The directive on European Works Councils in Action

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The Directive on European Works Councils in Action

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After 25 years of discussion, the European Community in 1994 finally agreed upon a Directive on information and consultation of employees within Community-scale undertakings, the EWC-Directive.[2] The Directive introduced a system in which it may take many years before a European Works Council in a company is finally established. Now, ten years later, the time has come to make a first evaluation of the effectiveness of the Directive. This article is partly based on the country reports published in this Journal on Austria, Belgium, Germany and the Netherlands.

1. History

History on a national level

Works councils were invented in Germany at the end of the nineteenth century, soon followed by other countries such as Italy and the Netherlands.[3] "Enligthened" 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 "Betriebsrätegesetz" (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 first were opposed by the unions, but later accepted by them and used to obtain more influence on the shop level. The 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).[4] 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 many countries also know various committees composed of employees' representatives for specific purposes, for instance health and safety matters, as well as various forms of joint committees between employer and employees' representatives, both falling outside the scope of this article.[5]

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

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2 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, [1994] O.J. L254/64. The Directive was based on the Social Protocol annexed to the Maastricht Treaty which excluded the United Kingdom. In 1997 the United Kingdom accepted the Directive as well, which led to a revision of the Directive, Directive 97/74/EC, [1997], O.J. L10/22.

3 The historical information is based on Walter Kolvenbach & Peter Hanau, *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, 242-267, 242-260; M. Biagi, "Forms of Employee Representational Participation", in: R. Blanpain & C. Engels, *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Vth and revised edition, (Kluwer, 1993), 315-352, 317-342. *See* these books for more detailed information.

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

5 *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 of Living and Working Conditions, no. EF/WP/90/41/EN, Dublin 1990 and A.M. Koene/H. Slomp, *Medezeggenschap van werknemers op ondernemingsniveau, Een onderzoek naar de regels en hun toepassing in zes Europese landen*, (VUGA, 1991).

councils.[6] 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 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 adversial 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.[7]

History on a European level

Before the introduction of the EWC-Directive attempts to create international rules to protect employees' interests in multinational enterprises failed.[8] Codes of conduct were promoted without success by the United Nations Economic and Social Council (1972), and introduced by the OECD (1976)[9] and ILO (1977),[10] however with marginal practical results.[11]

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.

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).[12] 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 representatives in case the employer does not have a recognised union. According to the ECJ, these two Directives require, in such a situation, national legislation that forces such employers to consult the employees by other means.[13]

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.[14] 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.[15] 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.[16] Also important was the fact that several MNE's had already introduced some form of employees' participation on a European level themselves, either in the form of a European Works Council or otherwise.[17]

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

7 *See* the report of the Labour Party's Social Justice Commission, *Social Justice: Strategies for National Renewal* (1994), 213, quoted by K.D. Ewing, Democratic Socialism and Labour Law, 24 *Industrial Law Journal* 2, (June 1995), 103-132, 122.

8 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 cross-border employees' representation.

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

10 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.

11 R. Blanpain, "Guidelines for Multinational Enterprises", in: R. Blanpain & C. Engels (eds.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Vth and revised edition, (Kluwer, 1993), 129-142.

12 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 L 48/29, replaced by Council Directive 98/59/EC, [1998] OJ L 225/16; 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.

13 ECJ 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.

14 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).

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

16 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.

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

The establishment of the EWC-Directive has in the meantime paved the way for further developments in the field of employees' involvement, with the introduction of a Directive on the role of employees in the European Company (SE)[18] as well as on the national level.[19]

2. Legal status of the Directive

As a result of the resistance of the United Kingdom under Conservative governments against a Directive on European Works Councils, the legal base was finally found in Article 2 paragraph 2 of the Agreement on Social Policy, concluded by eleven of the twelve Member States at the Maastricht Intergovernmental Conference. After the acceptance of the Social Policy Chapter in 1997 by the Labour Government of the UK, this Chapter became part of the EC-Treaty in the Treaty of Amsterdam. By an additional Directive, the scope of the EWC-Directive was extended to the United Kingdom. Substantially, the Directive can now be considered to be based on Article 137 of the present EC-Treaty.

Besides the eleven Member States that originally adopted the Directive, and the United Kingdom that joined in later, the EWC-Directive is today also applicable in the Member States that joined the European Union in 1995 (Austria, Finland and Sweden) and 2004 (Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Czech Republic, Slovakia, Slovenia). The Directive is also to be applied in the other countries of the European Economic Area (Iceland, Norway and Liechtenstein). Other countries that enter the Community (in the near future Bulgaria and Rumania) will be obliged to introduce the EWC-Directive upon entry as well.

But the EWC-Directive in practice reaches further than the area of the countries that are formally bound by it. The United Kingdom experienced this during the period that it fell outside the scope of the EWC-Directive, while other countries had implemented it. The MNE's that had their headquarters in the United Kingdom, had to fulfil the requirements of the Directive with their undertakings on the continent. They were obliged to establish a European Works Council at least for the establishments in the continental Member States. But it would have been very strange for their British employees should they not be represented in this European Works Council. The opposite applied to the MNE's who had their central management on the continent, but also one or more undertakings in the United Kingdom. It would be awkward to keep their British employees outside their European Works Council. And when management did not already think of this, it was certainly brought up by their counterparts during the negotiations on the agreement that the Directive requires. Within Great Britain, the unions demanded the same. At present, the same goes for undertakings of the MNE's in countries that are not a member of the EU or a party to the EEA-agreement, like Switzerland, but also non-European countries like the United States and Japan. And employees of plants in non-Member States on the European Continent also desire to be represented in EWC's if their MNE has one. Besides this, foreign MNE's are free to enter into negotiations with employees' representatives on the establishment of an information and consultation procedure.

3. The scope of the Directive

A European Works Council (hereafter: EWC) or an Information and Consultation Procedure (hereafter: ICP) shall be introduced in every Community-scale undertaking and every Community-scale group of undertakings.

A Community-scale undertaking is defined as an undertaking with at least 1,000 employees within the Member States and at least 150 employees in each of at least two Member States. A controlling undertaking and its controlled undertakings together are seen as a group of undertakings. For a community-scale group of undertakings the same criteria are applied. The thresholds for the size of the workforce shall be based on the average number of employees, including part-time employees, employed during the previous two years, calculated according to national legislation and/or practice. The national legislation or practice may only be used for the calculation method, not to select whether (or which) part-time employees are included. The English text of the Directive is not exactly clear on this point, but the French and German texts are. However, a country could decide to take part-time employees into account *pro rata* to the amount of their working hours.

The directive does not define the notion of "employee", except that part-timers are included. This seems to be less of a problem than with respect to other social legislation of the EC, since the employees are in this Directive treated as a group with collective rights, rather than as individuals.[20] Nevertheless, it might be important for the calculation of the thresholds of the workforce whether the definition of "employee" is to be given in the national legislation or is common for all Member States.

The notion of "undertaking" is also not clarified in the Directive. The European Court of Justice was of the opinion, in the context of other legislation in the social field, that a body might be regarded as an "undertaking" if it is engaged in economic activities, even though it is not operating with a view to profit.[21] The term "controlling undertaking" is extensively defined in Article 3 of the Directive.

18 Directive 2001/86/EC of the Council of 8 October 2001 to supplement the Statute of the European Company with regard to the role of employees, [2001] OJ L 294/22.
19 Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, [2002] OJ L 80/29.
20 *See* the records of the third meeting of the Working Party of the European Commission, 16-17 March 1995.
21 ECJ Judgments of 8 June 1994, Cases C-382/92 and C-383/92 *Commission* v. *United Kingdom*, [1994] ECR I-2461.

The Directive also applies to MNE's that have their headquarters outside the Member States, for instance in Switzerland, the United States of America or Japan. When they have enough employees in the Member States to meet the requirements of the Directive, they will have to comply with the Directive at least with regard to these European establishments. Where the central management is not situated in a Member State, it will have to act through their representative agent in a Member State, to be designated if necessary. In the absence of such a representative, the management of the establishment or group undertaking with the greatest number of employees in any one Member State is regarded as the central management (Article 4).

4. Agreements within the framework of the Directive

A Community-scale undertaking will have the following options in case the employees request negotiations:

a. to conclude an agreement within the framework of the Directive within three years after the request is made by the employees;
b. to refuse negotiations and therefore become obliged to apply the subsidiary requirements six months after the employees' request;
c. to have to apply the subsidiary requirements three years after the employees' request in case the negotiations have no result;
d. do nothing at all, in case the SNB terminates the negotiations itself. In this case, employees can request that negotiations be restarted, but only after two years.

The employer has no obligation to negotiate as long as the employees do not make such a request.

The Directive puts emphasis on the fact that the establishment of an EWC should be based on an agreement between the central management and employees' representatives. The first responsibility for the setting-up of an EWC lies with the central management. Where a group of undertakings is concerned, the central management is the management of the controlling undertaking. It shall initiate negotiations on its own initiative or on 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.

For this purpose a Special Negotiating Body (hereafter: SNB) shall be established. It has a minimum of three and a maximum of seventeen members. The election of appointment of the members of the SNB will be determined in national law. Each Member State in which the undertaking has establishments should be represented by at least one member in the SNB. Supplementary members are added in proportion to the number of employees working in the establishments, which is laid down by the legislation of the Member State within the territory of which the central management is situated.

The SNB has the task of determining, with the central management, by written agreement, the scope, composition, functions, meetings, resources and term of office of the EWC and the duration of the agreement. Or they have to agree on the arrangements for implementing a procedure for the information and consultation of employees.

The central management, after being informed of the composition of the SNB, shall convene a meeting and inform the local management. The SNB may be assisted by experts of its choice. Expenses that the SNB needs to carry out its task in an appropriate manner are borne by the central management, but Member States may give budgetary rules and limit the funding to cover one expert only. For the purpose of concluding agreements the SNB acts by a majority of its members. The SNB may end the negotiations by a two-thirds majority decision. In this case a new request to convene the SNB must wait for two years.

Since the Directive does not prescribe the creation of a European Works Council as such, the central management and SNB can also decide to establish one or more ICP's instead of an EWC. This may be a form of consultation and information without meeting in a council. If they choose to do so, they must do this in writing, and stipulate by what method the employees' representatives shall have the right to meet to discuss the information conveyed to them. This information shall relate in particular to transnational questions which significantly affect employees' interests.

It is not very clear which procedures could be imagined by an "ICP". Theoretically, one could imagine that employees could even be informed by e-mail at their workplace, but still they are supposed to meet to discuss the information.

5. The "subsidiary requirements"

The Directive relies heavily on the willingness of employers and employees to negotiate on agreements with regard to the EWC. That willingness will not always be obvious in practice. There must be pressure on parties to cooperate. Otherwise, the stronger party, the employer, could just refuse to negotiate or to reach an agreement. For this situation the Directive knows the notion of "subsidiary requirements". The Member States have to adopt in their national law the subsidiary requirements that must satisfy the provisions set out in an Annex to the Directive.

The subsidiary requirements laid down by the law of the Member State in which the central management is situated are to be applied in case the central management refuses to commence negotiations within six months after a request as mentioned above. They also are to be applied where, after three years from the date of this request, parties are unable to conclude an agreement. It is important, that the SNB may not itself decide to end the negotiations. It has to continue the negotiations until the three-years term has passed if it wants to see the subsidiary requirements imposed on the employer. Of course, both parties

can also decide voluntarily to agree on the application of the subsidiary requirements.

The subsidiary requirements as set out in the Annex to the Directive are really "subsidiary" in this sense that various opportunities are offered in order to avoid the application of them. But in practice, they will be very important. They will form the basis of the "subsidiary requirements" to be formulated in the national legislation of the Member States. And the "subsidiary requirements" of the legislation of the country where the central management is situated, will often form the basis of the negotiations of the SNB with the central management. Both parties know that when they do not conclude an agreement within the term of three years, these rules will be imposed on them. Both will try to use the negotiations to modify them in their direction, but know that they can fall back on them, if they cannot agree in the end.

The subsidiary requirements in the Annex of the Directive have the following (summarised) features:

I. Establishment, composition and competence:

a the information and consultation of the EWC will be limited to matters which concern at least two establishments in different Member States;

b the members of the EWC will be elected or appointed from among the employees' representatives or, in the absence thereof, by the entire body of employees in accordance with national legislation and/or practice;

c the EWC will have three to 30 members; the larger EWCs might elect a select committee of at most three members; it adopts its own rules of procedure;

d each Member State in which establishments are situated must be represented in the EWC, with supplementary members in proportion to the numbers of employees working in the different Member States;

e the central management shall be informed of the composition of the EWC;

f four years after the establishment of the EWC it shall examine whether to open negotiations for the conclusion of the agreement referred to in Article 6 of the Directive or to continue to apply the subsidiary requirements.

II. The EWC will 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 business and prospects, in particular certain specified subjects.

III. In exceptional circumstances affecting the employees' interests (relocations, closure and collective redundancies), the select committee or the EWC will be informed and may request to meet the central management or a more appropriate level of management.

IV. The Member States may lay down rules on the chairing of the meetings with the management. Before any meeting the EWC or select committee may meet without the management being present.

V. The members of the EWC inform the representatives of the employees, or in the absence of representatives the workforce as a whole, of the content and outcome of the information and consultation procedure.

VI. The EWC or select committee may be assisted by experts of its choice, in so far as this is necessary for it to carry out its tasks.

VII. The central management provides the EWC with financial and material resources in order to enable them to perform their duties in an appropriate manner. In particular, the costs of meetings, interpretation facilities, accommodation and travelling expenses shall be met by the central management unless otherwise agreed. The Member States may lay down budgetary rules and in particular limit funding to cover one expert only.

It may be noted that according to the subsidiary requirements, the EWC is only composed of employees' representatives. This is in line with the system of e.g. Germany, Greece, the Netherlands, Portugal and Spain. In the system of e.g. Belgium, Denmark, France and Luxembourg, the employer or even more employers' representatives are members of the works council. As we read in the Directive, it is not allowed to implement such a system in the national legislation of Member States with regard to the European Works Council, since Article 7 of the Directive requires that the subsidiary requirements are satisfied. However, it will be possible to agree on such a construction between central management and the SNB.

Finally, the fact that the subsidiary requirements are applied does not mean that it is not allowed to grant additional rights to the EWC. The management of the enterprise may of course give more information or consult the EWC more often than the Directive and the national legislation require. It is also possible to make agreements on these matters. It is to be expected, that in the course of informing and consulting between the EWC and the management a relationship develops, that in a atmosphere of understanding might lead to new arrangements. In order to work productively, it would be better not to confine discussions to the area that is foreseen by formal rules, but to discuss every issue that is of importance for the workers in more than one country.

6. Cooperation, confidentiality and protection of representatives

Article 9 provides, that the central management and the EWC shall work in a spirit of cooperation with due regard to their reciprocal rights and obligations. The same applies in the case of an ICP.

The Directive also has some clauses on the protection of confidential information and of the position of employees' representatives. Under employees' representatives in this respect are understood members of the EWC, those employees acting under an ICP, as well as members of the SNB.

Member States shall provide that employee representatives, and experts who assist them, are not authorised to reveal any information which has expressly been provided to them in confidence, even after the expiry of their term of office. Member States may regulate that the central management in its territory is not obliged to transmit information when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them. This will be possible under the conditions and limits laid down by national legislation. The dispensation may be made subject to prior administrative or judicial authorisation.

It seems that the notion of "confidentiality" of the country where the central management is located is applicable to all members of the EWC. However, the employment relationships with the members are (normally) ruled by the legislation of the country in which each employee works. This implies that in case a member of the EWC violates the confidentiality, the employer could take disciplinary measures against that employee, according to the employment legislation of his own country.

Particular provisions may be given for the central management of undertakings which pursue directly and essentially the aim of ideological guidance with respect to information and the expression of opinions. This is recognition of the German rules for "Tendenzbetriebe": institutions like the press and schools, where opinions are "part of the business".[22] However, the condition that at the date of the adoption of this Directive such particular provisions already must have existed in national legislation, means that this provision does not introduce a new general principle of European labour law. Only practically existing national exceptions are tolerated. New exceptions on this point cannot be introduced.

Article 10 provides that employees' representatives enjoy, in the exercise of their functions, the same protection and guarantees provided for employees' representatives by the national legislation and/or practice in force in their country of employment. This shall apply in particular to attendance of the meetings and the payment of wages for members who are on the staff of the undertaking for the period of absence necessary for the performance of their duties. By referring to the national legislation on this point the Directive makes it easy to protect the employee representatives in a way that fits into the national labour law system. This is possible because all Member States know some form of such protection. But not just the national systems are varied, also the degree of protection that is offered. This implies that the different members of one single SNB or EWC, in practice will have different degrees of protection against disadvantages because of their diverging national systems of protecting employees' representatives.

7. Agreements in force

The Directive provides that the obligations arising from this Directive shall not apply to those undertakings in which, on the date the Directive should be implemented (September 1996 or earlier on the date when it has already been transposed by the Member State in question), there is already an agreement, covering the entire workforce, providing for the transnational information and consultation of employees. When such an agreement expires, both parties may jointly decide to renew it. Where this is not the case, the provisions of the Directive shall apply.

This Article 13 of the Directive was meant to encourage MNE's to negotiate on agreements already before the obligations arising from the Directive are imposed on them. An agreement reached before September 1996 would allow them to escape certain provisions of the Directive that they do not approve of. They could, for instance, agree on more decentralised (and therefore less costly) forms of presenting information to employees' representatives. On the other hand, the employees' representatives, will of course not give rights away which they consider to be important, knowing that they can wait until the Directive will grant them these rights anyway. But the provision gives both parties some flexibility, provided that they act fast, and by this it stimulated the process of introducing the EWC in practice. Once such an agreement is working well, the employer has a reason to argue that the parties can leave it at that and do not need to introduce further reaching rights based on the Directive. It might be mentioned however, that when the agreement is concluded for an indefinite period, either of the parties may give notice according to the applicable national law. This may be done to enforce new negotiations on an agreement under the provisions of the EWC-Directive.

In practice, many of these "agreements in force" were concluded before 22 September 1996. In Germany 100 of the roughly 300 relevant companies had such an agreement, especially in the field of chemical industries (Bayer AG) and automobile industry (Volkswagen). In Belgium 57 per cent of the EWC's in 2004 were based upon an Article 13 agreement, 40 per cent upon an Article 6 agreement, and only two per cent upon the subsidiary requirements of the Directive. In Austria twenty of the 45 relevant companies have an EWC, all based on an agreement and not one on the subsidiary requirements. These figures suggest that the subsidiary requirements are not often used. But of course they do not say to which extent the content of the agreements differs from the subsidiary requirements.

In total, 737 MNE'S had installed an EWC in 2004, which makes the EWC-Directive a success, although still many companies which fall under the scope of the Directive did not install an EWC.[23]

22 Dirk Michael Burton, Tendenzschutzprinzip hinreichend berücksichtigt, *Arbeitgeber* 22/46 1994, 801-803.

23 *See* for more detailed information European Foundation for the improvement of Living and Working Conditions, European Works Councils in Practice, Dublin 2004 and European Commission, European Works Councils: fully realising their potential for employee involvement for the benefit of enterprises and their employees, Brussels 2004.

8. The transposition of the Directive by the Member States

The Directive may be transposed into national law in two ways: either by legislation or by way of agreement between management and labour. In practice, both ways are used.

In Austria, Germany and the Netherlands the directive was transposed by legislation, in Belgium by two inter-industry wide collective agreements. Germany and the Netherlands chose separate Acts, only dealing with European Works Councils (EBRG respectively WEOR), Austria implemented the Directive in the Labour Relations Act (Arbeitsverfassungsgesetz).

The EWC-Directive explicitly requires the national regulation to foresee:

- the concept of "employees' representatives" (Art. 2, para. 1d)
- the calculation methods to determine the size of the workforce (Art. 2, para. 2)
- the method to be used for the election or appointment of the members of the SNB to be elected or appointed in that territory (Art. 5, para. 2a) and of the members of the EWC (point 1b Annex)
- rules for the proportionate composition of the SNB (Art. 5, para. 2c) and EWC (point 1d Annex)
- subsidiary requirements that satisfy the provisions set out in the Annex to the Directive (Art. 7)
- protection of confidential information (Art. 8, paras. 1 and 2)
- protection of employees' representatives (Art. 10)
- sanctions on compliance with the Directive (Art. 11).

Besides, the transposition also has to provide several provisions of the Directive itself, such as concepts, obligations, rights, contents of the agreements and the application of subsidiary requirements.

Optionally, it is also possible to regulate:

- that the Directive does not apply to merchant navy crews (Art. 1, para. 5)
- budgetary rules regarding the operation of the SNB (Art. 5, para. 6) and the EWC (point 7 Annex), including the possibility of limiting funding to cover one expert only
- particular provisions on undertakings that pursue directly and essentially the aim of ideological guidance, in case such provisions already existed in national legislation (Art. 8, para. 3)
- rules on the chairing of information and consultation meetings (point 4 Annex).

The transposition of the Directive into national legislation was not too simple, partly because of the problem that various national law systems are applicable to the EWC and the persons participating in it. A orchestration of national transposition legislation therefore was with this Directive very important. For the discussion of legal problems and to find common solutions where necessary, a Working Party on the transposition of Directive 94/45/EC was created by the European Commission with representatives of all Member States, which met regularly. One of the conclusions of the Working Party was, that it is necessary to assure that all national laws transposing the Directive enter into force simultaneously on 22 September 1996. This would prevent a situation in which one national law already requires the establishment of an EWC, while another Member State would not have given the rules and procedures to be followed in that country. In practice, this was not realised. This goal was not achieved, the implementation was (completely) realised in Germany on 1 November 1996, in the Netherlands on 5 February 1997, in Belgium in August 1998.

Most Member States were not eager to put more burdens on the enterprises than the Directive already provides for. The country that would have done otherwise, could have made itself less attractive for investments. Since the national legislation of the country where the central management is situated will be most influential on the MNE's, a far-reaching national legislation would not attract enterprises to establish their headquarters in such a country. Therefore, the Member States tended to follow the minimum requirements of the Directive as closely as possible. As a result, the national transposition law of the various Member States is highly comparable, which will also make the working of the EWC more comparable.

The sanctions on the compliance with national legislation have to be arranged in agreement with national legislation and practice. Although the case law of the European Court of Justice demands sanctions to be effective and not just symbolical, countries do have a margin of discretion here. The SNB and the EWC will need access to court procedures. In case the employer does not fulfil his obligations with respect to the functioning of a once established EWC, it would not be enough if legal recourse was restricted to (a group of) employees or to unions. Usually the ordinary labour courts are competent in these matters. In the Netherlands, it is the Enterprise Chamber of the Court in Amsterdam, which is also the competent court in co-determination matters with regard to the right to advice of works councils on financial and organisational matters. Since the introduction of the EWC-Directive there have been only three occasions when the European Court of Justice had to give a preliminary decision, all related to German cases.[24] Also some cases before domestic courts in the other countries are reported. An article by Dorssemont will be published in ECL 2006/1 which discusses French and Belgium cases, the national reports of Austria and the Netherlands each mention one case. Besides the Renault cases, most of these issues dealt with the establishment of the continuation of the EWC itself. There are not many cases yet on substantial issues. But this can be explained as a result of the short history of the EWC.

24 *See* the contribution of Waas in this edition.

It is foreseen that the Directive shall be without prejudice to employees' existing rights to information and consultation under national law (Article 12, para. 2). This is important, because in some countries the EWC Directive will not impress the existing works councils very much. In countries like Austria, Germany, Greece and the Netherlands the rights on information and consultation are further developed and the works councils even have the right to co-decide certain aspects of personnel policies. They of course would not welcome the EWC Directive, when it would bring about a cut on the existing rights to influence MNE's, acquired under national law. This is not to say that the Directive will have no influence on national legislation at all. It could set a minimum standard for national legislators also with respect to domestic enterprises. On the other hand, the clause mentioned here might have a preventive effect against the argument that countries for the sake of competitiveness should bring their legislation back to the European minimum standards.

9. Conclusion

Since Member States had the time to implement the Directive in national legislation until 1996 and in fact sometimes took longer and companies may take three years for negotiations on agreements before an EWC will be imposed on them, the amount of EWC0s that is established at present is encouraging. This is a result of the strategy to promote the conclusion of agreements in advance. It seems wise, that the Directive has such a flexible structure, that many flowers can grow in the field of European employees' participation.

One could say that the Directive introduces a form of "double subsidiarity". It firstly promotes the conclusion of agreements before the expiration of the transposition period, albeit that the incentive was the negative wish not to have to apply the Directive at all. As far as this did not work, *subsidiary*, the Directive obliges to negotiate for an agreement within more narrow rules and procedures. If even this does not lead to a result, at last, *more subsidiary*, the "subsidiary requirements" are imposed on the undertaking by the national legislation. The less employer and employees' representatives can agree among themselves, the more they are forced by the Directive and the national transposition legislation. Maybe this is to be considered as a new way of giving shape to the principle of subsidiarity of the EC-Treaty (Article 5). It also is called a form of "horizontal subsidiarity", since it is not subsidiarity between the European and the national level, but between different rules on the national and European level..

Although originally the Directive called for an evaluation not later than 22 September 1999 with a view to proposing suitable amendments to the Council, where necessary, this evaluation did not lead to a change in the Directive. This period was too short to draw conclusions, since the mandatory working of the Directive had just started at that time. Article 15 of the EWC-Directive also states that the Commission will in particular examine whether the workforce size thresholds are appropriate. A minority of the European Parliament already has promoted this in its (rejected) amendments on the draft-Directive. It is remarkable, that the Directive seems to work quite satisfactorily. The national reporters of this Journal were asked to mention wishes for a change of the Directive. But the reports mostly go no further than to refer to these threshold discussions. The Austrian reporter reports a wish for tougher sanctions, but this is mostly a national matter. National organisations do not offer clear viewpoints on the desired changes of the Directive. We will have to rely on the ETUC and UNICE-reports on this matter.[25] The ETUC requires extended rights for the EWC and the unions, UNICE promotes consolidation. It gives hope that both parties also produced a common position to promote the EWC in the new EC-Member States.[26]

With the EWC-Directive the standard is set for a European model of employees' participation, highly influenced by the German example, but also with specific features, especially the high flexibility that is found in the Directive. Most important is that Europe definitely has chosen a two-channel system of employees' representation with works councils next to trade unions. This will certainly provoke further discussions on the relations between the two. After ten years, the EWC's are established in so many companies that the model cannot be disregarded anymore, being already an important element of European labour relations. Now the time has come for EWC's to develop their influence and to find the way to courts where necessary to reach real influence on decision-making in multinational enterprises.

25 ETUC strategy in view of the revision of the EWC Directive adopted by the Executive Committee, 4-5 December 2003 and final agreement given by the Steering Committee on 13 February 2004; Position UNICE 1 June 2004, to be found on their respective websites.
26 ETUC and UNICE, Lessons learned on European Works Councils, 1 March 2005.