning of the undertakings concerned or be prejudicial to them.

It is therefore only logical that such exemptions are made subject to ‘prior administrative or judicial authorisation’, as suggested by Art. 8.2, paragraph 2.

2.3 Undertakings ‘pursuing the aim of ideological guidance’

Art. 8.3 starts off by granting Member States the possibility of laying down particular provisions for the central management of undertakings in their own territory which pursue, directly and essentially, the aim of ‘ideological guidance’ with respect to information and the expression of opinions.

However, this power in no way applies to all Member States, but only to those Member States which already had corresponding national legislation at ‘the date of adoption of this Directive’. The new Directive was adopted on 6 May 2009 but since this provision was already contained in Directive 94/45/EC the ‘date of adoption’ should logically be understood as 22 September 1994.

A Council declaration states that this provision of the Directive concerns undertakings which directly and essentially pursue political, professional organisational, religious, charitable, educational, scientific or artistic aims and aims involving information and the expression of opinions (for example, press groups). Article 8.3 does not entail total exclusion from the scope of the Directive. The Directive simply gives the Member States concerned the possibility of laying down particular provisions for these undertakings. A form of information and consultation must therefore be implemented, with the Member States defining particular rules which are to apply to those undertakings.³⁶

2.4 Appeal procedures

Where central management relies on confidentiality, Art. 11.3 stipulates that the employees’ representatives can have recourse to administrative or judicial procedures. In this way, employees can make sure that any information which should have been received from central management has to be communicated to them.

36. European Commission Working Party on Information and Consultation. Working Papers V/6943/95/EN, p. 169.

Chapter 3 Role and protection of employees' representatives

(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.

(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 and must be able to receive the training they require.

(34) Provision should be made for the employees' representatives acting within the framework of the Directive to enjoy, when exercising their functions, the same protection and guarantees as those provided to employees' representatives by the legislation and/or practice of the country of employment. They must not be subject to any discrimination as a result of the lawful exercise of their activities and must enjoy adequate protection as regards dismissal and other sanctions.

Article 2.1.d

'Employees' representatives' means the employees' representatives provided for by national law and/or practice;

Article 10 Role and protection of employees' representatives

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.

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.

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.

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.

3.1 Legal action

European Works Council members are regarded as the legal representatives of the interests of the employees of the undertaking. They are, as a result, entitled to take legal action against management where one or more rights provided for under the Directive have been infringed.

'Means required to apply the rights stemming from this Directive' must also be understood as covering financial means to cover the costs linked to legal action.

The Directive establishes the competence of EWC members to collectively represent the interests of the employees of the undertaking or group of undertakings. This leads to implications of a legal and financial nature.

Article 10.1 means that EWC members will be regarded as the legal representatives of 'the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings'. As a result, EWC members are entitled to take legal action against management where one or more rights provided for under the Directive have been infringed. It is clear that, even in cases where the EWC is a mixed body – that is, where a representative of the management is a full member – it should be considered an autonomous entity which represents the interests of the workforce only and is, as a result, entitled to go to court where management does not honour the agreement.

Depending on the practice of the relevant jurisdiction, the entitlement to take legal action may take several forms: for example, legal personality for the

EWC, individual entitlement of employees' representatives to go to court on behalf of the European Works Council and so on.

'The means required to apply the rights stemming from this Directive' must be understood as also including financial means to cover the costs linked to legal actions.

3.2 Obligation to report

The duty of employees' representatives to report to the employees they represent implies that the management at all levels is under an obligation to provide EWC members with the appropriate means of communication with the workforce, including granting access to all company sites.

Article 10.2 introduces the obligation for the members of the EWC to report to employees' representatives or, in their absence, the workforce as a whole, on the content and outcome of the information and consultation procedure. The EWC is indeed part of an information and consultation system which can function only when communication is as multidirectional as possible.

The duty laid on the employees' representatives to report to the employees they represent implies that the management at all levels is under an obligation to provide EWC members with the appropriate means of communication with the workforce, including granting access to all company sites.

The new Directive has moved this duty to report from the Annex to the body of the Directive. The legislator has made it clear that the obligation to report to the workforce, which involves a right to appropriate communication links with all sites, cannot be restricted by agreement.

3.3 Protection of employees' representatives

Members of the SNB and the EWC enjoy the same protection as all other employees' representatives in their country. As labour law is different in each Member State, this could lead to varying degrees of protection of employees' representatives, depending on the country of origin. But the protection should at least deal with discrimination, dismissal and other sanctions (Recital 34). Recital 34 also points out that adequate protection must be given to employees' representatives acting within the framework of the Directive, which should also cover employees' representatives requesting the establishment of an EWC under Art. 5.1.

Art. 10.3 mentions the right to participate in meetings of the SNB and the EWC or any other meetings within the framework of the information and consultation procedure referred to in Art. 6.3. Employees' representatives who are also employees of the company have the right to the payment of their wages for the

period of absence necessary for the performance of their duties. Emphasis is placed on necessary time off to fulfil their duties as members of the EWC. This can include more than taking part in a meeting. It can involve other necessary activities, such as travel and training, as further clarified in Art. 10.4.

The negotiating parties may wish to put in place special procedures for the protection of EWC employees' representatives. They may, for instance, introduce that the EWC must be informed and consulted about the possible dismissal of a member.

Example from Fresenius SE agreement (13.07.2007)

Without prejudice to the prohibition to discriminate (...), the members of the SE Works Council shall be entitled to protection against dismissal in accordance with the respective national provisions applicable to employee representatives. The [Select] Committee shall be informed in advance with an adequate notice period of intended dismissals of members of the SE Works Council. The affected member of the SE Works Council shall be entitled to comment on the intended dismissal before the [Select] Committee. In those cases in which the effectiveness of the measure requires shortened notice periods, it shall not be necessary to provide advance information to the [Select] Committee and to conduct a hearing of the affected member of the SE Works Council before the [Select] Committee.

3.4 Right to training without loss of wages

The obligation to provide and pay for training falls on management. This does not mean, however, that management should be able to influence the choice and content of training.

The new Directive clarifies and strengthens the right to training. As explained by Recital 33, in order to play their representative role to the full and ensure that the EWC is useful, employees' representatives must be able to receive the training they require. The formulation used in the Directive is strong: members of the SNB and the EWC shall be provided with training without loss of wages. The implication is that the obligation to provide and pay for training falls on management. This does not mean, however, that management should be in a position to influence the choice and content of training. As stated in Art. 10.1, the EWC must be given the means to represent the interests of the employees, which involves a high degree of discretion with regard to the appropriate training courses.

Besides having the technical, economic and language skills they need to do their work, EWC and SNB representatives need training that has been specifically designed to enable them to:

- familiarise themselves with the various national systems of workforce representation practised by other employees' representatives of the SNB or EWC;
- overcome communication difficulties. This is not just a question of language; it is also important to learn about the expectations with regard to behaviour and meaning that come from different national cultures and traditions;
- identify areas for communication and cooperation with other representatives;
- develop a communication and information strategy between the represented workers and the respective EWC;
- know about and think how best to use the specific resources that national bodies have at their disposal (for example, financial expertise, codetermination and so on).

As issues such as corporate social responsibility, sustainable development or health and safety start to crop up on the agendas of European meetings, workforce representatives will also need training to tackle them in the appropriate manner.

Chapter 4 Adaptation of the EWC in case of change of structure

All agreements, regardless of the date of signature, are subject to the provisions of Article 13. The basic principle is not negotiable: where the structure of the undertaking changes significantly, the existing EWC(s) must be adapted.

(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.

Article 13 Adaptation

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.

Where the structure of the undertaking or group of undertakings changes significantly, for example due to a merger or an acquisition, Article 13 stipulates that the existing agreements must be adapted to the new structure through renegotiation, possibly including the establishment of an SNB. This provision allows EWCs to be sufficiently dynamic to better deal with the changing structure of companies. Art. 13 also contains a number of safeguards aiming at securing continuity in the information and consultation arrangements.

4.1 The agreements concerned

All agreements, whether establishing an EWC or an information and consultation procedure, are subject to the provisions of Article 13.

In addition, the first sentence of Article 14.1 ('without prejudice to Article 13') makes it clear that the agreements signed prior to the entry into force of Directive 94/45/EC ('old Article 13 agreements') and agreements signed or revised between 5 June 2009 and 5 June 2011 ('interim agreements') are also covered by the adaptation clause.

In this regard, a fundamental difference must be established between the mere revision of an 'old Article 13' agreement or of an 'interim agreement', as allowed by Article 14.2 of the Recast, and the mandatory adaptation in case of a significant change of structure of the company, as required by Article 13 of the Recast. A mere revision, for instance to adjust the agreement to the changing size of the workforce, does not affect the special status of these agreements with regard to the obligations of the Recast. By contrast, a negotiation under the terms of Article 13 involves the setting up of an entirely new agreement, which should then be fully governed by the provisions of the Recast Directive.

4.2 When is adaptation necessary?

The basic principle of Art 13 is not negotiable: where the structure of the undertaking changes significantly, the existing EWC(s) must be adapted. It is not possible for the negotiating parties to include a clause in their agreement excluding or limiting the application of Article 13.

Existing agreements must be adapted in case of a significant change of structure of the undertaking. 'Significant change of structure' – which may require the establishment of a new SNB – should be distinguished from other minor changes, which would require only technical adjustments to the agreement. The distinction is important because Art. 13 should not be misused to un-

necessarily put into question well functioning agreements. At the same time, mere technical adjustments are not adequate where the agreement is simply no longer appropriate to deal with the new structure of the company.

A structural change leading to a substantial alteration in the legal structure of the company and affecting a significant percentage of the workforce would require the application of Article 13. Recital 40 quotes as examples of a significant change of structure merger, acquisition or division. These are only indications of what may constitute a significant change of structure. The final assessment lies with the parties themselves, having regard to factors such as the global representativity of the EWC as well as the effectiveness of its information and consultation arrangements following the change of structure.

4.3 The procedure for adaptation

Arrangements contained in the agreement

The Directive imposes an obligation with regard to the result to be achieved – the adaptation of existing agreement(s) – but not the means. Article 13 leaves it to the negotiating parties to include in their EWC agreement the appropriate steps to follow in case of a significant change of structure (see also Art. 6.2.g³⁷).

The parties may therefore decide to depart from the provisions of the Directive and to devise mechanisms best suited to their needs. For instance, they may decide that the whole negotiating period should be reduced from three years to one. It should indeed be possible to introduce lighter procedures as the negotiations would not start from scratch but aim at adapting an existing EWC agreement.

Such arrangements, however, must be fair and respect the principle of democracy. Convening a well balanced SNB may be the only way to secure this.

In the absence of arrangements

Where the existing EWC agreement does not contain specific provisions concerning adaptation, Article 13 foresees a fallback position. This fallback position is also applicable where two EWC agreements conflict with one another, for example following the acquisition of or a merger with another undertaking with its own EWC. In such a scenario, Article 13 foresees formal negotiations in accordance with the provisions of the Directive and in association with the members of the existing EWC(s).

37. See 'Duration of the agreement', pp. 91ff.

The negotiation has to be initiated at the initiative of the central management or on the request of 100 employees or their representatives, in at least two Member States. It is, in theory, possible that no one takes the initiative of requesting negotiations, in which case the existing arrangements remain in place after the significant change of structure. However, the absence of negotiations may lead to undesirable confusion where two or more EWCs come into conflict. Employees of a newly acquired undertaking should also be entitled to appoint representatives to the EWC.

If a request to initiate negotiations has been made, an SNB must be established in accordance with Art. 5. The only difference is that ‘at least three members of the existing EWC or each of the existing EWCs shall be members of the SNB, in addition to the members elected or appointed pursuant to Art. 5.2’ (Art. 13 paragraph 2). This clause is designed to ensure continuity in the information and consultation arrangements. The SNB will indeed be able to benefit from the experience of ‘insiders’.

The SNB has the task of negotiating an agreement in accordance with Article 6, taking into account the new structure of the company. The negotiations should follow the same rules as if it was a ‘first time’ negotiation. Priority is given to the parties to devise their own arrangements, but subsidiary requirements apply if one of the conditions of Article 7.1 is met.³⁸ Article 13 does not make an express reference to the subsidiary requirements but it is only logical that they are taken into account. Without subsidiary requirements, the negotiations under Article 6 would be meaningless and Article 13 would, as a result, be deprived of any useful effect. If the SNB decides not to open or to terminate negotiations in accordance with Article 5.5, the subsidiary requirements do not apply. In such cases the existing EWC(s), if any, should remain in place.

According to Art. 13 paragraph 3, ‘during the negotiations the existing EWC(s) shall continue to operate in accordance with any arrangements agreed between the members of the EWC(s) and the central management’. This implies that, even if the change of structure leads to the creation of a new company, with a new legal personality, the existing EWC(s) will not lose legal status with the extinction of the previous companies. The newly created undertaking will therefore have to report to the existing EWC(s) until the new agreement comes into force. This is an important clarification, as it means that there should not be any discontinuity in the information and consultation procedure during the often decisive period that follows a change of structure. This also guarantees that the EWC of a smaller company will not be ‘swallowed up’ following an acquisition.

38. That is, where central management and the SNB so decide, where central management refuses to initiate negotiations within 6 months of the request or where, after three years, the negotiating parties are unable to conclude an agreement.

4.4 The outcome: application of the Recast to the agreements

Where the negotiations lead to the establishment of a new agreement, whether under Article 6 or the subsidiary requirements, this new agreement must be understood as being fully subject to the provisions of the Recast Directive.

In other words, Article 14 no longer applies to ‘old Article 13 agreements’ and ‘interim’ agreements in case of negotiation following a significant change of structure. While the special status of such agreements vis-à-vis the obligations of the Recast Directive is maintained in case of ‘adjustment’ (Article 14.1 (a)) and ‘revision’ (Article 14.1 (b) and 14.2), negotiation under Article 13 implies the conclusion of an entirely new agreement, negotiated under the terms of the Recast, and for which the application of the derogation provided for in Article 14 is no longer justified.

The adaptation clause is therefore likely to play a unifying role in the future. As the business environment is constantly changing – involving important operations such as mergers and acquisitions – one can logically expect that Article 14 will over time become obsolete. Agreements in force will have to be renegotiated under the terms of the new EWC directive, thereby unifying the regimes applying to EWCs throughout Europe.

Chapter 5 Compliance with the Directive. The issue of sanctions

(35) The Member States must take appropriate measures in the event of failure to comply with the obligations laid down in this Directive.

(36) 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.

Article 11 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.

Article 11 stipulates that Member States must ensure that the parties concerned by the Directive – that is, both management at all levels and employees' representatives – fulfil the obligations laid down by the Directive.

A dispute relating to the application of the Directive may arise at any time in the life of an EWC. It may be, for instance, that management does not provide the information necessary to the start of negotiations, in violation of Article 4.4 of the Directive. Even if both parties to the agreement have reached a consensus regarding the establishment of an EWC, a dispute may subsequently arise in relation to the role and functioning of the EWC. Practice has shown that a frequent complaint on the part of employees' representatives relates to the absence of information and consultation or to a superficial procedure (in terms of the quality and timing of the information).

The need for adequate sanctions is an important principle in EU law. The national legislator is under the obligation to guarantee the full effectiveness of EU instruments. Without adequate sanctions, the provisions of the EWC Directive would have no more value than a declaration of good intentions. Article 11 does not specify the type and scale of sanctions that should be applied. It is therefore up to the national legislator to devise appropriate provisions. Member States' power to impose appropriate penalties must, however, guarantee the effectiveness of the EWC Directive.

The Recast Directive stipulates that there must be 'sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence' (Recital 36). This means that, while the penalty must be proportionate to the offence committed, it must also have a real deterrent effect. In other words, an adequate sanction should not only have a punitive dimension. The nature and the scale of the sanction should be such that individuals are dissuaded from committing the offence in the first place.

Member States must, in the course of their transposition, reassess existing penalties in light of the new Recital 36. For instance, a simple fine, of a limited amount compared to the size and resources of the undertaking or group of undertakings, would not guarantee the effectiveness of the Directive as management could choose to pay a relatively small sum rather than conduct meaningful information and consultation procedures.

Example: Injunction by the French Court in the case *Gaz de France*, 21 November 2006 (case number 781)

A proposed merger between Gaz de France and Suez, was announced in February 2006, without prior information of the Gaz de France European Works Council. As a result of this violation of the EWC Directive, the French Court ordered management to submit the various documents and information requested by the EWC and to organise an extraordinary EWC meeting within 10 days of the submission of the report of the experts designated by the EWC. This meant that the board meeting scheduled to confirm the merger was postponed until after the EWC had completed the information and consultation process.

A meaningful sanction in case of serious violation of the provisions of the Directive would consist in suspending the disputed measure until the information and consultation procedure has been completed, in line with the requirements of the Directive.

Not only the imposition but also the enforcement of sanctions is important. To that end, Article 11.2 provides that Member States put in place adequate administrative or judicial procedures to enable the obligations deriving from this Directive to be enforced.

Part V

Annexes

Annex 1 List of European social partner organisations consulted under Article 138 of the EC Treaty (updated for 2009)

1. General cross-industry organisations

- BusinessEurope
- European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP)
- European Trade Union Confederation (ETUC)

2. Cross-industry organisations representing certain categories of workers or undertakings

- Eurocadres
- European Association of Craft and Small and Medium-Sized Enterprises (UEAPME)
- European Confederation of Executives and Managerial Staff (CEC)

3. Specific organisations

- Eurochambres

4. Sectoral organisations representing employers

- Airports Council International – Europe (ACI EUROPE)
- Association of Commercial Television in Europe (ACT)
- Association of European Airlines (AEA)
- Association of European Professional Football Leagues (EPFL)
- Association of European Public Postal Operators (PostEurop)
- Association of European Radios (AER)
- Association of Mutual Insurers and Insurance Cooperatives in Europe (AMICE)
- Association of National Organisations of Fishing Enterprises in the EU (EUROPECHE)
- Civil Air Navigation Services Association (CANSO)
- Committee of Agricultural Organisations in the European Union (COPA)
- Community of European Railway and Infrastructure Companies (CER)
- Community of European Shipyards' Associations (CESA)
- Confederation of National Associations of Tanners and Dressers of the European Community (COTANCE)
- Council of European Municipalities and Regions (CEMR)
- Employers' Group of the Committee of Agricultural Organisations in the European Union (GEOPA)

- Eurogas
- European Apparel and Textile Organisation (EURATEX)
- European Association for Coal and Lignite (Euracoal)
- European Association of Cooperative Banks (EACB)
- European Association of Mining Industries (Euromines)
- European Association of Potash Producers (APEP)
- European Banking Federation (FBE)
- European Barge Union (EBU)
- European Broadcasting Union (EBU)
- European Chemical Employers Group (ECEG)
- European Club Association (ECA)
- European Committee of Sugar Manufacturers (CEFS)
- European Community Shipowners Association (ECSA)
- European Confederation of Hairdressing Employers’ Organisations (EU Coiffure)
- European Confederation of Iron and Steel Industries (Eurofer)
- European Confederation of Private Employment Agencies (Eurociett)
- European Confederation of the Footwear Industry (CEC)
- European Confederation of Woodworking Industries (CEI–Bois)
- European Construction Industry Federation (FIEC)
- European Coordination of Independent Producers (CEPI)
- European Federation of Cleaning Industries (EFCI)
- European Federation of Contract Catering Organisations (FERCO)
- European Federation of National Insurance Associations (CEA)
- European Federation of Security Services (CoESS)
- European Furniture Manufacturers’ Federation (UEA)
- European Furniture Industries Confederation (EFIC)
- European Hospital and Healthcare Employers’ Association (HOSPEEM)
- European Industrial Minerals Association (IMA)
- European Rail Infrastructure Managers (EIM)
- European Regions Airline Association (ERA)
- European Savings Banks Group (ESBG)
- European Skippers’ Organisation (ESO)
- European Telecommunications Network Operators’ Association (ETNO)
- General Committee for Agricultural Cooperation in the European Union (COGECA)
- Hotels, Restaurants and Caf  s in Europe (HOTREC)
- International Air Carrier Association (IACA)
- International Aviation Handlers’ Association (IAHA)
- International Federation of Film Producers’ Associations (FIAPF)
- International Federation of Insurance Intermediaries (BIPAR)
- International Road Transport Union (IRU)
- Performing Arts Employers’ Associations League Europe (PEARLE)
- Retail, Wholesale and International Trade Representation to the EU (EuroCommerce)
- Union of the Electricity Industry (EURELECTRIC)

5. European trade union organisations

- European Arts and Entertainment Alliance (EAEA)
- European Cockpit Association (ECA)
- European Confederation of Independent Trade Unions (CESI)
- European Federation of Building and Woodworkers (EFBWW)
- European Federation of Journalists (EFJ)
- European Federation of Public Service Unions (EPSU)
- European Federation of Trade Unions in the Food, Agriculture and Tourism Sectors and Allied Branches (EFFAT)
- European Metalworkers' Federation (EMF)
- European Mine, Chemical and Energy Workers' Federation (EMCEF)
- European Trade Union Federation: Textiles, Clothing and Leather (ETUF:TCL)
- European Transport Workers' Federation (ETF)
- International Federation of Actors (FIA)
- International Federation of Musicians (IFM)
- International Federation of Professional Footballers' Associations (FIFPro Division Europe)
- Union Network International Europe (UNI–Europa)
- European Trade Union Committee for Education (ETUCE)*

The list will be adapted as new sectoral social dialogue committees are set up and/or in light of the study on representativeness.

- Organisations affiliated to ETUC receiving copies of information.

Annex 2 Summary table

Subject	Articles	Content	ETUC recommendations	Relevant pages in the guide
Part I Principles of interpretation				
Relationship between body of the Directive and subsidiary requirements	Art. 1.2 Art. 1.4 Art. Recitals 12,	The following requirements must be respected by the negotiating parties: <ul style="list-style-type: none"> – General principle of effectiveness – Notion of transnationality – Information and consultation definitions – Procedural obligations to secure good quality negotiations – Mandatory content of Art 6 agreement – Role and protection of employees' representatives 		20–22
A minimum standards Directive		A Member State is free to provide for more detailed and more protective provisions in its transposition law	The following points deserve careful examination by the national legislator so as to ensure the useful effect of the Directive: <ul style="list-style-type: none"> – Definition of transnationality – Articulation between national and European level of representation – Determination of the undertakings affected by the application of the Directive (thresholds, notion of controlling undertaking) – Confidentiality restrictions – Adaptation clause in case of significant change of structure – Sanctions 	23–25
Private international law principles		As a general principle, the EWC agreement is subject to the law of the country in which its central management is established. Other regimes may also have the authority to govern specific issues (calculation of workforce, appointment and protection of employees' representatives and so on)	By drafting an appropriate choice of law clause, the parties can ensure that the most favourable legal regime is applicable to their EWC	25–27
Impact of the Directive on existing agreements	Article 14	General non-renegotiation principle. However, existing agreements are not immune from the new rules (see summary table p. 36) Adaptation clause in case of significant change of structure applicable to all agreements, regardless of the date of signature	Between 5 June 2009 and 5 June 2011, agreements should be signed or revised in full awareness and knowledge of the recast Directive. The agreement should define the rights and obligations of parties to the agreement as intended by that Directive	30–37

Subject	Articles	Content	ETUC recommendations	Relevant pages in the guide
Part II The parties affected by the application of the Directive				
<i>Role of the EWC:</i> Definitions of information and consultation	Recital 21–23 Article 2.1 (f) and (g)	Information and consultation must fulfil essential criteria of advance timing and quality	Mere oral communication by management – for example a Powerpoint presentation containing basic information – at the annual meeting does not constitute adequate information A consultation which leaves no or little flexibility as to the type of decisions that may eventually be taken intervenes too late in the decision-making procedure and violates the terms of the Directive. Consultation cannot be equated to a mere disclosure by management of its final decision	41–47
<i>Competence of the EWC</i> Definition of transnationality	Recitals 12, 15, 16, 18 Articles 1.3, 1.4 and 1.6	EWCs are competent for transnational matters. A matter becomes transnational whenever it exceeds local management competence	 A decision affecting the whole undertaking but implemented in different stages, should be regarded as transnational, even if it is in practice affecting one country after another.	 48–51
Articulation with national representative bodies	Recitals 37, 38 Article 12	EWCs exercise competence without prejudice to national procedures for information and consultation. Applicable arrangements are determined by agreement. Failing that, procedure to be conducted at both levels, in accordance with national law(s)	Managerial tactics aimed at playing one level of representation against another must be prevented	52–54
The undertakings concerned	Article 2.1 and 2.2	The Directive applies to undertakings employing at least 1000 employees within the EU and 1500 employees in at least two Member States. In case of a group, the thresholds are 1000 employees within the EU, with at least 2 group undertakings in different Member States employing at least 150 employees.	The ETUC encourages smaller sized companies and their employees' representatives to establish an EWC as part of good governance and corporate social responsibility policies	57–59
The notion of controlling undertaking	Article 4.1 Recital 17 Article 3	The management of the controlling undertaking is responsible for creating the conditions and means necessary for the setting up of an EWC A controlling undertaking exercises a dominant influence over another by holding a majority of capital or controlling majority of votes or appointing the majority of the administrative/ supervisory board members	 More precision could be envisaged with regard to the specific case of joint ventures, franchise companies and monopsonies	60–64
Responsibilities of central management	Recital 25 Articles 4.1 and 4.4	Central management must facilitate the start of negotiations, which involves: – providing information necessary for the beginning of negotiations – creating the conditions and means necessary for establishing an EWC	Central management is not in a position to delay the start of negotiations by simply arguing that essential information has not been received Furthermore, if employees' representatives are not able to communicate with a view to discussing possible negotiations, the useful effect of the Directive would be greatly undermined	69–72

Subject	Articles	Content	ETUC recommendations	Relevant pages in the guide
Composition of the Special Negotiating Body	Article 6.2	For every 10% of the workforce, a Member State has the right to send one representative to the SNB (see summary table p. 46) Representatives from a European Industry federation or a trade union official can be members of the SNB		72–73
The role of trade unions	Article 5.4 Article 5.2.c Article 4.4	<ul style="list-style-type: none"> – can participate in SNB – can participate to the negotiation meetings at the request of the SNB – shall be informed of composition of the SNB and of the start of negotiations 	The competent European workers' organisations within the meaning of the Directive should be the social partner organisations that are consulted by the European Commission under Art. 138 EC	73
Part III The establishment of an EWC or information and consultation procedure				
Conduct of negotiations	Recitals 26 and 27 Art 2.1.i Art 5	<p>Negotiations start at the initiative of central management or at the written request of 100 employees or their representatives in at least 2 different Member States</p> <p>Practical arrangements for the functioning of the SNB are:</p> <ul style="list-style-type: none"> – First meeting within 6 months of the request; SNB entitled to meet on its own before and after any meeting with management – Access to experts – Expenses borne by management 		77–81
Negotiated agreements (Article 6 agreements)	Recitals 19, 20, 28–31 Article 6	<p>The agreement must address as a minimum the following issues:</p> <ul style="list-style-type: none"> – composition of the EWC. Must take into account where possible the need for balanced representation with regard to activities, category and gender – Size, allocation of seats and term of office – Function and procedure for information and consultation, including linking European and national level of representation – Rules on the functioning of the EWC, including select committee – Duration of the agreement 	<p>The EWC agreement could include provisions on the objective reasons that may call for an early interruption of mandate, with a view to preventing arbitrary removals of employees' representatives by management</p> <p>A select committee should be informed and consulted between annual meetings, whenever circumstances affecting employees' interests arise</p> <p>Very careful attention should be paid in the definition of cases which simply require revision/ adjustment of the agreement as they must be clearly distinguished from cases necessitating a full renegotiation because they involve a significant change of structure, in accordance with Article 13</p>	83–94
Subsidiary requirements	Recitals 30, 32, 42–44 Article 7 Annex	<p>Subsidiary requirements apply when central management refuses to commence negotiations within 6 months of the initial request; when the central management and SNB so decide; when the negotiations have not led to an agreement within 3 years of the initial request.</p> <p>The standard requirements cover:</p> <ul style="list-style-type: none"> – the powers of the EWC – composition and method of appointment – establishment of a select committee – term of office – number of meetings (1 per year + exceptional circumstances, prep and post meetings without central management) – resources 		95–104

Subject	Articles	Content	ETUC recommendations	Relevant pages in the guide
Part IV The functioning of the EWC or information and consultation procedure				
Confidentiality	Article 8	<p>EWC and SNB members are not authorised to reveal information which has expressly been provided in confidence</p> <p>Information can be retained by management if, according to objective criteria, the nature of the information would seriously harm the functioning of the undertaking</p>	<p>Confidentiality requirement must be carefully balanced with clear obligation to report to workforce under Art. 10.2. In any case, such requirement does not affect consultation procedure which must still go ahead at EWC level</p> <p>The principle of useful effect of the Directive means that the right to withhold information must be interpreted restrictively by the national legislator. Such exemptions should be made subject to prior administrative or judicial authorisations.</p>	109–112
Role and protection of employees' representatives	Recitals 20, 33, 34 Article 10	<p>EWC members are the legal representatives of the interests of the employees of the undertaking. This involves an entitlement to take legal action, including financial means to cover legal costs</p> <p>EWC members have an obligation to report to the employees they represent, which implies appropriate means of communication, including access to sites</p> <p>Right to training without loss of wages</p>	The obligation to provide and finance training does not mean that management should be in a position to influence the choice and conduct of training	113–117
Adaptation in case of change of structure	Recital 40 Article 13	In case of significant change of structure (for example, merger, major acquisition), agreements must be adapted to the new structure. In the absence of specific arrangements in the agreement, formal renegotiations in accordance with the Directive and at the request of central management or written petition from 100 employees or representatives in at least 2 Member States	<p>All agreements are subject to this adaptation clause, regardless of date of signature</p> <p>The basic principle of Article 13 is not negotiable</p> <p>It is important to establish a clear distinction between significant change of structure, which may lead to renegotiation, and other changes which only require adjustment of the existing agreement</p>	119–123
The issue of sanctions	Recitals 35, 36 Article 11	Effective, dissuasive and proportionate sanctions should be applicable in case of violation of the Directive	An adequate sanction would be to suspend the decision until the information and consultation procedure has been completed in accordance with the terms of the Directive	125–127

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