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The European Works Council legislation in transition

1. Introduction

European works councils (EWCs) are bodies representing the European employees of a company. Through them, workers are informed and consulted at transnational level by management on the progress of the business and any significant decision that could affect them.¹

European Works Councils (EWCs) are highly significant in terms of European industrial relations. They represent the first genuinely European institution of worker interest representation at enterprise level. They reflect the growing recognition of the need to respond to the “Europeanisation” of business² emerging from the Single European Market with the Europeanisation of worker representation, by supplementing existing national channels of information and consultation.³

Usually many factors affect the degree of influence that EWCs are able to exert upon business decisions. The most important elements include:

- the business strategy and the structure of the company;
- national industrial relations practices in the company’s home country;
- the resources the EWC has at its disposal;
- the degree of cohesion between employee representatives in the headquarters and in the subsidiaries.

The latter point is of key importance. Some worker representatives believe that they are expected to represent primarily the interest of their national colleagues, and only

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¹ Sigurt Vitols: European Works Councils: an assessment of their social welfare impact, ETUI, Brussels, 2009, ISSN 1994-4446, pp. 56-62

² Arnold Wilts: Europeanisation and ways of interest representation by national business associations, http://aei.pitt.edu/2207/1/002262_1.PDF

³ <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/EUROPEANWORKSCOUNCILS.htm>

secondarily the interests of the wider European workforce. It is clear that for EWCs to function effectively, representatives from different countries must develop a functioning working relationship. A number of factors make this objective difficult to achieve:

- the different industrial relations cultures from which representatives come;
- different approaches to employee representation;
- particular experiences of restructuring, such as situations where national subsidiaries have competed against one another for investment;
- language barriers;
- lack of continuity of membership;
- infrequent contacts.⁴

Change in corporate structures in a rapidly evolving business environment, the liberalisation of world trade and the globalisation of the economies were the main drivers behind the proposal and adoption of the EU directive on EWCs in 1994.⁵ The purpose of this directive is to improve the right to information and to consultation of employees in:

- a) Community-scale undertakings employing in total more than 1,000 employees within the Member States and at least 150 employees in each of at least two Member States;
- b) Community-scale groups of undertakings employing at least 1,000 employees within the 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.⁶

Within the framework of the European social dialogue process, the social partners (CEEP, ETUC and BUSINESSEUROPE/UEAPME) looked at the issue of EWCs⁷ and enlargement as part of their joint 2003-2005 work programme and issued a joint text, *Lessons learned on European Work Councils* in April 2005.⁸ In this document, the EWC is recognised as a „useful tool to organise transnational information and consultation” in fast-evolving companies or groups confronted with continuous and rapid changes in work organisation and production in the context of globalisation and ongoing technical innovation.⁹

⁴ <http://www.eurofound.europa.eu/pubdocs/2008/28/en/1/ef0828en.pdf>

⁵ Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (<http://europa.eu.int/eur-lex/lex/>).

⁶ <http://www.eurofound.europa.eu/pubdocs/2008/28/en/1/ef0828en.pdf>

⁷ Thomas Fetzter: *Industrial Relations History in Transnational Perspective: A Review Essay*, *History Compass* Volume 10, Issue 1, pages 56–69, January 2012 Blakwell Publishing Ltd. pp. 57–58

⁸ *Lessons learned on European Work Councils* (http://ec.europa.eu/employment_social/social_dialogue/docs/300_20050407_ewc_en.pdf).

⁹ Paul Teague: *Economic citizenship in the European Union: Employment relations in the new Europe*, Routledge, 1999. p. 23.

The last two enlargements of the European Union to 25 (in 2004) and to 27 (in 2007) Member States has presented a number of ongoing challenges for the EU, not least in the operation and running of European Works Councils (EWCs). EWCs were formed in response to a 1994 European Directive aimed at bringing together employee representatives from each European country in which a multinational company had operations in order to facilitate information disclosure and consultation with group-level management. The Works Council Directive paved the way for the development of transnational industrial relations structures.¹⁰

The enlargement of the EU is directly relevant to EWCs as a large majority have representation in the new member states (hereinafter: NMS). Integrating these representatives and dealing with a growing diversity of cultures, languages and concepts of participation is one major challenge.¹¹ A further challenge is the transfer of jobs in manufacturing and services to Central and Eastern Europe, in light of lower labour costs and more favourable tax environments. Internal competition between production sites of the same company puts particular pressure on employee interest representation.¹²

The enlargement of the European Union in May 2004 represents one of the most important landmarks and the greatest challenge in the 10-year history of European Works Councils (EWCs): around 1,140 of all companies in the EU - more than half of those covered by the EWC directive - have operations in one or more of the 10 new Member States. Moreover, among the approximate total of 530 existing EWCs, nearly 70% had operations in the NMS in 2005. This means that the integration of representatives from the NMS is a highly relevant issue for most EWCs. Growing diversity of cultures, languages and concepts of participation will characterise an increasing number of EWCs in the future.¹³

The right to establish EWCs was originally introduced by Directive 94/45/EC for undertakings or groups of undertakings employing at least 1 000 employees in the European Union and the other countries of the European Economic Area (Iceland, Liechtenstein and Norway) with at least 150 employees in each of two Member States. Some 970 EWCs represent over 15 million employees, favouring social dialogue and anticipation of change in transnational companies.

A new development regarding the revision of the EWC directive occurred on 13 September 2006, when the European Economic and Social Committee (EESC) adopted by a vast majority its own-initiative opinion. In its opinion, EESC claimed that „ ... following a reasonable period of integration of the New Member States and in the light of whatever the social partners highlight from the lessons learned on EWCs ... the direc-

¹⁰ LADÓ MÁRIA: *Európai szociális párbeszéd: szót értenek egymással*. KüM Integrációs és Külgazdasági Államtitkárság, 2003. pp. 34–36

¹¹ ROGER BLANPAIN: *European Labour Law*, Kluwer Law International BV, The Netherlands, 2008. p. 773

¹² <http://www.eurofound.europa.eu/pubdocs/2006/65/en/1/ef0665en.pdf>

¹³ Európai Integráció: Fejlesztési a szociális párbeszédet és megvédeni a minőségi közszolgáltatásokat, EPSU 2004. p. 28.

tive should be subject to a review ...” (EESC, 2006). The EESC considers the EWCs to be an integral part of the European social model and of social dialogue.¹⁴

After consulting the European social partners and carrying out an impact assessment, the Commission submitted in 2008 a proposal to recast the directive. This new directive was adopted in 2009 by the European Parliament and the Council, with some amendments mainly suggested by the European social partners. Building on the results of the existing legal framework, recast Directive 2009/38/EC aims, in particular, at ensuring the effectiveness of employees’ transnational information and consultation rights, at favouring the creation of new EWCs and at ensuring legal certainty in their setting up and operation.

Directive 2009/38/EC was obliged to be transposed by Member States before 6 June 2011. On that date, the existing Directive 94/45/EC (as amended by Directive 97/74/EC and 2006/109/EC) was repealed and replaced with Directive 2009/38/EC. National implementing measures for the repealed directives are, however, maintained after 6 June 2011, to cover the cases where the new obligations introduced by Directive 2009/38/EC do not apply.¹⁵

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

As from 6 June 2011, EWCs are to be established and operate within the framework of recast Directive 2009/38/EC through its implementing provisions in the Member States.¹⁶

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

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

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

¹⁴ European Works Councils: Consultation of the European social partners on the revision of Council Directive, 94/45/EC of 22 September 1994, http://ec.europa.eu/employment_social/labour_law/docs/2008/ewc_consultation2_en.pdf

¹⁵ FILIP DORSSEMONT and THOMAS BLANKE ed.: *The recast of the European Works Council Directive Intersentia*, Antwerp, ETUI, Brussels, 2010, ISBN 978-94-000-0075-9

¹⁶ Report Group of Experts Implementation of Recast Directive 2009/38/EC on European Works Councils December 2010 pp. 55–58.

extension of the directive to the UK in 1999. The continuity of such agreements is ensured by Directive 2009/38/EC.¹⁷

As regards the setting up of new European Works Councils, three landmark cases brought before the European Court of Justice for a preliminary ruling have established the principle that the managements of all undertakings located in Member States are required to supply any information required to open negotiations on setting up an European Works Council, in particular information on the structure or organisation of the group, to employee representatives, irrespective of where the headquarters of the group is located or of the central management's opinion as to the relevance of the Directive. These ECJ cases are the C-62/99 *Bofrost*, C-440/00 *Kühne & Nagel* and C-349/01 *ADS Anker GmbH*.

1) Summary of the *Bofrost* case. On a proper construction of Article 11(1) and (2) of Directive 94/45 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, an undertaking which is part of a group of undertakings is required to supply information to the internal workers' representative bodies, even where it has not yet been established that the management to which the workers' request is addressed is the management of a controlling undertaking within a group of undertakings.¹⁸

Where information relating to the structure or organisation of a group of undertakings forms part of the information which is essential to the opening of negotiations for the setting-up of a European Works Council or for the transnational information and consultation of employees, an undertaking within the group is required to supply the information which it possesses or is able to obtain to the internal workers' representative bodies requesting it. Communication of documents clarifying and explaining the information which is indispensable for that purpose may also be required, in so far as that communication is necessary in order that the employees concerned or their representatives may gain access to information enabling them to determine whether or not they are entitled to request the opening of negotiations.¹⁹

2) Summary of the *Kühne & Nagel* case: Articles 4(1) and 11(1) of Directive 94/45 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees must be interpreted as meaning that:

- where the central management of a Community-scale group of undertakings is not located in a Member State, central management's responsibility for providing the employees' representatives with the information essential to the opening of

¹⁷ ROMUALD JĄGODZINSKI in cooperation with IRMGARD PAS: *The EWC landscape on the eve of the transposition deadline of the recast directive 2009/38/EC Evidence from the ETUI database of European Works Councils ETUI aisbl*, Brussels 2011. pp. 15–17.

¹⁸ <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-62/99&td=ALL>.

¹⁹ BARRETO JOZEFA és BORBÉLY SZILVIA: *Mit kell tudni az európai üzemi tanácsokról?* Marmol Research, Budapest, 2001. http://www.mresearch.co.hu/mr6uzemitanacs.htm#_Toc532549368

negotiations for the establishment of a European Works Council lies with the deemed central management under the second sub-paragraph of Article 4(2) of the directive;

- where central management does not, for the purpose of establishing a European Works Council, make certain information available to the deemed central management, the latter, in order to be able to fulfil its obligation to provide information to the employees' representatives, must request the information essential to the opening of negotiations for the establishment of such a council from the other undertakings belonging to the group which are located in the Member States, and has a right to receive that information from them;
- the management of each of the other undertakings belonging to the group which are located in the Member States is under an obligation to supply the deemed central management with the information concerned where it is in possession of the information or is in a position to obtain it;
- the Member States concerned are to ensure that the management of those other undertakings supplies the information to the deemed central management.

The obligation to provide information deriving from Articles 4(1) and 11(1) of Directive 94/45 encompasses information on the average total number of employees and their distribution across the Member States, the establishments of the undertaking and the group undertakings, and on the structure of the undertaking and of the undertakings in the group, as well as the names and addresses of the employee representation which might participate in the setting up of a special negotiating body in accordance with Article 5 of the directive or in the establishment of a European Works Council, where that information is essential to the opening of negotiations for the establishment of such a council.²⁰

3) Summary of the *ADS Anker GmbH. case*: Article 4(1) and Article 11 of Council Directive 94/45 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees must be interpreted as meaning that Member States are required to impose on undertakings established within their territory and constituting the central management of a Community-scale group of undertakings for the purposes of Article 2(1) (e) and Article 3(1) of the directive, or the deemed central management under the second subparagraph of Article 4(2), the obligation to supply to another undertaking in the same group established in another Member State the information requested from it by its employees' representatives, where that information is not in the possession of that other undertaking and it is essential for opening negotiations for the setting up of a European Works Council.²¹

²⁰ ECJ rules on German EWCs case, <http://www.eurofound.europa.eu/eiro/2004/04/inbrief/de0404202n.htm>

²¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001CJ0349:EN:HTML>

2. Evolution of the European Works Council

2.1. History of works councils on a national level

Originally works councils were invented in Germany at the end of the nineteenth century, soon followed by other countries such as Italy and the Netherlands.²² "Enlightened" employers created voluntarily bodies with representatives of employees, in order to inform and consult them on developments in the factory. They were either led by the progressive wish to improve communication with workers in their expanding enterprises, or, less idealistic, just wanted to keep the unions out of their factory. In 1920 Germany was also among the first to impose works councils statutorily on enterprises in the "Betriebsratengesetz" (Works Councils Act), after World War II replaced by the "Betriebsverfassungsgesetz" (Work Constitution Act 1952).

Other European countries were inspired by the German example: works councils - under different names and with various compositions and competences - were made obligatory by statute in Luxemburg, Austria (both around the same time), Norway (1920, but not effective), Czechoslovakia (1921), France (1938/1944), Belgium (1948), the Netherlands (1950), Hungary (1956); they were introduced by nationwide agreements in Italy (1943, restoring the pre-fascist tradition), Sweden (1946) and Denmark (1947). This legislation introduced a second channel next to the negotiations with the trade-unions for collective agreements on primary working conditions. In most countries the works councils were first opposed by the unions, but later accepted by them and used to obtain more influence on the shop level. Works councils mainly deal with working conditions on the plant level, fringe benefits etc.

The next tendency to promote works councils was the "democratic revolution" of the 1960s. This was translated into extended "Industrial Democracy" throughout Europe: works councils were established (Norway 1966), or obtained extended rights (Denmark 1965/1970, Italy 1966, Sweden 1967, France 1968/1982, the Netherlands 1971/1979, Germany 1972, Austria 1974, Luxemburg 1974/1979).²³ Finland mentioned in 1978 in its legislation the possibility to agree on the establishment of a council. Democratising countries embraced the concept of works councils (Portugal 1977, Spain 1980, Greece 1988) or renewed their legislation on the topic (Hungary 1992). Besides these "general" works councils, in many countries there are also various committees composed of employees' representatives for specific purposes, for instance health and

²² The historical information is based on WALTER KOLVENBACH & PETER HANAN, *Handbook on European Employee Co-management*, (Kluwer, loose-leaf); THILO RAMM, "Worker's Participation, the Representation of Labour and Special Labour Courts" in: Bob Hepple (ed.), *The Making of Labour Law in Europe, A Comparative Study of Nine Countries up to 1945*. London/New York 1986, pp. 242-267. pp. 242-260; M. Biagi, "Forms of Employee Representational Participation", in: R. Blanpain & C. Engels, *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, 5th and revised edition, Kluwer, 1993, pp. 315-352, pp. 317-342.

²³ In countries like Germany and France workers were also represented on the board of the larger companies.

safety matters, as well as various forms of Joint committees between employer and employees' representatives, both falling outside the scope of this article.²⁴

In all countries with statutory works councils, they are (at least partly) elected by the employees (albeit that the unions may propose candidates). The same goes for Norway. But in the other countries where works councils are based on agreements (Denmark, Italy and Sweden), the works councils are entirely composed by the unions, reflecting the relatively strong position of the unions in those countries. These countries approach the Anglo-American "one-channel systems" the most. Ireland and Great Britain lack almost any tradition of works councils.²⁵ They maintain a centuries-long tradition of unionism. At the beginning of the twentieth century they followed the Danish example by building up a one-channel system of employees' representation on the work floor by the shop stewards of the union. In the United Kingdom, before World War II some types of works councils existed, but after the war they disappeared. As in the United States, unions and employers in these countries are equally used to adversarial labour relations, in which the underlying principle is a complete independence of union and employer who only meet at the bargaining table. Nevertheless, the Irish Government shows itself since 1974 to be in favour of the concept of works councils, based on voluntary agreements between employers and unions and in some enterprises this system functions. Even in Labour Circles in Great Britain discussions are held on the desirability of introducing works councils.²⁶

2.2. Evolution on a European Union level

Within the European Economic Area, European Works Councils (EWCs) have often been regarded as one possible instrument for coping with the negative side-effects (regime competition, downgrading of working conditions, etc.) of economic internationalisation. Research on EWCs began even before the passing of the first directive in 1994 and its transposition into national law by 1996. Since the mid-1980s, predecessors of EWCs have been founded in French companies and in 1990 the European Volkswagen Konzernbetriebsrat (European Volkswagen works council) was established. Since the mid-1990s, an increasing number of studies concerned with the evolution of EWCs have been published. Concerning the points of interest as well as the theoretical approaches, most EWC research is based on an (traditional) industrial relations framework, analysing processes of interest representation against the background of the capital-labour relationship. With respect to the contents, most of the early research tried to evaluate whether EWCs have been able to become relevant actors despite the fact that the EWC Directive provides only for rights of information and consultation on transnational issues. Thus the conditions influencing the strength of an EWC as an effective in-

²⁴ See for comparisons of the works councils within EU-countries MICHEL GOLD-MARK HALL: *Legal Regulation and the Practice of Employee Participation in the European Community*, Working Paper European Foundation for the Improvement to Living and Working Conditions, no. EF/WP/90/41/EN, Dublin 1990.

²⁵ The same goes for Turkey, but here several committees on specific points are statutorily obligatory.

²⁶ See the report of the Labour Party's Social Justice Commission, *Social Justice: Strategies for National Renewal*, 1994. p. 213, quoted by K.D. EWING, *Democratic Socialism and Labour Law*, 24 *Industrial Law Journal* 2, June 1995, pp. 103–132, 122.

strument for the interest representation of employees was at the centre of the research agenda. The emphasis of most research on EWCs lies on the degree of their strength as interest representation bodies in inter-organisational bargaining with the management side. This focus has led to shortcomings concerning the intraorganisational bargaining between the plant and national representatives on the labour side and with respect to the role of structural organisational conditions.²⁷

Before the introduction of the EWC Directive, attempts to create international rules to protect employees' interests in multinational enterprises failed²⁸. Codes of conduct were promoted without success by the United Nations Economic and Social Council (1972), and introduced by the OECD (1976)²⁹ and ILO (1977),³⁰ however with marginal practical results.³¹ From the very beginning of the European Community in 1957 it was suggested to introduce employee participation on a European level, but firstly in the framework of Company Law. The proposals for the introduction of a European Company (Societas Europaea, SE), included in 1970 the establishment of a European Works Council. It was this issue that kept the discussion going for years. Only after the European Works Council Directive was introduced, was it possible to regulate the European Company as well.³²

Yet, obligations to inform and consult employees' representatives on specific issues were introduced in Directives regarding Collective Redundancies (1975), Transfer of Undertakings (1977) and Health and Safety (1989).³³ The impact of these obligations on European Law was already noted when the European Court of Justice, in June 1994, considered that the United Kingdom had failed in the transposition of the Directives on Collective Redundancies and on Transfers of Undertakings. The transposition failed in this respect that the national legislation did not foresee the consultation of employee

²⁷ DR. MARKUS HERTWIG – PROF. DR. LUDGER PRIES – DR. LUITPOLD RAMPELTSHAMMER: *European Works Councils in complementary perspectives ETUI*, Brussels, 2009, ISBN 978-2-87452-162-1; pp. 7–8.

²⁸ Article 2 of the Additional Protocol of 5 May 1988 to the European Social Charter of the Council of Europe recognises the right of workers (representatives) to be informed and consulted. Article 3 recognises their right to contribute to the determination and improvement of certain personnel matters. These articles, however, do not aim at crossborder employees' representation.

²⁹ Guidelines for multinational enterprises, Annex to the Declaration on International Investment and Multinational Enterprises, 21 June 1976, revised in 1979.

³⁰ Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Geneva, 16 November 1977; see also Recommendations 94 (1952), 129 and 130 (both 1967) and Convention 135 (1977) on aspects of workers' representation.

³¹ R. BLANPAIN, "Guidelines for Multinational Enterprises" in: R. Blanpain & C. Engels (eds.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, 5th and revised edition, Kluwer, 1993, pp. 129–142.

³² GUSTAV J.J. HEERMA van VOSS: *The Directive on European Works Councils in Action, European Company Law*, December 2005, Issue 4, pp. 130–132. pp.[https://openaccess.leidenuniv.nl/bitstream/handle/1887/14802/W2005-5The directive on European Works Councils in Action.pdf](https://openaccess.leidenuniv.nl/bitstream/handle/1887/14802/W2005-5The%20directive%20on%20European%20Works%20Councils%20in%20Action.pdf)

³³ Council Directive of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, 75/129/EEC, [1975] OJ L48/29, replaced by Council Directive 98/59/EC, [1998] OJ L225/16; Council Directive of 14 February 1977 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, 77/187/EEC, [1977] OJ L 61/26, replaced by Council Directive 2001/23/EC of 12 March 2001, [2001] OJ L 82/16; Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, 89/381/EEC, [1989] OJ L 183/89.

representatives in case the employer does not have a recognised union. According to the EC, these two Directives require, in such a situation, national legislation that forces such employers to consult the employees by other means.³⁴

But a general system of workers' participation on the European level had to wait. The Vredeling Proposal of 1980 was heavily opposed by industry, partly because of the so-called by-pass option, which included that the overseas management could be directly approached by the European Works Council.³⁵ But also labour was divided, as a result of the differences in national systems. The breakthrough came at the beginning of the 1990s with the acceptance by the European Trade Union Confederation, after decades of difficult discussions, of the concept of works councils as a framework for workers' participation in Europe.³⁶

The works council Directive of 1994 was also more acceptable for industry, because not only the "by-pass option" was dropped, but also more emphasis was put on the freedom to conclude voluntary agreements on the issue. The pressure exercised by the European Parliament, the Commission and some other governments' gave the decisive push towards the acceptance of the Proposal.³⁷ Also important was the fact that several MNEs had already introduced some form of employees' participation on a European level themselves, either in the form of a European Works Council or otherwise.³⁸

Almost two decades have passed since EWCs surged on to the European stage, and during this period they have received attention from both policymakers and academics³⁹. According to Falkner⁴⁰, it can be seen as "an essential counterpart to the de-regulatory Internal Market Programme", their introduction marked a sea of political

³⁴ EC Judgments of 8 June 1994, Cases C-382/92 and C-383/92 *Commission v. United Kingdom* [1994] ECR I-2461; see Wolf-Dieter Rudolph, Thatchers Alpraum, *Bundesarbeitsblatt* 1/1995, 16.

³⁵ Proposal of 23 October 1980, COM (80) 423 final, [1980] O.J. C 297/3; amended on 8 July 1983, COM (83) 292 final, [1983] O.J.C 217/3. R. Blanpain and others, *The Vredeling Proposal*, Kluwer, 1983.

³⁶ ETUC Executive Committee Resolution, *The European Works Councils on its Way*, Brussels 3–4 October 1991.

³⁷ The so-called Community Charter of the Fundamental Social Rights of Workers of Strasbourg 1989 foresaw in point 17 information, consultation and participation for workers to be developed along appropriate lines, taking into account the practices in force in the various Member States. This should apply especially in companies having establishments in two or more Member States of the European Community. The Community Charter was adopted by eleven heads of state or government of the European Union in 1989, with the United Kingdom rejecting it.

³⁸ See for examples of agreements on European Works Councils Roger Blanpain & Paul Windey, *European Works Councils, Information and Consultation of Employees in Multinational Enterprises in Europe* (Peeters, 1994).

³⁹ See more details: WHITTALL, M., KNUDSEN, H., HUUJEN, F.: *Towards a European Labour Identity – The Case of the European Work Council*, Routledge, London, 2007; WADDINGTON, J.: „*The views of European Works Council representatives*”, *What's the Problem?*, European Trade Union Institute, Brussels, 2005; HANCKE, B.: „*European Works Councils and industrial restructuring in the European motor industry*”, *European Journal of Industrial Relations*, 2000, Vol. 6 No.1, pp. 35–59.; NAKANO, S.: „*Management views of European works councils: a preliminary survey of Japanese multinationals*”, *European Industrial Relations Journal*, 1999, Vol. 5 No.3, pp. 307–25.; WILLS, J.: „*Great expectations: three years in the life of a European Works Council*”, *European Journal of Industrial Relations*, 2000, Vol. 6 No.1, pp. 85–107.; RAMSAY, H.: „*Fool's gold? European works councils and workplace democracy*”, *Industrial Relations Journal*, 1997, Vol. 28 No.4, pp. 314–22. and ROBERTS, J.: „*Where are European works councils? An update*”, *Industrial Relations Journal*, 1993, Vol. 3 No.1, pp. 178–81.

⁴⁰ FALKNER, G.: *EU Social Policy in the 1990s*, Routledge, London, 1998. p. 97.

change and the emergence of social policy making in Europe, signalling a move towards a more Europeanised industrial relations system. The original EWC Directive was approved in 1994. It was one of many policies to be ratified by the Treaty of the European Union.

Beforehand, the EU President, Jacques Delors announced in 1992 that European social policy be fundamental to the success of economic development, describing social regression as unacceptable and urging the EU to consider "social dialogue and collective bargaining [as] essential pillars of democratic society"⁴¹. Later, the Treaty of the European Union (1993) and the Social Protocol encouraged social reform further through the expansion of qualified majority voting provisions and competences, leading to an increase in EU directives.⁴² Emerging from the Treaty were reforms relating to worker information and consultation and the EWC Directive (94/45/EC). Having spearheaded the development of social policy in Europe, the use of multi-level governance enabled the EU to push national governments and apply tighter worker regulations on transnational organisations operating in Europe. The final provision on EWCs was considered a rather "watered-down" version of the original guidelines, with the EU Commission forced to produce a much less restrictive policy if it was to succeed in enforcing a European social dimension⁴³. Indeed, opinion on their implementation is mixed amongst stakeholders. Whilst the European Commission⁴⁴ believes they have been well received, others view their establishment with concern, dubbing the EWC as a "human resource regime", created for managers and not for workers, and aimed at undermining trade union policy⁴⁵.

Originally over 2,000 companies were covered by the Directive but to date, only a third of businesses had a EWC. In terms of employees, this means that approximately two-thirds of the European workforce were affected by the Directive, since many EWCs operate in large MNCs, with smaller firms failing to establish them.⁴⁶

3. Main features of the original European Works Council Directive (94/45/EC)

The Directive 94/45/EC applied to all MNCs operating in Europe and employing a minimum of 1,000 workers with 150 employees working at sites in two or more EU Member States. Its aim was to provide workers with information and consultation and bring together democratically elected employee representatives from all MNC operations across Europe to meet with senior central management. During the meeting, man-

⁴¹ DELORS, J.: "Europe 1992: the social dimension", address to the TUC, Bournemouth, 1992.

⁴² Az Európai Unió szociális dimenziója szerk.: Gyulavári Tamás: Szociális és Családügyi Minisztérium, Budapest 2000. pp. 32–40.

⁴³ FALKNER, G.: EU Social Policy in the 1990s, Routledge, London, 1998.

⁴⁴ European Commission, First Stage Consultation of the Community Cross-industry and Sectoral Social Partners on the Review of the European Works Councils Directive, European Commission, Brussels, 20 April, 2000.

⁴⁵ STRECK, W.: "Industrial citizenship under regime competition: the case of the European Works Councils", Journal of European Public Policy, 1997. Vol. 4 No.4, pp. 643–64.

⁴⁶ European Trade Union Confederation (1999), "Executive Committee – Review of the Directive on European Works Councils", available at: www.etuc.org/EN/Decisions/ecenglish/EWC/9912_EWC.cfm

agement were obliged to provide information to representatives on business-related matters that affect the Company and its workforce, excluding pay and performance schemes. Representatives were required to put forward their comments and views to management on these initiatives and whilst management were expected to listen, there was no legal obligation to undertake decision-making based on employee wishes. In effect, the Directive did not warrant co-determination rights and instead placed emphasis on consultation rather than negotiation. During its initial implementation, a EWC agreement could be arranged by a company under Article 13 of the Directive. This allowed some exemptions from the Directive's Annex to those companies who voluntarily set up a EWC or similar before the original September 1996 deadline. Since that date, those companies who conclude EWC agreements did so under Article 6 of the Directive, with the help of a Special Negotiating Body (SNB). The role of this group of employee representatives was to agree the scope and content of the EWC agreement with management.

The EWC structure followed one of two forms: the French or the German model. Whilst the German model is composed exclusively of employee representatives, the French model allows for joint representation between management and workers, with management predominately acting as EWC chair. At the early stage the existing EWCs, approximately two-thirds have chosen to implement the French system. Providing each council meets the minimum statutory requirements, decisions relating to the function of the forum, such as the frequency of meetings, election of representatives, establishing a sub-committee and communication methods are made by mutual agreement. In 2005, over 60 per cent of all EWCs had a sub-committee in operation, whilst just under 30 per cent outlined training provisions for representatives. A small minority had opted to meet on a bi-annual or more frequent basis. The majority of EWC company agreements outline procedures over and above the minimum standards set out in the Annex, however the type of company agreements in operation were varied, with some offering better mechanisms of employee voice than others.^{47 48}

The EWCs at supranational level were established as a provision of employee voice for workers of MNCs. As part of the EU's attempt at regulating social reform, their aim was to provide collective information and consultation rights to employees. Yet, Directive 94/45/EC offered no explicit role to trade unions in their establishment. Whilst they permitted employee representatives to seek the advice of an "expert", there was no official role for unions on the Council. However, EWC representatives were commonly found to hold membership of both, since union members were often elected by workers to the Works Council. So what do EWCs provided in terms of information and consultation and can consultation ever be meaningful without union involvement? Critics suggest EWCs relied too heavily on management attitudes and prerogatives and gave management unwarranted power over the forum. Success depended largely on management informing and giving staff sufficient time to prepare for consultation. It supposed that

⁴⁷ Eironline (2008), "European Works Councils", available at: www.eurofound.europa.eu/areas/industrial-realtions/dictionary/definitions/europeanworkscouncils.htm,

⁴⁸ Marie Bailey, (2009) "Can you hear us?: The effectiveness of European Works Councils as a mechanism of employee voice for Hungarian workers of Print Co", *Employee Relations*, Vol. 31 Issue 2, pp. 197–218

management will always convey openly and truthfully and that employee representatives will understand fully the level of engagement, and assumes that management will not have made decisions before consulting with staff. In essence, effectiveness was largely based on goodwill and management relations with staff.⁴⁹ Management normally considered EWCs and similar voice mechanisms to be a channel of communication, operating in either a top-down or occasionally a bottom-up direction, rather than a more complex and less linear arrangement involving employees in active discussion.⁵⁰ Two-way communication was often regarded as providing workers with rights beyond the level of consultation, particularly if the outcome elicits change. Management could legitimately override employee wishes without providing a full and satisfactory explanation. In many instances, a grey area seemed to have emerged where information ends and meaningful consultation begins, casting a shadow over management interpretation of what effective consultation comprises. Much of the literature on EWCs made reference to the broad framework under which MNCs have been allowed to set up EWC agreements, highlighting major concerns in their establishment. Communication, national identity, language barriers, training, managerial attitudes as well as union involvement had all proved problematic, prompting concern over their suitability.⁵¹ Staff attitudes equally played a part in their success.

From dogmatic approach, the EWC typology could describe the nature of EWCs by identifying four categories of employee forum:

- 1) symbolic;
- 2) service;
- 3) project-orientated; and
- 4) participative.⁵²

The “*symbolic EWC*” is a body which, despite being formally constituted, does not truly operate. Its activities are usually restricted to annual meetings with central management. EWC employee representatives behave largely passively, leaving management to determine the course of joint meetings. Preparatory or debriefing meetings are not systematically used to build up trust and cohesion within the forum. For structural, organisational or political reasons the EWC is unable or unwilling to obtain information

⁴⁹ WATLING, D., SNOOK, J.: “*Works Councils and trade unions: complementary or competitive?*”, the case of SAG Co, *Industrial Relations Journal*, 2003, Vol. 34 No.2, pp. 206–70.

⁵⁰ TERRY, M.: “*Systems of collective employee representation in non-union firms in the UK*”, *Industrial Relations Journal*, 1999, Vol. 30 No.1, pp. 16–30.

⁵¹ HANCKE, B.: “*European Works Councils and industrial restructuring in the European motor industry*”, *European Journal of Industrial Relations*, 2000, Vol. 6 No.1, pp. 35–59.; LUCIO, M. & WESTON, S.: “*European Works Councils and ‘flexible regulation’: the politics of intervention*”, *European Journal of Industrial Relations*, 2000, Vol. 6 No.2, pp. 203–16.; WILLS, J.: “*Great expectations: three years in the life of a European Works Council*”, *European Journal of Industrial Relations*, 2000, Vol. 6 No.1, pp. 85–107. and MILLER, D. & STIRLING, J.: “*European Works Council training: an opportunity missed?*”, *European Journal of Industrial Relations*, 1998, Vol. 4 No.1, pp.35–56.

⁵² LECHER, W. – PLATZER, H. – RUB, S., – WEINER K.: *European Works Councils: Developments, Types and Networking*, Gower, Aldershot, 2001.

and process it as well as to develop its own information and action resources which go beyond existing national provisions. Trade unions are included only formally, if at all.

The “*service EWC*” is a body for mutual information and support. It functions as a service agency for national workplace - or enterprise - level employee representation by providing additional information obtained at European level, and via cross-border exchange and horizontal communication of (national) experiences. Individual EWC members, who as a rule have fairly good access to resources, function as service providers for those EWC members who have less access to such resources. The service function may include active support to national or local levels of employee interest representation, either through the select or steering committee of the EWC or individual leading figures of the body. Service EWCs are constituted internally to enable them to access, process and forward information with a “European added value”, that is information which would not be accessible without the existence of a European level for information and consultation.

The “*project-oriented EWC*” is a body which defines and carries out projects based on the systematic development of its internal operational and communication structures. It defines its own tasks (projects) which, if necessary, it can implement independently of management. This systematic and strategic approach serves to consolidate and build the EWC, forging mutual trust and experiences of cooperation between members, as well as creating sustainable structures for practical operations – delivering an “institutional added value”. Specific projects, such as the systematic collection and exchange of data related to (national) workplace conditions, social standards, and industrial relations practices, deliver transnational informational resources which can be used in interactions with the central or local management of the company, and which can demarcate and structure new issues for negotiation.

The “*participative EWC*” aims to widen the scope for activity and participation beyond the remit of information and communication to include formally regulated consultative procedures, negotiations and joint initiatives with central management. The gateway to accords and agreements with group management often lies in consensual issues on which joint projects can be initiated or common positions agreed. Negotiations in difficult issues, such as working time, mass redundancy, etc. entail a complete set of prerequisites related to the internal constitution of the EWC, specific constellation of interests and pressures to act which can engender processes of exchange. Participative EWCs are characterised by intensive transnational interactions and the development of a genuinely European level of industrial relations. The activities of participative EWCs, for example, include negotiated agreements on health and safety, equal opportunities, information and trade union rights, Social Charters or even agreements on such “difficult” issues as the protection of employee rights in the case of demergers of suppliers.⁵³

These categories derive from four sets of relationships: 1) management relations with the EWC; 2) national frameworks of IR; 3) trade union relations; and 4) employee

⁵³ BERNDT KELLER AND HANS-WOLFGANG PLATZER: *Industrial Relations and European Integration*, Ashgate Publishing Limited, England 2003. pp. 69–70.

relations.⁵⁴ However, the four types do not represent a strict linear sequence of developmental stages.⁵⁵

Whilst the symbolic EWC describes the forum for management to simply relay information to staff, the participative EWC goes beyond this level and attempts to provide a consultative structure. Its remit includes a part in the decision-making process and the negotiation of agreements using formally recognised procedures, providing employee voice at its most comprehensive level. The participative EWC is by far the best type of forum identified, but more importantly, what Lecher's typology demonstrates is the scale and breadth of EWCs on offer and all identified forums comply with the minimum standards laid down in Directive.⁵⁶

For Hungary, their introduction to the EWC is relatively recent and most Hungarian representatives have entered an EWC that has long been in existence. Accession to the EU in 2004 brought a whole host of new regulations to Hungary, but what makes their position particularly interesting and unique by comparison to other CEECs is their implementation of national works councils ten years prior to joining the EU.⁵⁷ The 1992 Labour Code was not the first experience Hungarian workers had of national works councils. As it was mentioned before, during the communist era, works councils were introduced but received a lukewarm response and were eventually aborted.⁵⁸ The Labour Code (1992) resurrected the works council in an attempt to establish an industrial relations system fit for a market economy. However, their reintroduction did not prompt a favourable response from the trade unions or opposition parties and for some years the powers of works councils and trade unions changed in accordance with the reigning political party.⁵⁹ For organisations, the political "ping pong" which has ensued over the rights and remits of the works council and trade union has caused confusion, and workers often find difficulty in distinguishing the two bodies. According to Tóth (1997) the works council is a "useless bureaucratic duplication of employee representation" and in many organisations they remain inactive forums, with the trade union taking responsibility for both bargaining and consultation. Indeed, a significant number of employees remain in the dark and unaware of their rights at work, not knowing they are entitled to establish a works council at all. Confusion has been compounded further by the number of trade unionists who have been elected as employee representatives to the works council. The strength of the Hungarian industrial relations system lies with the union

⁵⁴ *New frontiers of democratic participation in work* ed. MICHAEL GOLD. Ashgate Publishing limited, England 2003. pp. 58–59.

⁵⁵ BERNDT KELLER and HANS-WOLFGANG PLATZER: *Industrial Relations and European Integration*, Ashgate Publishing Limited, England 2003. pp. 69–70.

⁵⁶ MARIE BAILEY, (2009) "Can you hear us?: The effectiveness of European Works Councils as a mechanism of employee voice for Hungarian workers of PrintCo", *Employee Relations*, Vol. 31 Iss: 2, pp.197–218

⁵⁷ GALGOCZI, B. (2003), "The impact of multinational enterprise on the corporate culture and industrial relations in Hungary", *South-East Europe Review*, Vol. 1 No.2, pp. 27–44.

⁵⁸ ACZEL, J. (2005), "Changes in the role of the trade union in the Hungarian printing industry", *Employee Relations*, Vol. 27 No.6, pp. 568–80.

⁵⁹ TOTH, A. (1997), "The invention of works councils in Hungary", *European Journal of Industrial Relations*, Vol. 3 No.2, pp. 161–81.

movement, although it remains largely ineffective and this is partly blamed on falling membership and a lack of funding.⁶⁰

4. *The new EWC directive: 2009/38/EC Directive*

4.1. The meaning of the European Works Council

According to the new EWC directive, the European Works Council means: a council established in accordance with A) Article 1(2) of directive or B) the provisions of Annex I, with the purpose of informing and consulting employees.

A) *According to the Article 1(2)* 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. According to Article 5 (1) in order to achieve the objective set out 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.

B) *According to Annex I.* on subsidiarity provisions.

1. 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): 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 the new EWC Directive shall be limited to transnational issues.⁶¹

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 concern-

⁶⁰ ACZEL, J.: "Changes in the role of the trade union in the Hungarian printing industry", *Employee Relations*, 2005, Vol. 27 No.6, p.575.

⁶¹ 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.

ing 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 management⁶² 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' representatives⁶³ 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 %, 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.

(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 (content of the agreement) or to continue to apply the subsidiary requirements adopted in accordance with the Annex I. Articles 6 (*content of the agreement*) and 7 (*subsidiarity requirements*) shall apply, *mutatis mutandis*, if a decision has been taken to negotiate an agreement according to Article 6, in which case „special negotiating body“⁶⁴ shall be replaced by „European Works Council“.⁶⁵

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 under-

⁶² According to the new EWC Directive Article 2(1) (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.

⁶³ According to the new EWC Directive Article 2(1) (d), “employees’ representatives” means the employees’ representatives provided for by national law and/or practice.

⁶⁴ According to the new EWC Directive Article 2(1) (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)

⁶⁵ SÉVERINE PICARD: *European Works Councils: a trade union guide to directive 2009/38/EC ETUI*, Brussels, 2010, ISBN 978-2-87452-180-5

taking 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.

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.

4.2. Legal base of the new EWC directive

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.

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

The new EWC 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 Community⁶⁶ 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 redundancies⁶⁷ 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.⁶⁸

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 who are affected by their decisions.

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.

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.

In order to guarantee that the employees of undertakings or groups of undertakings operating in two or more Member States are properly informed and consulted, it is necessary to set up European Works Councils or to create other suitable procedures for the transnational information and consultation of employees. Only dialogue at the level where directions are prepared and effective involvement of employees' representatives make it possible to anticipate and manage change.

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

⁶⁶ OJ L 80, 23.3.2002, p. 29.

⁶⁷ OJ L 225, 12.8.1998, p. 16.

⁶⁸ OJ L 82, 22.3.2001, p. 16.

Council must be distinct from that of national representative bodies and must be limited to transnational matters.

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

Since the objective of the new EWC 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.

The new EWC 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.⁶⁹

4.3. The transposition period

The new EWC Directive 2009/38/EC entered into force on 5th June 2009. From that date Member States had 2 years to transpose the recast EWC Directive into their national law. The laws in force (based on the 1994 Directive) continued to apply during the transposition period. The new provisions came into force after this implementation into national law. In other words the improvements introduced by the recast EWC Directive have been directly and automatically applicable from 6th June 2011. The new Directive has introduced some special arrangements for this transposition period which require particular attention from trade unions and workers' representatives. Any new agreement or Article 6 agreement formally revised/re-negotiated during the transposition phase will continue to operate on the basis of the legal obligations arising from the old 1994 Directive, even after the new laws come into force. Furthermore, whenever negotiation or re-negotiation took place during the transposition period, the parties should be working with the provisions of the new EWC Directive.

4.4. Trade union role in assisting EWC negotiations or renegotiations

According to my view, the information and consultation rights are better defined by the new Directive than in the previous one. EWC agreements are for setting out how

⁶⁹ Article 27 of the Charter of Fundamental Rights of the European Union.

transnational information and consultation should be carried out in big companies. Of course, they can include good practice that goes beyond the minimum standards laid out in the EWC Directive. They cannot decide what the terms „transnational” „information” and „consultation” actually mean in law. However, it is strongly recommended that negotiated and renegotiated agreements should include the definitions set out in the new Directive in their text, as they provide clarity for all concerned. These are for example, *information, consultation and transnational matters*.

Information: means the 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.

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. Consultation should 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.

Transnational matters: 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 undertakings or group situated in two different Member States.

According to recital Nr. 12 of the new Directive (which is also in the preamble to the 1994 Directive), such matters include decisions which are taken in a Member State other than that in which the effected workers are employed and, according to recital Nr. 16, they also 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.

4.5. Exceptional circumstance

On the basis of the subsidiary requirements and the new definitions, EWC agreements should state that where there are exceptional circumstances or envisaged measures potentially affecting the employees' interests to a considerable extent (particularly in the event of relocation, 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 meet the central management, at its request, so as to be informed and consulted (in the sense of the new definitions). Those members of the European Works Council who have been elected or appointed in the establishments

and/or undertakings which are directly concerned by the circumstances or envisaged measures shall also have the right to participate in any such meeting organised with the select committee.

The information meeting should take place at the earliest possible moment on the basis of a written report drawn up by the central management. The information provided must enable workers' representatives to conduct an in-depth assessment of the envisaged measures. During that meeting, workers' representatives and management will agree on a consultation process (timing, experts' role with regard to helping the workers' representatives develop their opinion). On the basis of the agreed timing, the consultation meeting should take place with a view to allow workers' representatives to deliver their opinion and engage in discussions with management. Following the consultation meeting, an additional meeting should take place in order to allow management to respond to the EWC opinion supporting and training employee representatives in EWCs.

However, some employers may try to incorporate a limited time for consultation in the agreement. This is not acceptable. Appropriate information and consultation processes should be decided on a case by case basis depending on the scale of the envisaged measures. It is also important that consultation should not be treated as an obstacle to the decision-making process but as a contribution to effective company decision-making. This is made clear by the new Directive.

4.6. Entitlement to training

New agreements should contain clear rules for the training of EWC members (and SNB members in case there is a new negotiation process following a significant change of structure). The new EWC Directive gives EWC members the right to receive training and be released from work to follow training. Training and related costs should be borne by management. Employee representatives should be able to determine the content of the training, choose the trainers, and decide how the training session will be organised (individually, at national level or at the EWC level). Obligation to inform workers and other employee representatives

4.7. Linking national and European levels of information and consultation processes

The EWC agreement should ensure that national and European levels of information and consultation are linked. More precisely, it is important to note that the new EWC Directive states that the information process at European level should start before or at least at the same time as national processes, in order to guarantee the effectiveness of these processes.

4.8. Adaptation clause

The adaptation clause foreseen by Article 13 of the EWC Directive 2009/38/EC is to apply to all agreements including Article 13 agreements of the 1994 Directive and Arti-

cle 6 agreements which are signed or revised during the transposition period once national laws apply. This clause gives the opportunity for renegotiation of those agreements under the terms of the new Directive but it only applies if those agreements do not already contain provisions dealing with the change of structure or if those provisions are conflicting.

While renegotiating Article 13 or 6 agreements or negotiating new agreements some employers may try to incorporate clauses on the change of structure in order to permanently remove the possibility to renegotiate those agreements under the new Directive. This is unacceptable, and should be avoided by including an adaptation clause equivalent to the wording of the new Directive.⁷⁰

5. EWCs in the new Member States

As it was mentioned, the EU enlargement process extended the geographical reach of the EWCs Directive as companies with operations in the new Member States now fall under its scope. EU enlargement has become in many respects the testing ground for the functioning, efficiency and strength of EWCs. The integration of representatives from the new Member States – a challenging task for nearly two thirds of existing EWCs – already highlights existing weaknesses, problems and structural deficits. Enlargement of EWC structures has added a new quality of regime competition, cultural diversity, differences in tradition and language barriers.⁷¹

Eurofound⁷² carried out a series of ten case studies in four of the NMS: the Czech Republic, Hungary, Poland and Slovakia. Analysis of the case studies reveals that most EWCs are not equipped to deal with the new challenges arising from the growing „regime competition” in economic and social systems and in the field of labour relations. The biggest challenge is the growing significance of Europe-wide intracompany competition, relocation and restructuring. The Eurofound research found that EWCs which have developed a clear, proactive strategy, or at least a clear understanding of necessary tasks, common interests and broad objectives are generally better equipped to deal with these challenges at group and local level than the more passive, „symbolic” EWCs.⁷³

⁷⁰ <http://www.vd.hu/euprojectanyagok/az-europai-parlament-es-a-tanacs-200938ek-iranyelve-8905.html>

⁷¹ The findings of Eurofound research carried out in 2008 on the functioning of EWCs in the new Member States reflects mainstream research carried out earlier in the former EU15 and supports its results.

⁷² Between January and July 2006.

⁷³ A határokon átvívelő párbeszéd üzleti érdeket szolgál, *A Munkaadó Lapja* - 2004/08 (augusztus), <http://munkadoivelek.hu/2004/08/lenduletben-az-europai-uzemi-tanacsok/>

Table 1.

Main differences in the practice of EWC in New Member States

<i>Areas of impact</i>	<i>„Symbolic“ EWCs</i>	<i>„Proactive“ EWCs</i>
<i>Information and consultation</i>	Information and consultation, as well as social dialogue, is seen as a formal practice with no real impact.	Employees are better informed, illustrating the added value of information, consultation and representation of interests.
<i>Industrial relations</i>	EWC members face a legitimacy problem: it is unclear who they exist to serve. EWC may end up undermining the concept of employee involvement and social dialogue. EWC practice might be seen to be determined by management interests.	EWC activity enables learning from good practice and solutions in other company areas, and facilitates skills and competency development in employee representatives. It strengthens the legitimacy of both employee and management representatives and hence the position of the local company within the multinational group.
<i>Corporate cultures</i>	EWC practice simply reproduces the existing balance of power and influence within the company.	EWC practice illustrates the practical benefits of social dialogue and a cooperative company culture.
<i>Company development</i>	Lack of activity restricts any development of joint aims, concepts and strategies at the multinational level.	EWC action enables a better understanding of structural change, and facilitating a joint search for solutions with regard to restructuring and structural change.

Source: Eurofound, *The experience of European Works Councils in new EU Member States, 2007*.

5.1. Key findings with regard to the functioning of EWCs in the NMS

The following points are the highlights of the key findings of the functioning of EWCs in new member states:

a) The structures and institutions of shop-floor interest representation, as well as the cultures of social dialogue and employee participation are quite weak in NMS; however, there is a clear trend towards works-council type models of interest representation.

b) A strong correlation was observed between strong labour relations and stable institutions of employee-interest representation on the one hand, and EWC participation and good practice on the other.

c) There is a clear correlation between early involvement of NMS representatives in EWCs (either as observers or full members) and proactive EWC practice at the headquarters level.

d) All cases of early and intensive involvement in the NMS (e.g. in steering functions) are characterised by relatively strong trade union membership structures and fairly well developed international cooperation between trade unions.

e) A positive management attitude with regard to EWC issues and involvement has a very strong, positive impact on employee representation, social dialogue and labour relations in general.⁷⁴

5.2. Key indicators of good practice

Through the case studies, four key indicators of good EWC practice, in terms of information and consultation as well as the involvement and integration of new EWC members, were identified:

a) a strong labour relations culture and active trade union involvement in EWC business and practice, which also includes support from sectoral trade union organisations and their involvement in the development of concepts and strategies regarding EWC agenda and policy;

b) active support from the EWC headquarters for representatives from the NMS and for measures of active involvement, which should include language training, special training programmes, joint workshops, manuals and EU-funded projects;

c) the integration and embedding of EWC practice in local industrial relations structures and institutions, namely company-wide information, consultation and negotiation processes, integration in other forms of employee interest representation, participation and social dialogue, reporting and communication processes;

d) a participative management culture and active involvement of management representatives in EWC practice, for example through joint preparation and feedback meetings.

The most important challenge in the context of EU enlargement for the functioning of EWCs is the growing significance of European wide intra-company competition for jobs and investment. The potential conflict of interest between different employee groups has to be addressed by European Works Councils which are even more diverse and culturally heterogeneous than before.

Intensified company re-organisation, cross-border relocation and accelerated processes of mergers and acquisition are providing the European Works Councils with new challenges and tests unknown at the time the directive was drafted.

5.3. EWCs and transnational restructuring

As an institution, EWCs were born out of the controversy caused by cases of cross-border restructuring which demonstrated that the information and consultation rights of workers stopped at national borders and were thus ineffectual in these cases.

⁷⁴ Európai Üzemi Tanács: Magyar munkavállalók bekapcsolódása, Munkaadó Lapja – 1998/01 (január), <http://munkaadoilevelek.hu/1998/01/>

It can therefore be argued that how European Works Councils deal with the issue of transnational restructuring is the real test of whether or not they are achieving their stated purpose „to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings”.⁷⁵

Evidence from Eurofound research on restructuring suggests that there is enormous variation in EWC practice in this area, but that relatively few bodies have influenced transnational corporate restructuring in an appreciable way through the exercise of their information and consultation function.⁷⁶

HAJDÚ JÓZSEF

AZ EURÓPAI ÜZEMI TANÁCSRA VONATKOZÓ JOGI SZABÁLYOZÁS VÁLTOZÁSA

(Összefoglalás)

Az Európai Üzemi Tanácsok létrehozására a 94/45/EK irányelv teremtette meg a jog-alapot az Európai Unióban és az Európai Gazdasági Térség országaiban (Izland, Liechtenstein és Norvégia), a legalább 1000 alkalmazottat, és egyidejűleg két tagállamban egyenként legalább 150 főt foglalkoztató vállalkozások és vállalkozáscsoportok számára. Mivel a létező nemzeti eljárások a munkavállalók tájékoztatására és a velük folytatott konzultációra gyakran nem állnak összhangban a vállalkozások nemzetek feletti szerkezetével, igény merült fel a közösségi szintű (szupranacionális) fellépésre. A vezetőség ezeken keresztül tájékoztatja a munkavállalókat, és konzultál velük transznacionális szinten a gazdálkodásban bekövetkezett változásokról és bármely jelentős döntésről, amely hatással lehet rájuk. Az Unió eredeti célja az irányelv elfogadásával annak biztosítása volt, hogy a közösségi szintű vállalkozások munkavállalói akkor is megfelelő tájékoztatást kapjanak, amikor az őket érintő döntés nem abban a tagállamban születik, amelyben őket foglalkoztatják.

Az első Európai Üzemi Tanácsokról rendelkező irányelv (1994) elfogadása óta jelentős változások mentek végbe a Közösségi és a hazai jogalkotásban, a gazdaságban és társadalomban. Ezért elodázhatatlanná vált a régi irányelv módosítása, továbbá a hatékonyabb szociális párbeszéd kialakítása érdekében a korábbinál világosabb megfogalmazásokra volt szükség. Az európai szociális partnerekkel folytatott konzultációt és egy hatásvizsgálat lefolytatását követően a Bizottság 2008-ban javaslatot nyújtott be az irányelv átdolgozására. Ezt az új irányelvet 2009-ben hagyta jóvá az Európai Parlament és a Tanács. A meglévő jogi keret eredményeire építve, az átdolgozott 2009/38/EK

⁷⁵ Article 1.1 of the EWC Directive.

⁷⁶ HANTI ERZSÉBET: *Az Európai Unió munkügyi irányelvek és érvényesítésük a hazai kollektív tárgyalásos gyakorlatban*, Kézikönyv Magyar Szakszervezetek Országos Szövetsége, Budapest 2003. pp. 107–111.

irányelv elsődleges célja a munkavállalók transznacionális tájékoztatásra és konzultációra vonatkozó jogai hatékonyságának biztosítása, az új Európai Üzemi Tanácsok létrehozásának támogatása, valamint létrehozásukkor és működésük során a jogbiztonság biztosítása.

Ebben a tanulmányban a régi és az új EWC irányelvek fejlődési jellemzőit mutatjuk be. Ezt követően röviden kitérünk az EWC irányelvek érvényesülésére az új EU tagállamokban.