

Review, revision or recast?

The quest for an amended EWC Directive

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Introduction

Overdue by nine years, contested by employers and awaited by trade unions, a review of the European Works Council (EWC) Directive 94/45/EC finally became reality. This chapter aims at presenting background information about the positions of the European social partners and other institutional EU actors in order to provide the reader with a better understanding of the outcome of the events of 2008 in this field. First of all we cast our minds back to the 1990s, focusing on the then controversies and approaches of the stakeholders involved in the adoption of the EWC directive. Interestingly, some circumstances and developments before and during 1994 seem very similar to those of 2008. Next, we analyse the main arguments and claims of the European employers' and trade union organisations, with a view to discerning their evolutions and the reasons for some changed stances in 2008.

The focus of the chapter is on analysing the events of the ten months since the European Commission's communication of February 2008 on opening the second stage of consultation with the social partners. In this respect an important question about the nature of the process, whether it was a review, revision or a recast¹, is posed and analysed. It is followed by a general overview of the new elements in the final recast directive on EWCs adopted by the Council on 17 December 2008.

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1. The three terms referring to formal amendments to the Directive on European Works Councils (review, recast and revision) have been used interchangeably in the debate. In this paper (and in the general debate) the term 'revision' has been used as the default word describing the process of introducing changes to the directive. 'Review' is the legal term used in Art. 15 of Directive 94/45/EC, whereas 'recast' did not appear, in the context of the EWC Directive, until mid 2008 in the text of the Commission's proposal to the European Parliament. The differences are discussed in one of the paragraphs of this chapter.

1. The prelude to the EWC directive of 1994

When, after several attempts to adopt a directive on European Works Councils, the consensus among the European social partners turned out to be a moving target, and, in fact, so fragile that a single organisation could swing the pendulum (e.g. the Confederation of British Industry (CBI) in March 1994; see Falkner, 1998: 106), the European Commission, based on new prerogatives set out in the Social Protocol of 31 October 1991, decided to pursue its role of legislator. On 22 September 1994 the Commission adopted Directive 94/45/EC, which was the culmination of political bargaining lasting more than a decade. The fact that each of the social partners attempted to put blame on the other (Ross, 1995: 75) reveals how strained the issue of institutionalising EWCs has been from the very beginning. Interestingly, the fact that the European Commission's new proposal² to the European Parliament was transmitted in a great hurry, as well as that the political acceptance of the Council was ranked much higher than substantial contributions from the European Parliament (Falkner, 1998: 107), opened a parenthesis that was, unexpectedly, to be closed in a very similar way as the events of 2008 leading to the revision (recast).

Since there had been no legislative precedent and only a limited record of voluntary 'pioneering' practices in the form of bodies for transnational information and consultation in some international companies since the mid 1980s (Kerckhofs, 2002: 10-13; Kowalsky, 1999: 174) the legislator foresaw a deadline by which this innovative instrument would be examined and refined where necessary. In Art. 15 of the EWC Directive (94/45/EC) the European Commission undertook to pursue, 'in consultation with the Member States and with management and labour at European level', a review of the directive by September 1999.

2. Proposal for a Council Directive on the establishment of European committees or procedures in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, COM (1994) 134 final, OJ C 135 of 18 May 1994, page 8.

2. The first missed deadline for revision

The year 1999 was supposed to mark an important turning point in the timeline of EWCs, when the first review of their operation according to Art. 15 of the EWC directive would be undertaken.

Ahead of the deadline for commencing formal steps aiming at satisfying the obligation included in Art. 15 of Directive 94/45/EC, the European social partners (ETUC, UNICE and CEEP), with the support of the European Commission, held a conference on 28-30 April 1999 entitled 'European works councils: practice and development' (Hall, 2000). This event revealed the diverging views of labour and employers on the idea of amending legislation on EWCs.

3. Position of the European Trade Union Confederation

Even though the differences between the social partners may not yet have been crystal clear at the April conference, they were soon clarified, at least by the unions. When the European Commission had not undertaken any action in relation to the review by September 1999, the European Trade Union Confederation issued a resolution in December 1999 calling upon the Commission to fulfil its self-imposed obligation (ETUC, 2000: 16-22). The meaning of the ETUC's 1999 position was significant as it included core arguments brought up by the trade unions in the years to come. Contrary to UNICE (EIRO, 1999), the ETUC argued that the then existing 600 EWC agreements represented a sufficient basis for conducting an assessment and undertaking the measures necessary to improve the very right to information and consultation, as well as the working conditions of EWCs. On the former point, according to the ETUC, what required special attention in view of earlier experiences (especially the Renault Vilvoorde case of 1997) was the crucial question of the timing of information and consultation. The ETUC demanded that information 'must be comprehensive, provided in good time and given on an ongoing basis' and that its 'timing, form and content must enable employee representatives to examine in detail repercussions of a proposed measure, allowing consultations' (ETUC, 2000: 17). It was stressed in this regard that workers' representatives on EWCs were often not consulted, but simply presented with a *fait accompli*, especially in respect of poor information about restructuring measures (EWCs had been finding out mainly from the

press). The ETUC also called for the right of EWCs to be informed of management opinions on *planned* measures (i.e. communicated before being implemented) as a part of a meaningful consultation. It was, however, not only the legal criteria defining information and consultation that were in the spotlight, but also guarantees on how to make these entitlements practicable. Therefore the European trade unions also insisted on guaranteeing that information was disseminated in writing and in all languages in order to avoid obstacles to understanding on the part of representatives from different countries.

Concerning improvements to other facilities at the disposal of EWCs, the ETUC asked, among other things, for the recognition and inclusion of representatives of European Industry Federations (EIFs) in Special Negotiating Bodies (SNBs), and a lowering of the thresholds (of employees) governing the application of the EWC directive (*ibidem*). Moreover, access to company sites for EWC members was considered a necessary improvement for EWCs. It was also argued that EWCs should be guaranteed the right to preparatory and follow-up meetings and better access to trade union experts.

Finally, based on the infamous court case concerning Renault Vilvoorde³, the ETUC argued that the Commission should officially recognise the most important sanction, stemming from the body of the directive: namely that business decisions taken without consultation were null and void.

4. The employers' organisations

Contrary to the ETUC's approach in terms of campaigning for the revision of EWCs as from 1999, initially until roughly 2004 the European-level employers' organisations were much more unforthcoming about adopting official political resolutions. At the same time the employers' views on EWCs have been evolving over the years: back in 1994 the directive was adopted against their will, whereas finally in 2007 (BusinessEurope, 2007) EWCs were recognised by them as a useful instrument.

3. Interim ruling 4 April 1997 in B.O. 97/00992 of the Tribunal de Grande Instance of Nanterre, Cour d'Appel de Versailles, 7 May 1997.

In general, until the beginning of 2008, the attitude of the employers' organisations towards the revision had been consistently negative and critical. First of all, in 2003 UNICE announced its official response (UNICE, 2003a) to the 'Commission Communication on the Mid-Term Review of the Social Policy Agenda' (CEC, 2003). In this document the European employers' organisation declared itself 'strongly opposed to (...) consulting the social partners on possible revisions of existing directives or amending and complementing EU social directives as is envisaged for the directives on European Works Councils (...) ' since it 'would send the wrong signal at a time where new member states' efforts should focus on effective implementation of the existing legal *acquis*'. This stance was reaffirmed several times: two months later by Jacques Schraven, Vice-President of UNICE, at the Tripartite Social Summit (UNICE, 2003b) and by Dr Jürgen Strube, President of UNICE, one year later during the Tripartite Social Summit in Brussels (25 March 2004; UNICE, 2004a)⁴. In UNICE's Answer (UNICE, 2004b) to the First-Stage Consultation of the European Social Partners on the Review of the European Works Councils Directive (CEC, 2004), the opening remark states that 'UNICE is strongly opposed to a revision of the EWC directive' and considers 'the best way to develop worker information and consultation in Community-scale undertakings is through dialogue at the level of the companies concerned'. According to UNICE the main challenge for EWCs was not restructuring (as stated by the Commission in its communication of 2004), but EU enlargement and the integration of representatives from the New Member States. This line of argument was also sustained in the years thereafter: in 2005 UNICE's response (UNICE, 2005) to the Commission communication on Restructuring and Employment (CEC, 2005), the organisation remained 'convinced that launching it was neither desirable, nor necessary'.

As steps by the European Commission towards a formal legislative revision of the EWC directive were becoming more concrete and decisive, the language of the employers' organisations was becoming more and more radical. In UNICE's response (UNICE, 2005) to the communication opening the second stage of public consultation (CEC, 2005), the

4. 'The EU institutions should avoid proposing (...) unnecessary revisions of existing legislation such as the European Works Council directive or new legislation such as the directive on data protection'.

employers stated that since ‘dealing with consequences of restructuring operations is by definition a matter for local players (...) trying to prevent or limit restructuring by tightening the regulatory straitjacket around the business would be counterproductive’. Since EWCs were considered part of the proposed ‘regulatory straitjacket’, UNICE reaffirmed that it remained ‘convinced that launching it was neither desirable, nor necessary’. Equally indicative in this regard was a motion of Group 1, representing the employers, at the European Economic and Social Committee (EESC), submitted in 2006 on the occasion of a plenary vote concerning an opinion on European Works Councils (EESC, 2006): the employers stated, among other things, that ‘the potential of European Works Councils cannot be increased by modifying the EWC directive and extending its scope. Rather, the parties involved at company level must be left free to address their individual requirements on a customised basis. Hereby they adapt European Works Councils to new developments and globalisation. This is only possible in the existing flexible framework, not through further restrictive legislative provisions’.

Similarly, after the change of name from UNICE to BusinessEurope in 2006, its President Ernest-Antoine Seillière⁵ assessed the Commission’s possible re-launch of the EWC revision as ‘pretty worthless’ and said that such an approach of ‘forcing things or speeding things up in this area is a waste of time’. The same year, BusinessEurope General Secretary Philippe de Buck described revision of the EWC directive as potentially harmful to the Lisbon Agenda’s goals of growth and employment (BusinessEurope, 2007). He furthermore expressed approval of his organisation’s ‘successful (...) avoiding [of] a revision of the EU legislative framework’ in this area.

5. 2008: the final phase in the quest for an EWC revision

After so many years of waiting and in view of such widely differing positions between the European social partners, the European Commission was torn between, on the one hand, a clear expectation or obligation imposed by the European Parliament and the EESC and, on

5. *Bulletin of the European Union*, No.9524, 16 October 2007.

the other, the stance of representatives of the European business world, who objected to any new legislative burdens being imposed on them.

Despite the contradictory expectations, the Commission announced in October 2007 in its *Work Programme for 2008* (CEC, 2008a) that a revision was scheduled for 2008 to bring the EWC provisions into line with other acts, with the aim of reinforcing the role of EWCs in anticipating and monitoring restructuring operations. The motive behind this decision was most probably political and pragmatic: the Commission presumably spotted that at the end of its term of office its performance in the social field will be assessed.

Whatever the reasons for it, this announcement augured well and gave renewed hope to advocates of the EWC revision.

The ETUC's reviewed position

In view of the modified circumstances the ETUC's Executive Committee swiftly, in December 2007, adopted a document on its reaffirmed strategy for the revision. The main goal in the existing political scenario was to push for the directive to be revised before the end of 2008. This particular deadline was calculated based on the fact that after December 2008⁶ it would not be possible to reintroduce the revision into the Commission's agenda (as June 2009 will be the end of the Commission's term of office and the date of new EP elections). Another important realisation, based on earlier statements by BusinessEurope, was that the employers might want to play for time and delay the process, so that it would not be feasible to complete the revision by December 2008. In this context the ETUC reaffirmed its demands, focusing the revision strategy around four key political priorities:

- a) better definitions of information and consultation rights, upgraded to the same level as guaranteed in other existing acts of the *acquis communautaire*;
- b) increasing the number of EWCs by means of i) reduction of the employment size thresholds for application of the EWC directive

6. EU Council meeting on 15-18 December 2008; second half of 2008 under the French Presidency of the EU.

(from 1000/150 workers to 500/100) and *ii*) elimination, or at least reduction, of the barriers to setting up EWCs. The latter claim covered demands to resolve legal uncertainties and inconsistencies (shorter period for negotiations, better definition of a controlling undertaking, procedure for renegotiations of agreements);

- c) improvement of working tools and conditions for EWCs and SNBs (training, two meetings a year, better provisions for expert assistance, provisions for exceptional meetings, interpretation and translation of documents, gender balance, new topics for EWCs and access to workplaces);
- d) recognition of the role of trade unions.

Additionally, the implications of the Charter of Fundamental Rights, recognising entitlement to information and consultation as fundamental rights, and EU Directives 2001/86 and 2002/14 offering higher standards of information and consultation, as well as the consequences of ECJ and national jurisprudence for EWCs were highlighted as the main factors making the revision indispensable.

On the employers' side no similar document presenting a renewed position on the forthcoming EWC revision was made public until they issued their official response to the Commission's communication (CEC, 2008b).

The European Commission's proposal for a revised EWC directive

In February 2008 the Commission finally published a communication (CEC, 2008b) opening the second stage of consultation on the revision of the EWC directive⁷. The European Commission's leading motive for revisiting the revision was the 'renewed Lisbon strategy' as well as the 'better regulation' programme, in that 'it emphasises the need to adapt legislation on European works councils to take account of the new economic and social necessities, particularly in the light of the increase in the number and scale of transnational restructuring operations' (CEC, 2008b: 3).

7. In fact, by publishing the above Communication the EC indirectly recognised its earlier legal error committed in March 2005, when the Commission claimed to have opened the second stage of consultation on EWCs in a legally appropriate manner by means of publishing the Communication 'Employment and Restructuring' (see above in this chapter).

All in all, from the perspective of progress in terms of objectively better rights for EWCs, the proposal was a small step, but it was a step forward and in the right direction. Generally, it aimed at better defining the core of EWCs' operations, i.e. information and consultation rights, as well as at equipping these bodies with better facilities to ensure a more effective representation of employee interests. On the other hand, though, reading through the preamble to the directive and seeing the expectations and tasks laid upon EWCs in terms of contributing to company policies on handling restructuring in a socially responsible way, one gains the impression of a serious mismatch with the tools and facilities guaranteed for these bodies. Obviously, the proposal corresponded to and also mirrored the political state of affairs and the lack of agreement between the social partners, described above. Therefore it seems self-evident that it was drafted in a moderate and balanced way to enable further compromise between the social partners.

Review, revision or recast?

The three terms referring to formal amendments to the Directive on European Works Councils (review, recast and revision) being used interchangeably in the debate are not synonymous. In fact, each of them bears a slightly different legal meaning, which in 2008, when the much discussed and eagerly expected 'revision' (used even by the Commission in its communication of February 2008; CEC, 2008b) was downgraded to a 'recast', turned out to have serious implications for the process of adopting the amendments and its final outcome.

The most important differentiation is between 'recast' and 'revision'. The latter is a more comprehensive term indicating the possibility of all the eligible EU institutional actors without any restrictions making amendments to an unlimited number of provisions of the EWC directive. 'Recast', on the other hand, is a strictly defined category of legislative proceedings that imposes certain limitations on the European Parliament (and the Council), by committing it to work only on those provisions which the Commission had changed and debarring the Parliament from consideration of those not amended in the proposal. According to the Interinstitutional Agreement of 28 November 2001⁸ and Rule 80(a) of

8. Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, OJ C 77, 28 March 2002, pp.1-3.

the European Parliament's Rules of Procedure, a recast procedure is applied if several acts regulating the same matters overlap and need to be integrated into one single regulation:

'In that context, where a substantive amendment has to be made to an earlier legal act, the recasting technique permits the adoption of a single legislative text which simultaneously makes the desired amendment, codifies that amendment with the unchanged provisions of the earlier act, and repeals that act' (Interinstitutional Agreement, Recital 5).

With regard to the EWC legislation this was the case only to a limited extent, as just Directive 94/45/EC⁹ and one short, technical amendment (Council Directive 2006/109/EC of 20 November 2006) comprise content-related acts regulating the field.

Apart from the formal suitability of the recast procedure, more importantly, it had serious implications for the scope of the legislative competence of other European institutions involved in the process. In this context, the move by the Commission to change a standard revision procedure into a recast was, from a political and pragmatic point of view, a smart and effective approach aimed at cramming the whole complex process into a limited timeframe. For the Commission the benefits were twofold: a) a recast limited the scope of new amendments that could be proposed in the European Parliament; b) it excluded any possibility that the Council may backtrack or weaken the original proposal.

Formally, the European Commission was entitled to opt for the recast procedure, as it is possible to argue that the changes considered by the Commission were 'substantive amendments'. Additionally, according to Art. 15 of the EWC directive, the Commission was not bound by any specific procedure following the 'review', but was merely committed to proposing amendments where it deemed them necessary. Since the Commission abided by this obligation within the recast procedure, there is little basis for criticism of its approach on formal grounds. Nonetheless, this serious constraint on the powers of the European

9. Since Directive 97/74/EC merely extends Directive 94/45/EC to the UK and Ireland, it does not represent a different act in terms of content.

Parliament triggered a wave of disapproval from MEPs¹⁰ feeling that the recast could not be considered as satisfying the requirement of Art. 15 of the EWC directive, and thus a full revision should still follow in the years to come. On the other hand, none of the other political actors involved in the process decided to openly express doubts concerning the legality of the recast replacing a much hoped-for revision.

Finally, what remains to be settled is the discrepancy between ‘review’ and ‘revision’. Already in 1999, when only a revision was being considered, a rather substantial ambiguity of the text of Directive 94/45/EC concerning the nature of the ‘review’ surfaced.

Art. 15 of the said act mentions a review of the operations of EWCs (with a particular focus on thresholds of applicability for the act) ‘with a view to proposing suitable amendments to the Council’. As a consequence of the reference to possible rectifications to the legal text, the term ‘review (...) with a view to proposing (...) amendments’ was soon replaced by ‘revision’. This evolution was justified to a certain extent, though not exactly right in legal terms according to the Better Regulation Glossary (CEC, 2008a). The ambiguity of both the true nature of Art. 15 as well as the rather hazy distinction between ‘review’ and ‘revision’ contributed to the latter term coming into common parlance and gradually ousting the form of words originally used in the directive.

In this way the linguistic juggling with terms at the end of the 1990s and the conversion of the original relatively modest term ‘review’ into a somewhat inflated ‘revision’ finally resulted in the downgrading to a ‘recast’, with all the attendant legal consequences.

6. Reactions of the social partners

The key question contained in the February 2008 communication was whether the European employers’ and trade unions’ organisations

10. This criticism was to be found in some speeches made during the debate on 15 December 2008 preceding the final voting in the plenary of the European Parliament on its report on the EWC recast, e.g. those by MEPs Elisabeth Schroedter (Group of the Greens/European Free Alliance), Jean Louis Cottigny (PSE), Harald Ettl (PSE) and Steven Hughes (PSE) during the debate in the European Parliament, 15 December 2008.

wished to embark on negotiations. Within the prescribed six weeks, i.e. on 2 April 2008, BusinessEurope notified the Commission in a short letter that it was looking forward to commencing negotiations with the ETUC (BusinessEurope, 2008a).

Most probably, just like the trade unions belonging to the ETUC, employers' organisations affiliated to BusinessEurope engaged in heated internal debates about the official response, as various views on the right strategy were surfacing. For instance, the CBI, representing British business interests in Brussels, announced in its Lobbying Brief (CBI, 2008) that 'The [Commission's] consultation document contains a number of potentially unwelcome proposals (...)'. Similarly, the German Employers' Confederation (BDA) sent a letter to Commissioner Špidla on 10 October 2007, signed by BDA President Dr. Dieter Hund, attempting to block any progress with the revision of the directive. Finally, however, by means of a consensus (a qualified majority vote), it proved possible for the authorities of BusinessEurope to adopt a common response.

As regards the ETUC, it welcomed the European Commission's proposal for the long overdue revision of the EWC directive. The Confederation also expressed its hope that the revision process would be successfully completed under the French Presidency of the Council of the European Union, i.e. by 31 December 2008.

However, as for BusinessEurope, the reply was not straightforward for the European unions' organisation either. The main question for the trade unions was how to react to BusinessEurope's change of position on the EWC revision. The ETUC feared that BusinessEurope's willingness to enter into negotiations might have been just an attempt to play for time and prolong the negotiations beyond December 2008 and the term of the French Presidency, favourable to this dossier (ETUC, 2008a). Therefore the ETUC responded that its 'main objective is to see action to revise the directive during the lifetime of this European Commission and this Parliament', and thus the European trade unions were 'ready to negotiate but only on a basis which includes a tight timetable and a quick conclusion to the negotiations' (ETUC, 2008b). In plain language the latter formulation meant negotiations with a set of preconditions. This was a rather unexpected move from an organisation which has always called for a revision: at a decisive moment it decided to engage in negotiations only on certain initial

conditions. Consequently, the ETUC, BusinessEurope and the Commission met several times to agree upon the method of negotiation (e.g. Euractiv, 2008), but it proved impossible to reach a compromise, as the ETUC's conditions appeared unacceptable to BusinessEurope (ETUC, 2008a).

Not having initially managed to arrive at a formal agreement on commencing negotiations in line with the procedure set out in Art. 138 of the EC Treaty, on 29 August 2008 the European social partners – namely ETUC, BusinessEurope, the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME) and the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP) – following suggestions from the French Labour Minister Xavier Bertrand in charge of social issues under the French Presidency of the EU, decided to issue some Joint Advice to the Council (29 August 2008). This document represented a common position on the following points:

- improved definition of information and consultation upgrading the existing wording to the standards of the SE directive (2001/86/EC);
- recognition of the right of ‘representatives of competent recognised Community-level trade union organisations’ to assist negotiations for establishment of EWCs within the Special Negotiating Body (SNB);
- entitlement of EWCs ‘to collectively represent the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings’;
- guarantees of training without loss of wages for members of EWCs and SNBs;
- simultaneous information and consultation with EWCs and with national employee representation bodies in cases of substantial changes in work organisation;
- exceptional¹¹ status of the pre-directive agreements (so-called Art. 13 agreements) and its continuation under the revised directive.

11. Art. 13 agreements signed before 22 September 1996 (and in the case of the UK and Ireland before 15 December 1999) are exempt from the scope of Directive 94/45/EC.

This document drawn up by the social partners, even though voluntary and by no means binding in that it was not conceived within the legal framework of Art. 138 EC Treaty, was an important contribution to the revision. It not only facilitated a fast-track procedure at the European Parliament, but has also probably been crucial for coalition building in the Council. Finally, even if the points agreed upon by BusinessEurope and the ETUC were a modest compromise, they represented unquestionable progress in comparison to the current text of Directive 94/45/EC and might help in improving the functioning and establishment of new EWCs.

7. The new EWC directive

Less than a year after the launch of the legislative process in February 2008 (CEC, 2008b) the recast directive was adopted by the Council of the European Union on 17 December 2008¹². Its approval on the very next day after the adoption of the report by the European Parliament (2008/0141(COD)) was possible thanks to an agreement reached during a trialogue meeting on 4 December 2008 (European Parliament, European Commission, Council) and based on the Joint Advice of the social partners.

Even though the changes to the Commission's proposal put forward by the European Parliament and adopted by the Council were limited in scope due to the application of the recast procedure and, indirectly, by the Joint Advice, they were not meaningless. Firstly, an explanation to Recital 16 was added, shedding light on how to interpret the key definition of the 'transnationality' of EWCs' competence and entitling employee representatives themselves to assess it. Secondly, the MEPs also added at their own initiative recital 36, referring to the contentious sanctions for breaches of the directive, as well as a guarantee in Art. 10 ensuring the '*means [for EWCs] required to apply the rights stemming from this directive*'. Importantly, it furthermore clarified the obligation of management to provide EWC members with training (Art 10.4). In this way the Parliament managed to make its own distinctive contribution

12. Provisional reference of the new recast directive: P6_TA-PROV(2008)0602 (European Parliament, 2008).

beyond the political agreement imposed on it by the Joint Advice of the social partners.

All in all, the new directive represents major progress in some areas in comparison with the present legislation.

First, the motives for the recast are given in Recital 7, comprising ‘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 (...) and remedying the lack of legal certainty resulting from some of its provisions or the absence of certain provisions’ as well as a better link with other EU acts on information and consultation (see also Recital 21). These aims will also represent the criteria for assessing the efficacy of the recast directive.

Furthermore, the core competences and *raison d’être* of EWCs, information and consultation, are addressed and amended by the new directive. Altogether 8 recitals and Art. 2 refer to these key concepts highlighting, above all, the need to ensure the timely nature of information and consultation, as well as the need to ensure that they neither limit nor hamper the management’s competences nor slow down decision making processes in companies (e.g. Recital 22, Arts. 1.2, 2.1(g)). Most importantly, however, the definitions have been changed. With regard to information, the stress is laid, on the one hand, on its comprehensiveness and quality, enabling employee representatives appropriate scope for examination, and, on the other, on the timing (*proposed* measures, i.e. not decisions already taken) and the means of allowing for preparation for consultations. The definition of consultation has been supplemented by the entitlement for employee representatives to present opinions to management. These important changes, and especially the addition of the emphasis on timely information and consultation, should be analysed in the context of the general principle of shunning unnecessary delays in companies’ decision-making processes. These two elements together seem to put even greater emphasis on the timely conveying of information by management, which is obliged to transmit it to the EWC at a stage early enough for employee representatives to analyse and prepare for consultations. The supreme rule of avoiding hold-ups in decision-making means, far more,

an obligation for management to include information sharing at the earliest possible stage, rather than a means to circumvent or disregard information and consultation competences due to the requirement of making quick choices. Only by interpreting the amendments in this way is it possible to ensure that the spirit and *effet utile* of the directive are respected. Last but not least, one should mention that in the Subsidiary Requirements (Annex) a differentiation has been introduced between items on which the EWC should be informed and those which will require consultation (Annex Art. 1(a)).

Another new element in the directive is the obligation of the central management of a Community-scale undertakings and of the local managements (boards) of undertakings to transmit information required for commencing negotiations for an EWC (in particular information about the structure of the undertaking or group and its employees). This is a key upgrade and a facility aimed at raising the number of EWCs. The origin of this amendment is court cases where the European Court of Justice ruled in favour of employee representatives suing managements for withholding of this kind of data¹³.

Additionally, an important provision has been inserted concerning the composition of a Special Negotiating Body (SNB) which now introduces, in fact, a minimum number of ten members (one for each 10 % or fraction thereof of the workforce employed in a Member State). In recognition of the role of trade union (and employers') organisations an obligation to notify their European competent structures was introduced. Their participation in the negotiations will make it possible to monitor the establishment of new EWCs and promote best practice, which they have in fact been doing for many years now (European Industry Federations coordinating existing EWCs and assisting in the establishment of new ones; ETUI and the Social Development Agency compiling databases of EWCs). Apart from these two functions trade union representatives will also have the scope to act in the capacity of experts to SNBs (Art. 5.4).

Further, a new provision has been added in paragraph 4 of Art. 5 empowering EWCs to hold a follow-up meeting without management. This

13. Court cases: ADS Anker (*Betriebsrat der Firma ADS Anker GmbH v ADS Anker GmbH*; Case C-349/01), Bofrost (Case C-62/99) and Kühne & Nagel (Case C-440/00).

important facility will enable EWCs to openly discuss the content and quality of the plenary meeting and draw up strategies and action plans on the basis of information received from management.

As far as the mandatory content of the agreements is concerned, new elements have been added too. Firstly, the representation of employees in an SNB should reflect their various activities, categories and gender (Art. 6.2(b)). This provision clearly aims, on the one hand, to heighten the quota of women in transnational employee representation bodies, but also, on the other, seems to be a response to claims from CEC (the European Managers' Organisation) for the proper inclusion of managers and representation of their interests within EWCs. Furthermore, once the new directive enters into force it will be obligatory to include contractual provisions on linkages with national information and consultation bodies (Art. 12). The legislator chose to respect the principle of subsidiarity and the autonomy of contracting parties in terms of selecting the best arrangements for cooperation between EWCs and national employee representation levels (Art. 6.2(c)). At the same time, however, some doubts arise as to whether this question's EU-wide nature does not make it an issue for a Community-scale instrument such as a directive. The new directive does indeed contain an obligation on the Member States to guarantee proper fall-back provisions that apply by default where no arrangements were adopted in the EWC agreement (Art. 16), but it remains to be seen how this matter will be handled in EWC agreements and how effective these arrangements will prove to be overall. It seems, however, that this area might represent quite a challenge for parties to regulate in a precise way, as various practices and regulations concerning national-level information and consultation bodies (e.g. works councils) are already in place. Last but not least, arrangements for amending or terminating the agreement (Art. 6.2(g)) and the cases in which the agreement should be renegotiated (including changes of structure of undertaking) will need to be an inherent part of the agreements. The latter amendment is important to avoid signing accords not containing any procedures on renegotiation or termination, and thus not allowing (or making it very difficult for) such an agreement to be challenged in cases where its suitability is no longer guaranteed.

In Art. 1.2 an explanation, albeit only of a general nature, of transnationality is given, identifying such matters as ones with relevance for the whole Community-scale undertaking or at least two establishments

or undertakings. Recital 16 extends this scope by stating that transnational character should be determined by taking account of both the scope of potential effects of the matter and the level of management and representation it involves. It would seem very important that the actual potential effect on the entire workforce is also to be taken into account as a criterion for specifying EWC transnational competence. Similarly, Recital 12 suggests that the transnational competence of EWCs should be interpreted extensively by stipulating that ‘employees of Community-scale 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’.

EWCs’ competences are not only better defined in the new directive, as in Art. 1.2, but are also extended by Art. 12.1 to the area of collective representation of employees’ interests. This provision will help clarify the issue of EWCs’ ability to act in court in cases of legal conflict. Hitherto, some EWCs have experienced difficulty (e.g. the case of P & O at the Conciliation Council in the UK) in being recognised as parties entitled to participate in legal or administrative proceedings. The new provision of Art. 12.1 should exclude such a risk in future and allow EWCs better access and a more effective means of defending their rights. It also seems that the EU legislator managed to introduce this competence without granting EWCs a general legal personality, which could cause conflicts in some countries where trade union organisations are often still the traditional representative agent of employees. By that means, however, clarity (i.e. an explicit, EU-wide granting of legal personality to EWCs) was sacrificed to flexibility and the capacity to accommodate different national traditions. From this point of view, the indirectly granted quasi-legal personality of EWCs, subject to national transposition and all the attendant risks connected with it, might in future cause doubts and confusion in practice. Yet it can easily be argued that the trade unions’ traditional monopoly (in terms of their unique legal mandate to represent employees’ interests) should not hinder the exercising of, and capacity to defend, the fundamental rights to information and consultation by European Works Councils in court. In recognition of the need to realise the aim of the directive as well as to respect its spirit and *effet utile*, the vaguely formulated legal personality of EWCs should be interpreted extensively as in fact granting them the necessary legal capacity to act, not as a collection of individual private persons, but as a fully-fledged ‘legal person’ collectively representing employees’ interests.

Rightly, these new competences have been secured by guaranteeing the means to apply the rights stemming from the new directive (Art. 10.1). The general provision obliges managements to provide such means not only to the EWC as a whole, but to its members. This rule, read in conjunction with Art. 10.2, as well as combined with the obligation to give feedback to employees in constituencies at national level (Art. 12.2 and Recital 33) represents a fairly powerful guarantee and a strengthening of EWC tools. It is not out of place to argue that EWCs (and their members) will now have the right to organise meetings at undertakings they represent, aimed at reporting back about the debates and actions taken during the last EWC meeting. As far as the list of EWC facilities is concerned, it should be noted that a formal entitlement to be '*provided with*' training without loss of pay was also introduced. This represents another important achievement since EWC members often not only suffer from language barriers, but also fall short on understanding and using economic and financial information conveyed by management. In future, where necessary, they will be offered relevant training.

Finally, one of the most controversial elements of the directive, agreements already in force (Art. 13 pre-directive agreements and Art. 6 agreements), was tackled in the new Arts. 13 and 14. Art. 13 now includes the possibility of adapting the structure of an EWC and its agreement in cases where the structure of an undertaking changes significantly. It also covers situations where no such arrangements are in place as well as when conflicting regulations would apply (e.g. in the case of a merger or take-over between companies with EWCs). In the latter case the provisions of Art. 13 represent a guarantee for EWCs of smaller companies taken over that they will not be simply sucked in by the relevant body of the new undertaking, but that they will instead have the possibility to launch new negotiations. Importantly, the directive furthermore guarantees now that EWCs will continue to operate during such negotiations, thereby ensuring their continuity and legal certainty. At last, as far as currently existing agreements (old type Art. 13 and Art. 6) are concerned, the employers' organisations have achieved a guarantee that those agreements will remain untouched and exempted from the scope of the new recast directive. This was one of the employers' priorities, and for the trade unions represented a certain sacrifice or necessary concession in the political horse-trading. It is indeed a pity that all agreements signed before the implementation of the new directive will not be covered by the positive changes it introduces.

On the other hand, however, it is an achievement that those new, more favourable provisions of Arts. 13 and 14 will facilitate renegotiation of the previously exempted agreements. This is a major improvement and a window of opportunity for the 'pre-directive' EWCs to renegotiate or revise their agreements, and to either conclude new ones or, in case of failed negotiations, to base their operation directly on the directive.

Conclusion

The positive outcome of the recasting of the EWC directive is, despite all the criticism, an important step forward in comparison to the current Directive 94/45/EC. By setting out the very divergent positions of the European social partners, this chapter has sought to provide background information that might help the reader to make a proper assessment of the recast directive. It has seemed obvious from the very beginning that any compromise between the trade unions and employers on new solutions would be very difficult and that their initial arguments and claims would be exposed to political horse-trading. The process was, however, much more exciting than the mere waiting for subsequent concessions on each of the sides. With BusinessEurope changing its mind about the revision and the ETUC refusing to negotiate, the process took on a fresh momentum which, quite unexpectedly, brought both parties to an informal negotiating table and to agreeing upon their Joint Advice to the Council. On the other hand, the changed status of the initiative from revision to recast, carried out by the Commission, had serious implications for the work of the European Parliament and the Council. Quite extraordinarily, the recast was adopted in a series of legislative acts, with the European Parliament adopting the report on 16 December 2008 and the Council approving the new directive on the next day. Such a pace of legislative activity in EU is not usual, and the fact that the whole process was completed within ten months is definitely to be regarded as a good result.

Of course, as the saying goes, 'compromise will never win a beauty contest', but, as the last part of this chapter attempted to briefly show, the legal basis for the operation of EWCs is more solid than the current one. It should not be forgotten, however, that any revision will after all create 'only' a framework, an institution of law, which subsequently requires fleshing out with effective solutions in practice. It remains to

be seen what the tangible implications of those provisions will be at the national level and, more importantly, how will they be introduced into the practices of EWCs.

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