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**EUROPEAN WORKS COUNCILS IN
MULTINATIONAL ENTERPRISES**

Background Working Experience

By Roger Blanpain

Preface

The Tripartite Declaration, which was adopted in 1977, called on enterprises, both national and multinational, and their employees, to consult regularly on matters of mutual concern. This was taken a step further, and a much stronger foundation for information and consultation laid, with the issuing in 1994 of the Directive on European Works Councils.

Since their establishment on the basis of the Directive, works councils have made two-way communication much easier, and this has hopefully contributed to the social partners working jointly in ensuring much-needed cooperation in dealing with the problems that have cropped up as a result of changes brought about by globalization. While each undertaking has the responsibility of setting up machinery that is best suited to its own needs, the constant changes that the world of business heralds, make it imperative that there is vigilance on the part of both management and labour, to ensure that the enterprise operates effectively and efficiently, and that this in turn provides for security of employment and working conditions that conform to both national and international standards.

While it is true that the Directive has been in operation for a few years, this has not prevented new challenges coming to the fore, and it is our hope that knowledge, experience and skills gained over the past years, that Professor Blanpain has been commissioned to document in this study, will be useful in the discussions that are bound to follow on how best information and consultation can be more meaningfully carried out under constantly changing circumstances and new challenges.

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Foreword

The Directive of 22 September 1994 (94145 EEC) on the establishment of a European works council (EWC) or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees is referred to in this paper as the Directive on European Works Councils. The Directive has enormous significance for the information and consultation of workers in multinational enterprises as well as for the practice of labour law, industrial relations and human resources management in Europe, and even beyond. The reasons are obvious.

We are talking about a gigantic exercise, involving about 1,500 undertakings and groups of undertakings, 10 to 15,000 subsidiaries and thousands of people who are members of a European works council (EWC). Since the 1994 Directive was extended to the UK — on 15 December 1997 — a substantial number of extra companies and employees have been added.

Many undertakings have headquarters outside the European area, especially Japanese and US multinationals. Some EWCs have a worldwide span.

Implementation of the Directive is extremely complicated: it has to be incorporated in the national law of no less than 18 States, through legislation or collective bargaining or both. Although a European institution is being created, implementation must respect national diversity and traditional practice in the Member States. The process is an exercise in unity and divergence. EWCs are European institutions based on private law. They were created in the first place by an agreement between the social partners at European level, but they have their roots in different national legal systems, although they are governed by a single law.

Choices have to be made by the actors involved, managers and representatives of employees, be they trade unions or works councils or other institutions. The Directive is a model of subsidiarity and proportionality. Managers and employees themselves will in the first place agree to set up an EWC suited to their own needs. Hundreds of agreements have to be prepared, organized, concluded, monitored and reported on. Management, trade unions, EWC members, and experts will be involved in their various roles.

In this paper we give an overview of the background, working and experience of the Directive, and its transposition into national law, paying special attention to the agreements which have been concluded so far. We first deal with the genesis of the Directive (Chapter I), then with its objective and scope, the countries and employees concerned (Chapter II). Chapter III looks at such concepts as “information and consultation”, and “employee representatives”. The next chapter describes the establishment of a works council or of a procedure (Chapter IV). This is followed by shorter chapters (V-VII) on prejudicial and confidential information, protection of employees, compliance with the Directive and final provisions. Chapter VIII deals with the subsidiary requirements regarding information and consultation in cases where no agreement has been reached. Chapter IX analyses the possibility of concluding pre-existing (Article 13) agreements. Chapter X is devoted to a review of the Directive which brings us into the twenty-first century, while Chapter XI analyses agreements currently in force which establish information and consultation rights, including the so-called Article 13 and Article 6 agreements. We will also look at the implications of the Renault case.

After the conclusions, we provide a bibliography. The annexes include the text of the Directives (1994 and 1997), the state of transposition of the 1994 Directive into national law, a list of companies which have concluded voluntary agreements and, finally, experience with Article 13 agreements, as evaluated by the ETUC.

Finally, a word on the sources used in drafting this study. Next to an academic study this paper is mainly the result of insights gained from conferences and seminars, in which we were actively involved, together with representatives of the EU, national governments and the social partners.

These representatives included EU Commissioner P. Flynn and Mr. Paul Windey, head of the EC Working Party on Information and Consultation and now President of the National Labour Council (Belgium). Also involved were representatives of national governments, of the social partners, namely the ETUC, and of UNICE. The meetings were attended by human resource managers and trade unionists, who described their experience. Present at the conferences were also representatives of the European Foundation of Living and Working Conditions, as well as academics from most of the Member States involved. Various conferences were held by the Institute of Labour Relations of the Catholic University of Leuven, the European-Japan Institute for Law and Business (EJILB), Management Centre Europe, the University of Antwerp, "Europe et Société" (Paris). Most of these conferences were reported in publications, which have been widely disseminated.

The most recent of these publications is *The Bulletin of Comparative Labour Relations*, No. 32, *Kluwer*, The Hague, 1998, pages 1-163 (editor Roger Blanpain). This bulletin contains the papers presented and the discussions held at a conference organized by EJILB in Leuven, Belgium (1997). Academics and practitioners from 18 countries participated in this conference.

The author wishes to acknowledge the contribution made by participants at the 1997 conference to this paper on European works councils in multinational enterprises.

15 April 1998.

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List of abbreviations

CBI	Confederation of British Industries
CEEP	Centre Européen des Entreprises Publiques
CEO	Chief executive officer
COREPER	Comité des représentants permanents
EC	European Communities
ECJ	European Court of Justice
EEA	European Economic Area
EFTA	European Free Trade Association
EMF	European Metal Workers Federation
ECSC	Economic and Social Committee
ETUC	European Trade Union Confederation
EU	European Union
EuroFiet	Fédération internationale d'employés techniciens et cadres
EWC	European works council
ICFTU	International Confederation of Free Trade Unions
IELL	International Encyclopaedia for Labour Law and Industrial Relations
IGC	Intergovernmental conference
ILO	International Labour Organization
IMF	International Metal Workers' Federation
IRJ	Industrial Relations Journal
IUF	International Union of Food and Allied Workers' Associations
OJ	Official Journal
SNB	Special negotiating body
TUC	Trade Union Congress
UNICE	Union of Industrial and Employers' Confederations of Europe

I. Genesis of the Directive

For many years, measures have been proposed by the European Commission to provide employees in multinational enterprises with transnational information and consultation rights. An example is the Vredeling proposal (1980), which led to heated debate, but which eventually had to be abandoned as too controversial. The principle of information and consultation was not really contested: the problem was in finding a way to introduce these rights in practice. Less mandatory and more voluntary approaches had to be found.

On 5 December 1990, the Commission adopted a “Proposal for a Council Directive on the establishment of a European works council (EWC) in Community-scale undertakings or groups of undertakings for the purposes of informing and consulting employees”.

The Economic and Social Committee (ECSC) gave its opinion on 18 March 1991. On 10 July 1991, the European Parliament put forward an opinion on the proposal to the Council. On 10 September 1991, the Commission adopted an amended proposal.

The Council of Ministers discussed the Commission’s proposals at 14 meetings of its Working Party on Social Questions (between 3 July 1990 and 6 September 1993) and at five meetings of the Council of Labour and Social Affairs Ministers (between 6 May 1991 and 12 October 1993).

At none of these meetings did the Council reach unanimous agreement on the Commission’s proposal, as required by Article 100 of the EEC Treaty, the legal basis for the proposal. At its meeting on 12 October 1993 the Council did, however, establish a broad consensus on a text submitted by the Belgian Presidency. The Commission informed the Council of its intention to initiate, on entry into force of the Treaty on the European Union on 1 November 1993, the procedures provided for in the Agreement on Social Policy annexed to the Protocol on Social Policy on the basis of the text submitted by the Belgian Presidency and the views expressed in the Council’s discussions.

The Commission decided to set these procedures in motion. November 1993 saw the commencement of a six-week period of consultation between the social partners at European level, in accordance with Article 3(2) of the Agreement on Social Policy. A first consultative document on the possible direction of the Commission’s action in the field of information and consultation of workers in Community-scale undertakings or groups of undertakings was dispatched on 18 November 1993. Employers’ associations, federations and confederations, and the trade unions submitted a general opinion to the Commission on the questions put to them.

On 8 February 1994, in accordance with Article 3(3) of the Agreement on Social Policy, the Commission decided to consult the social partners at Community level on the content of the proposal, including its legal basis.

On that date, 8 February 1994, Mr. Flynn, Social Commissioner, introduced a new proposal. The Flynn proposal for a Council Directive on mechanisms for informing and consulting employees in Community-scale undertakings or groups of undertakings was drafted pursuant to Article 3(3) of the Agreement on Social Policy with a view to consultation with management and labour at European level on the content of the proposal envisaged by the Commission.

The main feature of the Flynn proposal was to provide the central management of European undertakings and the employees’ representatives with a legal framework allowing them to conclude an agreement on establishing a mechanism for transnational information and consultation of employees. The parties are free to conclude the agreement best suited to the organization and needs of their multinational corporation. The Flynn proposal respected the autonomy of the parties by imposing no conditions or minimum requirements on the nature and content of such an agreement.

The objective of the Flynn proposal was to set up mechanisms for transnational information and consultation of employees, which may or may not imply the setting up of a transnational structure. Consequently, the title was changed and the term “EWC” deleted.

The proposal was only addressed to the 11 Member States which had signed the Agreement on Social Policy. The UK was therefore excluded.

However, the Community-scale undertakings or groups of undertakings which have their central management in one of the 11 Member States would be obliged to invite the management and employees of their UK branches or subsidiaries to participate in the institution and operation of the information and consultation mechanism.

Furthermore, where the central management of a Community-scale undertaking or group was situated in the UK, its branches or subsidiaries located in the remaining 11 Member States were covered by the proposal if they met the employee threshold requirements laid down by the document. UK employees would be taken into account in calculating the threshold requirements.

The threshold requirements for triggering the procedure were raised so that the proposal required the written request of employees’ representatives representing 500 employees (employed in more than one Member State).

The Flynn proposal was intended to provide for a legal framework within which an agreement could be concluded between central management and employees’ representatives. The parties are free to set up the information and consultation mechanism most suited to their needs. The safety net laid down by the Belgian proposal, which had to be respected by any agreement, was deleted.

The proposal obliged Member States to allow management to withhold information, if disclosure might seriously prejudice the undertakings concerned.

The Flynn proposal extended the range of matters subject to information. These were limited to transnational measures likely to have serious consequences for the interests of employees and which relate to the transfer of production, closures, downsizing and collective dismissals.

The Flynn proposal allowed for only one consultation meeting. Once that meeting had been held, consultation would be carried out through written procedures.

By the deadline for this second phase of consultation (30 March 1994), the social partners had sent their views on the consultation document to the Commission. Despite all the efforts made, the social partners failed to reach agreement on setting in motion the procedure provided for in Article 4 of the Agreement on Social Policy.

The Commission took the view that a Community initiative on the information and consultation of workers in Community-scale undertakings and groups of undertakings was still needed. On 13 April 1994 the Commission therefore decided to adopt the present proposal, with a view to presenting it to the Council on the basis of Article 2(2) of the Agreement on Social Policy.

This proposal reiterated most of the elements of the Belgian compromise, whilst reintroducing some greater elements of flexibility from the Flynn proposal.

The European Parliament gave an opinion on 4 May 1994 (see Annex): the opinion of the ECSC was given on 1 June 1994. The Commission retained very few of the numerous amendments tabled by the European Parliament in its revised proposal.

That proposal was only slightly amended during the final discussions in the Comité des représentants permanents (COREPER) and the Council. The UK decision to opt out of the Social Agreement was completely respected. The Directive was adopted by the Council of Ministers at its first reading on 22 June 1994.

The term “European works council” reappeared. In order to increase flexibility, it was agreed that the minimum requirements would apply three years from the date of a request by employee representatives to initiate negotiations if the parties failed to agree, instead of two years as proposed by the Commission.

The measure became the Directive of 22 September 1994 (94/45/EC) on the establishment of an EWC or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, giving companies until the year 2000 to try to negotiate an information and consultation agreement with their employees. Member States had to implement the Directive before 22 September 1996.

In accordance with the Amsterdam European Council of 16-17 June 1997, which noted that the Intergovernmental Conference (IGC) was willing to incorporate the Agreement on Social Policy (Maastricht, 1991), in the Treaty, Directive 94/45/EC was extended to the United Kingdom. This was done by Council Directive 97/74 of 15 December 1997.¹ That Directive will enter into force on 15 December 1999.

Extension of the Directive to the UK means that a significant number of additional companies will be covered. According to the TUC, an extra 125 multinationals will be added, bringing the total number of UK companies covered by the Directive up to 239. The worldwide total of enterprises covered by the Directive will rise to 1,480.²

¹*O.J.*, 16 Jan. 1998, L 10/22.

²“EWC’s Directive extended to cover UK”, *European Works Councils Bulletin*, issue 13, Jan.-Feb. 1998, p. 1.

II. Objective and scope

1. Objective

The purpose of the Directive is to improve the right to information and to consultation of employees in Community-scale undertakings and groups of undertakings. To this end, appropriate mechanisms for transnational information and consultation (i.e. one or more European works councils (EWCs) or one or more procedures with the purpose of informing and consulting employees) have to be established in every Community-scale undertaking and every Community-scale group of undertakings, where this is requested (Article 1.1).

2. Scope

A. Territorial

The 15 EU Member States

The Directive applies to: *Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the UK* (from 15 December 1999).

The European Economic Area (EEA) (15+3)

The Directive also applies to such countries as *Iceland, Liechtenstein and Norway*. This happened by decision of the EEA, taken on 22 June 1995.

Companies with headquarters outside the EEA

The Directive also covers cases where undertakings or groups of undertakings have their headquarters outside the territory of the Member States. Such businesses should be treated in a similar way as Community-scale undertakings based on either a representative of the undertaking or group of undertakings, or the undertaking with the highest number of employees in the territory of one of the Member States.

Practically speaking, companies which have undertakings and a given number of employees (as will be indicated later) within the territories of the 15 Member States and the EEA-EFTA countries, wherever their headquarters are located, will have to comply with the Directive. The Directive thus applies to *American-* and *Japanese-*based multinationals, with regard to their European-based operations.

B. Personal: Which companies?

The Directive applies to private sector as well as to public sector undertakings, irrespective of the legal form of undertaking. The concept of undertaking, not explicitly defined in the Directive, may be a parent company, a subsidiary, an establishment, a branch or any other economic entity. An “undertaking” may also consist of a group of subsidiaries or establishments.

Numbers

According to the Directive an EWC or a procedure for informing and consulting employees has to be established in every Community-scale undertaking and in every Community-scale group of undertakings (Article 1.2).

(a) Community-scale undertaking

A “Community-scale undertaking” means an undertaking with at least 1,000 employees within the Member States and at least 150 employees in each of at least two of the addressed Member States.

Unless a broader scope is provided for by the agreement, the powers and competence of European works councils and the scope of information and consultation procedures cover, in the case of a Community-scale undertaking, all the establishments located within the Member States (Article 1.4).

The prescribed thresholds for the size of the workforce are to be based on the average number of employees, including part-time employees, employed during the previous two years, calculated (pro rata)¹ according to national legislation and/or practice (Article 2.2).

The Directive does not contain an express definition of the term “employee”. Considering that the Directive intends to achieve only partial harmonization of information and consultation processes in the EU, the term “employee” should be interpreted as covering any person who, in the Member State concerned, is considered to be an employee under national employment law. The same goes for the concept of “part-time worker”, as clearly indicated in Article 2.2.

The employees concerned must be employed by a Community-scale undertaking/establishment. This means that temporary staff, working for a Community-scale undertaking/user and subcontracted or posted workers will not count as employees of that undertaking, unless national law and/or practice would indicate otherwise.

No distinction is made between blue-collar workers, white-collar workers, managers or officials (*fonctionnaires*), and it is not important if the terms of employment come under public or private law.

The Directive applies equally to employees engaged for an indefinite period and to those engaged on a fixed-term contract, replacement contract or similar. The same is normally true for employees whose contract of employment is suspended because of sick leave, military service or similar reasons, again unless national law or practice would say otherwise.

The term of the previous two years is calculated from the date the Directive entered into force, or from the date of implementation of the Directive in the Member State in question, when this is earlier than the above-mentioned date,² or from the date when the parties concluded a (pre-existing) agreement.

Member States must ensure that information on the average number of employees is made available at the request of the parties concerned by the application of the Directive (Article 11.2).

(b) Group of undertakings

A “group of undertakings” comprises, according to Article 2.1(b) of the Directive, a controlling undertaking and its controlled undertakings.

Definition of “controlling undertaking”⁸

The terms “controlled undertaking” and “controlling undertaking” are based on Council Directive 89/440/EEC of 18 July 1989, amending Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts.⁴

For the purposes of the Directive, a “‘controlling undertaking’ means an undertaking which can exercise a dominant influence over another undertaking (‘the controlled undertaking’) by

¹Declaration by the Council and the European Commission.

²See Art. 13.1.

³Notwithstanding paras. 1 and 2, an undertaking shall not be deemed to be a “controlling undertaking” with respect to another undertaking in which it has holdings where the former undertaking is a company referred to in Art. 3(5)(a) or (c) of Council Regulation (EEC) No. 4064/89 of 21 Dec. 1989 on the control of concentrations between undertakings (Art. 3.4).

⁴Whereas it is accordingly to have a definition of the concept of controlling undertaking relating solely to this Directive and not prejudging definitions of the concepts or group or control which might be adopted in texts to be drafted in the future” (Considerans to the Directive, p. 12).

virtue, for example, of ownership, financial participation or the rules which govern it” (Article 3.1). Article 3.1 aims at covering all possible “controlling undertakings”.

All undertakings, which may exercise a dominant influence can be deemed to fulfil the duties under the Directive and they themselves will have to decide which of them will be the “controlling undertaking”. This can equally occur if employee representatives would differ on which company should be looked upon as the “controlling undertaking”.

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

- (a) holds a majority of the undertaking’s subscribed capital, or
- (b) controls a majority of the votes attached to that undertaking’s issued share capital, or
- (c) can appoint more than half of the members of that undertaking’s administrative, management or supervisory body (Article 3.2).

... a controlling undertaking’s rights as regards voting and appointment shall include the rights of any other controlled undertaking and those of any person or body acting in his or its own name but on behalf of the controlling undertaking or of any other controlled undertaking (Article 3.3).

A dominant influence shall not be presumed to be exercised solely by virtue of the fact that an office holder is exercising his functions, according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings (Article 3.5).

The law applicable in order to determine whether an undertaking is a “controlling undertaking” shall be the law of the Member State which governs that undertaking (Article 3.6, first paragraph).

As the possibility of exercising a dominant influence can be indicated by the central management, who can equally reverse the presumption of Article 3.2 central management seems to have a certain flexibility to choose the applicable law. The same applies in case of conflict of laws.

Where the law governing that undertaking is not that of a Member State, the law applicable shall be the law of the Member State within whose territory the representative of the undertaking or, in the absence of such a representative, the central management of the group undertaking which employs the greatest number of employees is situated (Article 3.6, second paragraph).⁵

In this case, central management can freely, without possible intervention of the employees, indicate which undertaking or person shall act as “representative”, thereby choosing at the same time the law it wants to apply.

Community-scale group of undertakings

- A ‘Community-scale group of undertakings’ means a group of undertakings with the following characteristics:
- at least 1,000 employees within the Member States;
 - at least two group undertakings in different Member States; and
 - at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State (Article 2.1(c)).

Where a Community-scale group of undertakings comprises one or more undertakings which are Community-scale undertakings, the EWC will be established at the level of the group, unless the agreement(s) provide(s) otherwise (Article 1.3).

Unless a wider scope is provided for by the agreements, the powers and competence of European works councils and the scope of information and consultation procedures cover, in the case of a Community-scale undertaking all the establishments located within the Member State and in the case of a Community-scale group of undertakings, all group undertakings located within the Member States (Article 1.4).

⁵Where, in case of a conflict of laws in the application of para. 2, two or more undertakings from a group satisfy one or more of the criteria laid down in that paragraph, the undertaking which satisfies the criterion laid down in point (c) thereof shall be regarded as the controlling undertaking, without prejudice to proof that another undertaking is able to exercise a dominant influence (Art. 3.7).

Central management

“‘Central management’ means the central management of a Community-scale undertaking or, in the case of a Community-scale group of undertakings, of the controlling undertaking” (Article 2.1(e)).

Merchant navy crews

“Member States may provide that this Directive shall not apply to merchant navy crews” (Article 1.5).

III. Concepts and definitions

Information and consultation

The Directive does not contain a definition of the word “information”. So, we have to refer to the ordinary meaning attributed to that term in its context and obtain such guidance as may be derived from Community texts and from concepts common to the legal system of the Member States.

The meaning of the word “information” seems rather simple: it is the communication of knowledge. Disclosure of information to the employee representatives means that the employer provides information of which explanation may be sought and questions can be raised.

Consultation has been defined by the Directive as “the exchange of views and establishment of dialogue between employees representatives and central management or any other more appropriate level of management” (Article 2.1(f)).

Between consultation and negotiation, which are difficult to distinguish in practice, stands an expression used in several EC directives,¹ namely: “consultation with a view to reaching agreement”. It seems that this expression goes further than consultation in the strict sense, where an employer asks for the benefit of the employees’ ideas on the matter in hand. Here more is required: the parties are also asked to try to reach an agreement, which means leaving the area of consultation and entering the area of negotiation.

Article 2.1(f) of the Directive addresses these questions only in very broad terms when it states that an exchange of views and dialogue will take place between the representatives of the employees and central management or any other appropriate level of management. First, this leaves the parties to the agreement free to decide which level of management would be most appropriate. Moreover, other questions will have to be worked out between the parties themselves, within the lines laid down in the Directive, unless the parties wish to conclude a pre-existing agreement.

Representation of employees

The concept of “employees’ representatives” has to be seen in the light of Council Directives 75/129/EEC on collective redundancies and 77/187/EEC on transfer of undertakings. According to Article 2.1(d) of the Directive on European Works Councils or procedures, “‘employees’ representatives’ means the employees’ representatives provided for by national law and/or practice”. In contrast to the Directive on transfer of undertakings, this Directive does not exclude members of administrative, governing or supervisory bodies of companies, who represent employees on such bodies in certain member countries.

Unlike the Directives on collective redundancies and transfer of undertakings, the Directive on European Works Councils or procedures contains the very important provision that “Member States shall provide that employees in undertakings and/or establishments in which there are no employees’ representatives through no fault of their own, have the right to elect or appoint members of the special negotiating body” (Article 5.2(a), second paragraph); this “without prejudice to national legislation and/or practice laying down thresholds for the establishment of employee representation bodies” (Article 5.2(a), third paragraph).

As the notion “employees’ representatives” refers to the law or practice of the Member States, this implies that it might be possible for “non-employees” (e.g. permanent trade union agents) to be elected or appointed provided national law and/or practice foresee this possibility.

¹See, for example, the 1975 Directive on collective redundancies or the 1977 Directive on acquired rights, mentioned above.

IV. Establishment of a European works council or a procedure

Timing	Steps to be taken
Prior to date of entry into force of the Directive	Agreement in force (Article 13.1). The obligations of the Directive do not apply
From date of entry into force of the Directive	<ol style="list-style-type: none"> 1. Initiation of the negotiation (Article 5.1) <ol style="list-style-type: none"> (a) Initiative by central management or (b) Request of at least 100 employees or representatives (two undertakings establishments in two Member States) 2. Establishment of the special negotiating body (SNB) (Article 5.2) <ol style="list-style-type: none"> (a) Members are elected or appointed (Article 5.2(a)) (b) Central and local management is informed of the composition of the body (Article 5.2(d))
The latest within six months after the request to initiate negotiations (Article 7.1)	<ol style="list-style-type: none"> 3. Negotiation starts <ol style="list-style-type: none"> (a) Central management convenes a meeting with the SNB, and (b) informs local management accordingly (Article 5.4)
Six months after the request to initiate negotiations	<ol style="list-style-type: none"> 4. No negotiations: subsidiary requirements apply (Article 7.1)
Three years after request to negotiate	<ol style="list-style-type: none"> 5. No agreement: subsidiary requirements apply (Article 7.1)
Agreement comes to end — no appropriate new agreement concluded	<ol style="list-style-type: none"> 6. Subsidiary requirements apply (Article 7.1)

The establishment of a European works council (EWC) or procedure by agreement between the parties requires different steps which have to be accomplished within a given period of time. The latest is within three years after the employees' request to initiate negotiations. So, if neither party moves, nothing will happen; the process can also be terminated by the special negotiating body (SNB), which may decide not to open negotiations or to cancel negotiations already opened, by a two-thirds majority of its members.

The steps involved are :

- the request to initiate negotiations, on the initiative of the employees/representatives or of the central management;
- the establishment of the SNB;
- the convening of a negotiating meeting;
- the conclusion of an agreement.

All this has to be accomplished within three years after the request to initiate negotiations. If not, the subsidiary requirements will apply. This provision can be evaded if the parties conclude an agreement before the entry into force of the Directive.

The same applies in case of renegotiation of the agreement with the understanding that the existing EWC (or its employee members) will constitute the negotiating body (see Annex to the Directive — subsidiary requirements 1(f), second paragraph).

If the subsidiary agreements apply and an EWC has been established, that EWC shall examine, four years after its establishment, “whether to open negotiations for the conclusion of the agreement referred to in Article 6 of the Directive or to continue to apply the subsidiary requirements adopted in accordance with this Annex” (Annex, paragraph 1(f), first paragraph). This brings us somewhere near the year 2004.

1. The obligation to negotiate in a spirit of cooperation

The Directive contains a mandatory duty for the parties to negotiate “in a spirit of cooperation with a view to reaching an agreement on the detailed arrangements for implementing the information and consultation of employees” (Article 6.1). This mandatory requirement is evidently important and has many implications.

First, it means that the elaboration of an EWC or an information and consultation procedure is not a unilateral management affair to be seen purely as an instrument of human resource management strategies. It is more than that. It indicates that both parties, central management and employee representatives, are full partners in regulating a subject of common concern on a basis of equality. Secondly, it indicates — in a spirit of well-conceived subsidiarity — that the parties themselves will regulate their own relations, and not the government. This is consequently an expression of “social autonomy” of the parties to negotiation. Thirdly, it allows for maximum flexibility, giving both parties the possibility to take into account their own needs and aspirations.

The obligation to negotiate in a spirit of cooperation, and not in a spirit of confrontation, is *de facto*, not much more than a policy guideline, an expectation from the European authorities, and less a legally enforceable rule unless applicable law would state the contrary. In case of outright refusal to negotiate or the raising of obstructions, measures and procedures should be available (Article 11.3) and the subsidiary requirements (Article 7.1) will apply.

However, the point is important. It underlines the need for a spirit of trust and good faith in labour relations. But such a state of mind and soul does not necessarily prevail and it depends a lot on the ideology of those who are involved. The truth is that trust can be built even between parties, who have opposing interests. Building trust and fostering a spirit of cooperation supposes continuous and conscientious efforts on all sides. It is a delicate plant to be cherished and nourished permanently.

2. Responsibility and initiation of negotiations

A. Responsibility of central management

The central management of the Community-scale undertaking or group of undertakings is responsible for creating the conditions and the means necessary for setting up an EWC or procedure for transnational information and consultation upon the terms and in the manner laid down by this Directive (Article 4.1).

Where the central management is not situated in a Member State, a central management representative in a Member State, to be designated if necessary, shall assume responsibility for setting up an EWC or a procedure. In the absence of such a representative, this responsibility will lie with the management of the establishment or the central management of the group undertaking employing the highest number of employees in any one Member State (Article 4.2). The term “employee” should be interpreted as covering any person who, in the Member State concerned, is considered to be an employee, calculated according to national legislation and/or practice. Earlier remarks concerning the concept of employee in relation to the Community-scale undertaking or group of undertakings applies accordingly.

For the purpose of this Directive, the representative of management, as provided for in Article 4.2 shall be regarded as central management (Article 4.3). This “representative” can be either a physical person (e.g., a manager, consultant, or any other person) or a legal entity (whether or not part of the undertaking, or group of undertakings), provided the representative has been specifically designated and has full powers to carry out the duties of this role and is authorized to take all necessary decisions.

B. Initiation of the negotiation

The procedure to establish the right to transnational information and consultation of employees shall be launched either on the initiative of central management, or at the written request of at least 100 employees in total or their representatives in at least two undertakings or establishments in at least two different Member States (Article 5.1). The request by the employee representatives has to be addressed to central management in the language chosen by the employees and signed by them, taking into account linguistic legal requirements in the establishment(s) where the employees are working. It may well be that request(s) emanate from different countries and are formulated in various languages. The request(s) can be signed by individual employees or by their representatives, e.g. president(s) of local works councils, members of a trade union committee etc., provided they have the legal power to do so. A total of 100 employees is sufficient. There is no need to have 100 employees or their representatives in each of the two undertakings or establishments in the different Member States.

C. One or more EWCs — Procedures

The Directive only provides for the obligatory establishment of one (negotiated or standard) EWC or one alternative procedure, even if a Community-scale undertaking or group of undertakings is composed of Community-scale undertakings or groups which on their own would also qualify for the establishment of an EWC or an alternative procedure (Article 1.2 and 1.3).

In this case, the Directive makes it obligatory to establish an EWC or an alternative procedure at the “highest” level only.

However, additional EWC/procedures may be set up, also at “sub” level, if management and employees’ representatives agree (Article 6.2(a) and 6.3) taking the specific features of the “sub” levels (activities, branches) into account. The problem remains that in a group of groups, a central EWC/procedure still has to be set up at the highest level, even if EWCs/procedures have been set up in some of the subgroups only, unless a pre-existing agreement is in force.

3. Negotiation of the agreement

Negotiation for the establishment of an EWC or a procedure will take place between central management and an SNB composed of representatives of the employees (Article 5.2). With a view to concluding such an agreement central management has to convene a meeting with the SNB. It has to inform local management accordingly (Article 5.4).

A. Parties to the agreement and the SNB

Parties to the agreement are thus the Community-scale undertaking or group of undertakings, represented by central management and employee representatives (as defined in every Member State) who will constitute an SNB, according to Article 5 of the Directive. The SNB has in a sense a restricted legal personality, with the necessary competence to conclude or to terminate an agreement, establishing an EWC or a procedure. By the same token, the SNB should have the legal competence to introduce actions before the courts in case of dispute relating to matters covered by the Directive. For the purposes of concluding an agreement, the special negotiating body acts by a majority of its members (Article 6.5).

Composition of the SNB

The SNB shall be established in accordance with the following guidelines

“(a) The Member States shall determine the method to be used for the election or appointment of the members of the special negotiating body who are to be elected or appointed in their territories” (Article 5.2(a), first paragraph).

The election or appointment of the members within each Member State shall be organized according to the legislation of those Member States (see Declaration No. 2 of the Council and Commission). The Member States will have to pay special attention to eligibility for election and eligibility to vote. Managers — at local as well as at central level — although they may be legally considered as employees, would not qualify either as candidates for election or as voters, but it seems reasonable to limit that group to the managers who really run the local or central undertaking (senior management) and thus to interpret this concept restrictively. This means that blue collars, white collars and “cadres” (middle and higher management) would qualify to vote or to serve as elected or appointed members of the special negotiating body (SNB). To become a member, employees obviously have to agree to stand for election.

It is also true that trade unions could represent the employees, according to national law/practice. “ Member States shall provide that employees in undertakings and/or establishments in which there are no employees’ representatives through no fault of their own, have the right to elect or appoint members of the special negotiating body” (Article 5.2(a), second paragraph). Member States have the right to lay down thresholds for the establishment of employee representation bodies (Article 5.2(a), third paragraph). Nevertheless, according to the territoriality principle, an establishment/undertaking in a Member State will be represented in the SNB even if there is only one worker employed there.

“(b) The special negotiating body shall have a minimum of three and a maximum of 17¹ members” (Article 5.2(b)).

The maximum number of 17 members may not necessarily be reached.

“(c) In these elections or appointments it must be ensured:

- firstly, that each Member State in which the Community-scale undertaking has one or more establishments or in which the Community-scale group of undertakings has the controlling undertaking or one or more controlled undertakings is represented by one member;” (Article 5.2(c), indent 1).

It stands to reason that the Member States and the contracting parties should, as much as possible and where appropriate, ensure that different groups of employees are adequately represented in the SNB (junior and senior employees, men and women, blue- and white-collar workers and (junior) managers).

- secondly, that there are supplementary members in proportion to the number of employees working in the establishments, the controlling undertaking or the controlled undertakings, as laid down by the legislation of the Member State within the territory of which the central management is situated” (Article 5.2(c), indent 2);²

“(d) The central management and local management shall be informed of the composition of the special negotiating body” (Article 5.2(d)), supposedly by local management and/or the

¹18 from 1999 on (the UK Directive).

²The Council and the Commission stated that:

“In compliance with the principle set out in the first indent, in implementing these provisions, the Member State within the territory of which the central management is situated shall establish the detailed rules for deciding on the exact number of members of the SNB and the EWC respectively including, if necessary, supplementary members, as well as the key for distributing this number among the Member States concerned, in accordance with the second indent of Article 5(2)(c) and point 1(d), second indent of the Annex.”

representatives themselves on an individual or a collective basis. This last seems the most probable way and might be combined with the possibility for employee representatives to make a written request to initiate negotiations, according to Article 5.1 of the Directive.

Legal personality of the SNB

Whether SNBs have legal personality is not explicitly determined by the Directive. In any case, as an executive body, the SNB must have the capacity to execute its rights and duties, including in court.

Task of the negotiating parties

The SNB and the central management of the Community-scale undertaking or group of undertakings have the task, without prejudice to the autonomy of the parties, of determining, by means of a written agreement on the detailed arrangements for implementing the transnational information and consultation of employees, the:

- scope (undertakings or establishments);
- composition of the EWC, number of members, allocation of seats and term of office;
- functions and procedure for information and consultation of the EWC;
- venue, frequency and duration of meetings of the EWC;
- financial and material resources to be allocated to the EWC;
- duration of the agreement and the procedure for its renegotiation;

or for establishing one or more information and consultation procedures instead of an EWC (Article 6.3).

The SNB may decide, by at least two-thirds of the votes, not to open negotiations or to terminate negotiations already opened. Such a decision stops the procedure to conclude an agreement. Where such a decision has been taken, the provisions (subsidiary requirements) in the Annex do not apply. A new request to convene the SNB may be made at the earliest two years after the above-mentioned decision, unless the parties concerned lay down a shorter period (Article 5.5).

B. Experts and costs

“For the purpose of the negotiations, the special negotiating body may be assisted by experts of its choice” (Article 5.4, second paragraph). These experts can be employees or non-employees, for example trade union representatives. There is no doubt that the trade unions consider this to be a role for them and want to assist the employee representatives. This point is, however, also negotiable.

Any expenses relating to the negotiations have to be borne by the central management so as to enable the SNB to carry out its task in an appropriate manner (Article 5.6, first paragraph). “In compliance with this principle, Member States may lay down budgetary rules regarding the operation of the special negotiating body. They may in particular limit the funding to cover one expert only” (Article 5.6, second paragraph).

C. Role of trade unions and the employers’ associations

Although trade unions and employers’ associations are, according to the Directive, not directly involved as parties to the agreement to be concluded concerning information and consultation, they may play an active role in practice. Undoubtedly, the European Trade Union Secretariats (sectoral level) and the European Trade Union Confederation (ETUC) (inter-industry level) are strongly behind the moves for a European social dialogue. But the decision by the European Union that the agreements should be concluded by representatives of the employees and not necessarily by the trade unions was made deliberately. In a sense this leaves all options

open. Trade unions can still play a role, however, by training of EWC members, by acting as experts, or even as contracting parties. The same goes for the Union of Industrial and Employers' Confederations of Europe (UNICE) as well as for the (national) employers' associations, which can help to monitor and guide their member undertakings. National trade unions may play a role in the election or appointment of (national) representatives in the SNB if national law or practice provides for such a role, as might be the case in Belgium or France.

4. Nature, binding effect, form, language and interpretation of the agreement

A. Nature and binding effect of the agreement

The agreement can be looked upon as a special kind of collective labour agreement concluded between representatives of European management and the European representatives of the employees in the form of a negotiating body, an EWC or an information or consultation procedure. One can qualify the agreement as a "contract-institution", namely a contract which creates an institution, a framework for information and consultation between management and labour. Such an institution assumes a life of its own, once it has been created. Like any other collective labour agreement, the agreement has a mandatory part and a normative part. The mandatory part relates to the rights and duties of the contracting parties, while the normative part relates to the information and consultation procedure which has been institutionalized, its scope, composition and competence. The contracting parties not only create, but also control the very existence of the EWC or the procedure since they will always have the right to denounce it, taking formalities and/or terms of notice into account.

The binding effect of the agreement — both its mandatory and its normative parts — will depend on the law applicable to the contract. As the agreement was concluded in Brussels, the venue of the EWC meeting or the framework of a procedure is in Belgium unless central management chose another legal system, and the relations between the contracting parties will be governed by Belgian law. This would then rely on the general principles of the law of contract: the Belgian Act of 5 December 1968 on joint committees and collective labour agreements would not apply, since in order to qualify for a collective agreement which is legally binding (in the sense of the 1968 Act), the employees have to be represented by (Belgian) trade unions, which is not the case for the special negotiating body (SNB), operating in the framework of the Directive.

B. Form and language of the agreement

The agreement establishing an EWC or a procedure has to be drawn up in writing; it has to be signed by the representatives of management and by the majority of the individual employee representatives assembled in the SNB. The negotiating body is a legal person: it is more than a vehicle for communication between the actors. More formal aspects of the agreement to establish its legal status, the number of copies to be signed and so on depend on the requirements of the applicable law.

The agreement may be drafted in various official languages of the Member States, depending on the (national) composition of the negotiating parties. A single language is also possible, with or without translation, provided the signatories understand what they sign. Special attention will have to be paid to the national legislation which applies to the agreement, especially if this legislation contains linguistic requirements as is the case in Belgium and France.

C. Interpretation of the agreement

Interpretation is primarily the responsibility of the parties to the agreement, the members of the EWC or those involved in the procedure. Interpretation takes the form of a permanent

dialogue about the content of the agreement and its application. In case of a (legal) dispute, which the parties and/or actors cannot settle themselves, the decision would lie with the competent national judge, unless the parties provide for binding arbitration. This might be a (legal) venue in a number of EU-EEA Member States.

5. Content of the agreement

The content of the agreement is the business of the contracting parties: they decide autonomously what to put in the agreement and what to leave out. However, in case of the establishment of an EWC, Article 6 of the Directive contains a mandatory list of subjects, but the parties are autonomous in deciding upon the content of the listed points.

According to the Directive, a distinction must be made between setting up an EWC and drawing up a procedure. It is not easy to see the difference between an EWC and a procedure, especially since Article 6.3 provides, in case of a procedure, for the right of employee representatives to meet to discuss the information conveyed to them. “The agreement must stipulate by what method the employees’ representatives shall have the right to meet to discuss the information conveyed to them. This information shall in particular relate to transnational questions which significantly affect workers’ interests.” It would therefore seem that an EWC is a more institutionalized form of communication and dialogue, while the procedure is a much looser one. But, it is not clear where the procedure ends and the EWC begins and vice versa. It may be that an agreement which does not lay out in detail all the points covered by Article 6.2 qualifies as a procedure rather than as an EWC. Parties could, however, make their intentions clear and indicate in the agreement whether they opt for an EWC or for a procedure.

A procedure might involve written reports forwarded by management, information and consultation at local level; within or outside existing proceedings at national level. An example might be a visit from a (European or national) human resources manager to the employee representatives at plant or national level, provided that the meeting deals with transnational issues. This procedure need not necessarily be the same in all undertakings; it may differ from one Member State to another or between different businesses in the group.

Parties are free to decide on these matters and can qualify their arrangement as they see fit, taking into account the right of the employees’ representatives to discuss the information conveyed to them and engage in a dialogue.

The agreement is not, unless it provides otherwise, subject to the subsidiary requirements referred to in the Annex (Article 6.4, first paragraph).

A. Scope

The agreement has to indicate “the undertakings of the Community-scale group of undertakings or the establishments of the Community-scale undertaking which are covered by the agreement” (Article 6.2(a)).

The agreement has to indicate the territorial and personal scope (establishments/undertakings) covered by the agreement, possibly addressed by various EWCs in the case of a group. The scope may also contain undertakings outside the EU and the EEA-EFTA countries.

B. Setting up of an EWC

(Article 6.2(b)) The composition of the EWC, the number of members, the allocation of seats and the term of office: The agreement can provide that the EWC may be composed of employee representatives only, or also of representatives of management: they might also agree that the EWC should be chaired alternatively by a representative of either group (management/employees). Parties should reflect on the appropriate representation of the different

groups of employees, manual workers and office staff, female workers, supervisors and junior managers. Parties can also agree on other members, such as trade unionists, who may participate either as full members, as observers or as experts. Complete freedom prevails on these matters. Parties may also agree whether there will be a select committee for the workers' group or of the EWC itself, if the council is composed entirely of employees.

Various problems could arise in case of mergers or other restructuring of undertakings/establishments which might affect the composition of the EWC (especially in the case of a merger of two groups which each have their own EWC).

As the Directive is silent on this matter, the question should be addressed according to the law which is applicable. If the law does not regulate the problem, the parties will have to renegotiate their agreement. So long as a new agreement is not reached, the existing agreement(s) continue(s) to have effect. In case no new agreement is reached within the terms foreseen in Article 7, the subsidiary requirements will apply.

The allocation of seats in the EWC will usually take account of the number of employees in the undertaking(s) and establishments. Regarding elections or appointments parties would be well-advised to follow national law and/or practice as closely as possible, as for the election of representatives to the SNB. Candidates should ideally have a given seniority, perhaps of one year as an employee in the establishment undertaking in order to represent their colleagues with a certain degree of insight and competence. The term of office should cover a number of years, not too long and not too short. Two to three years seems a minimum; five years a maximum.

(Article 6.2(c)) The functions and the procedure for information and consultation of the EWC: The agreement might specify the competence of the EWC more precisely with regard to the nature of the consultation and may indicate the prerogatives of management. The agreement should also clearly indicate the subject-matter of the information and consultation exercise; this may be inspired by the subjects enumerated in the subsidiary requirements. In particular, the employees are entitled to information and consultation regarding transnational questions which significantly affect their interests, i.e. jobs and working conditions in the broad sense. Employees are especially interested in the social consequences of certain managerial decisions. Information about future developments and prospects is relevant here: employees are more interested in the future of the business than in the socio-economic history of the company.

The agreement should specify the timing of the information and consultation exercise, which may be scheduled annually or on an ad hoc basis. It should also indicate how the exchange of views and/or the dialogue should be organized, and make provision for feedback. It should give guidance on the handling of confidential and/or prejudicial information, on the role of experts, and on the use of accountants to check information. Other points may concern: voting majorities, the drafting of the agenda, the drafting of reports, the organization of working parties, possible training of delegates, communication of information and consultation results to the rank and file and to the trade unions, and contacts with the press. Other points include written and/or oral procedures, the question of whether documents are to be sent beforehand and how long before the meeting takes place, the timing between information and consultation, the tabling of motions, voting, language interpretation and translation and the role of experts.

(Article 6.2(d)) The venue, frequency and duration of meetings: The agreement may say something about invitations to the meetings, and about the place of the meetings. It may distinguish between general information given on an annual basis, and ad hoc meetings when important events are discussed, such as closures and redundancies. The agreement may also provide for preliminary meetings, meetings of working parties, of the select committee, of the workers' group, and for the length of the meeting.

(Article 6.2(e)) The financial and material resources to be allocated to the EWC: Central management will have to provide the necessary financial resources to cover the functioning of the EWC (secretariat, catering, accommodation, etc.); while the agreement covers travel expenses, loss of wages of the employees' representatives and similar costs. Experts will normally be paid by the party they assist, or by the organization they represent, which may be

subsidized to this end by the EU, but the agreement might provide otherwise and indicate that expert costs will be borne by central management.

(Article 6.2(f) The duration of the agreement and the procedure for its renegotiation: The agreement should indicate its duration. It may be open-ended, with a term of notice; it may insist on certain forms such as a registered letter and may contain proposals for renegotiation, to be respected if the agreement is denounced. The agreement could be denounced, totally or partially, by central management or by the majority of members of the negotiating body. Both parties may also agree to terminate the agreement.

The agreement may be concluded for a fixed period, after which it automatically terminates. Parties can also foresee a fixed period with an extension for (a similar) period unless the agreement is terminated before a certain date (e.g. one year before the term ends).

In any case, there must be a procedure for renegotiation, which would normally take place between central management and a negotiating body. However, according to the Annex (point 1(f), paragraph 2) this is the (employee representatives of) the EWC. If no new agreement is reached before the old one expires, the subsidiary requirements will apply.

Others: The agreement could also expand on the law applicable to the agreement, on the settlement of interpretation or application difficulties, either by way of conciliation or arbitration, on the competent court and the like.

For the purposes of concluding the agreement the SNB shall act by majority of its members (Article 6.5).

C. Setting up a procedure

Article 6.3 of the Directive states:

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

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

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

Parties should focus on:

- (a) the scope of the procedure;
- (b) the mode of operation, including "the right to meet to discuss the information";
- (c) the matters subject to information and consultation;
- (d) the financial and material resources to be allocated for the functioning of the procedure;
- (e) the duration of the agreement and the procedure for its renegotiation;
- (f) the law applicable to the agreement.

V. Prejudicial and confidential information — Ideological guidance

According to Article 8.2, first paragraph of the Directive,

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

A Member State may make such dispensation subject to prior administrative or judicial authorization (Article 8.2, second paragraph).

According to Article 8.1 of the Directive,

Member States shall provide that members of special negotiating bodies or of European Works Councils and any experts who assist them, are not authorized to reveal any information which has expressly been provided to them in confidence.

The same shall apply to employees' representatives in the framework of an information and consultation procedure.

This obligation shall continue to apply wherever these persons are, even after the expiry of their terms of office.

Parties could in their agreement define more precisely the kind of information which is either prejudicial or confidential. The nature of the confidential and/or the prejudicial information could also be identified at the moment when the information is given.

VI. Protection of employees' representatives

Employee representatives have the same protection as their national colleagues. Article 10 of the Directive provides that members of special negotiating bodies (SNB), members of European works councils (EWC) and employees' representatives exercising their functions under an information and consultation procedure, shall, in the exercise of their functions, enjoy the same protection and guarantees provided for employees' representatives by the national legislation and/or practice in force in their country of employment, especially as regards attendance at meetings of (SBNs) or EWCs or any other meetings within the framework of the agreement establishing a procedure and the payment of wages for members who are on the staff of the Community-scale undertaking or group of Community-scale undertakings for the period of absence necessary for the performance of their duties.

This protection includes promotion, dismissal and working conditions. It should be pointed out here that the different national systems regarding protection vary considerably from one Member State to another. There may also be different systems of protection within the same country. For example, in Belgium there is a difference between the protection of works council members and members of trade union committees. In such a case it is presumed that the most favourable system of protection would apply unless national legislation implementing the Directive should state otherwise.

It is also presumed that in case of a dispute concerning, for example, the proposed dismissal of a (European) representative, national procedures have to be followed. In Belgium this means that national joint committees of employers and trade unions operating at branch-industry level, as well as labour courts, might be involved and that the (national) trade unions would have a role to play. This may give rise to legal complications.

It may also be necessary to have recourse to international private labour law to determine which national system is applicable if an employee representative is employed in more than one country, perhaps in the capacity of commercial traveller.

VII. Compliance with the Directive — Links — Final provisions

1. Compliance with the Directive

Each Member State has to ensure that the management of establishments of a Community-scale undertaking and the management of undertakings which form part of a Community-scale group of undertakings, which are situated within its territory and their employees' representatives or, as the case may be, employees abide by the obligations laid down by the Directive, regardless of whether or not the central management is situated in its territory (Article 11.1).

Member States shall ensure that the information on the average number of employees is made available by undertakings at the request of the parties concerned by the application of the Directive (Article 11.2).

Member States shall provide for appropriate measures in the event of failure to comply with this Directive; in particular, they shall ensure that administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced (Article 11.3).

As already indicated earlier, Member States provide for administrative or judicial appeal procedures which the employees' representatives may initiate when the central management requires confidentiality or does not give information for reasons of confidentiality. Such procedures may include procedures designed to protect the confidentiality of the information in question (Article 11.4).

The Directive does not provide explicitly for the right of the Member States to apply or introduce laws — regulations or administrative provisions laying down conditions more favourable to employees than those contained in the subsidiary requirements, for those undertakings where no agreements have been concluded within the period required by the Directive. However, as this Directive is adopted under the Social Protocol, such a possibility is already provided for in the Maastricht Social Agreement (Article 2.5).

Member States are thus entitled to maintain or introduce more stringent protective measures compatible with the Treaty, limited however to their territory. It seems unlikely that Member States will impose more stringent measures, since for obvious reasons, they will look carefully at the protective measures provided for in other Member States.

2. Links

Article 12 of the Directive concerns the links between this Directive and other provisions, European as well as national. It says that this Directive shall apply without prejudice to measures taken to the Directives on collective redundancies (1975) as amended, and on the transfer of undertakings (1977). Regarding national provisions it indicates that "this Directive shall be without prejudice to employees' existing rights to information and consultation of employees under national law".

3. Final provisions

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 22 September 1996, or shall ensure by that date at the latest that management and labour introduce the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them at all times to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof (Article 14.1).

Article 14.1 of the Directive thus gives Member States the option to give the national social partners (in conjunction with national legislation, if necessary) the possibility to conclude collective agreements implementing the Directive. These collective agreements must be binding

in law and cover all undertakings and employees concerned. This is the case where national provisions contain extension procedures which may make collective agreements binding *erga omnes*. This is the case in Belgium, France, Germany and the Netherlands. “When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States” (Article 14.2).

VIII. Subsidiary requirements: A mandatory EWC

If the central management and the special negotiating body (SNB) so decide or if the central management refuses to commence negotiations within six months of the request by representatives of the employees to initiate negotiations or if, after three years from the date of this request, they are unable to conclude an agreement providing for an EWC or a procedure for informing and consulting employees, the subsidiary requirements laid down by the legislation of the Member State in which the central management is situated, apply (Article 7.1).

The subsidiary requirements as adopted in the legislation of the Member State must satisfy the provisions set out in the Annex to the Directive (Article 7.2).

The subsidiary requirements thus constitute the mandatory core requirements regarding information and consultation rights, that the legislator wants European undertakings to grant if the parties do not follow the voluntary road by concluding an agreement, setting up an EWC or by establishing an information and consultation procedure. Indeed, the subsidiary requirements provide for the mandatory establishment of an EWC.

1. Composition of the EWC

“The EWC shall be composed of employees of the Community-scale undertaking or Community-scale group of undertakings elected or appointed from their number by the employees’ representatives or, in the absence thereof, by the entire body of employees” (Annex, paragraph 1(b), first paragraph).

“The election or appointment of members of the EWC shall be carried out in accordance with national legislation and/or practice” (Annex, 1(b), second paragraph).

The EWC has a minimum of three members and a maximum of 30. Where its size so warrants, it shall elect a select committee from among its members comprising at most three members. It shall adopt its own rules of procedure.

The maximum of 30 need not necessarily be reached; the number can be less if so provided by the applicable law (national law of the Member State in which the central management is situated) (Council and Commission Declaration No. 2).

In the election or appointment of members of the European Works Council, it must be ensured:

- firstly, that each Member State in which the Community-scale undertaking has one or more establishments or in which the Community-scale group of undertakings has the controlling undertaking or one or more controlled undertakings is represented by one Member :
- secondly, that there are supplementary members in proportion to the number of employees working in the establishments, the controlling undertaking or the controlled undertakings as laid down by the legislation of the Member State within the territory of which the central management is situated (Annex, paragraph 1(d)).

“The central management and any other more appropriate level of management shall be informed of the composition of the European works council” (Annex, paragraph 1(e)).

2. Competence

The competence of the European Works Council shall be limited to information and consultation on the matters which concern the Community-scale undertaking or Community-scale group of undertakings as a whole or at least two of its establishments or group undertakings situated in different Member States

In the case of undertakings or groups of undertakings, the competence of the European Works Council shall be limited to those matters concerning all their establishments or group undertakings situated within the Member States or concerning at least two of their establishments or group undertakings situated in different Member States (Annex, paragraph 1(a)).

A. General information (annual)

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

The meeting shall relate in particular to the structure, economic and financial situation, the probable development of the business and of production and sales, the situation and probable trend of employment, investments, and substantial changes concerning organization, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof and collective redundancies (Annex, paragraph 2).

B. Ad hoc information

Where there are exceptional circumstances affecting the employees' interests to a considerable extent, particularly in the event of relocations, the closure of establishments or undertakings or collective redundancies,¹ the select committee or, where no such committee exists, the European Works Council shall have the right to be informed. It shall have the right to meet, at its request, the central management, or any other more appropriate level of management within the Community-scale undertaking or group of undertakings having its own powers of decision, so as to be informed and consulted on measures significantly affecting employees' interests.

Those members of the European Works Council who have been elected or appointed by the establishments and/or undertakings which are directly concerned by the measures in question shall also have the right to participate in the meeting organized with the select committee (Annex, paragraph 3, first and second paragraphs).

3. Procedure

The EWC shall have the right to meet with central management once a year and if there are exceptional circumstances, particularly affecting considerably the interests, as indicated above. The yearly meeting takes place on the basis of a written report.

The special ad hoc information and consultation meeting has to take place as soon as possible on the basis of a report drawn up by the central management or any other appropriate level of the management of the Community-scale group of undertakings. An opinion on the report may be delivered at the end of the meeting or within a reasonable time. It is assumed that this report should also be in writing, except for a matter of great urgency on which an oral report would have to be made. "This meeting shall not affect the prerogatives of the central management" (Annex, paragraph 3, fourth paragraph).

Member States may provide for rules concerning the chairing of the information and consultation meetings (Annex, paragraph four, first paragraph). The applicable law may provide for management to chair the meeting, as this is common practice in most Member States.

"Before any meeting with the central management, the European Works Council or the select committee, where necessary enlarged in accordance with the second paragraph of point 3 shall be entitled to meet without the management concerned being present" (Annex, paragraph 4, second paragraph).

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

"The European Works Council shall adopt its own rules of procedure" (Annex, 1(c), paragraph 3).

¹The Council and Commission stated: "The collective redundancies in respect of which employees must be informed and consulted are those which concern a significant number of employees in relation to the size of the Community-scale undertaking, the establishment, the Community-scale group of undertakings or the undertaking which is a member of the Community-scale of undertakings, in which the collective redundancy is taking place."

4. Role of experts, trade unions and employers' associations

“The European Works Council or the select committee may be assisted by experts of its choice insofar as this is necessary for it to carry out its tasks” (Annex, paragraph 6). These experts may be employees or non-employees and they may be trade union representatives. There is no doubt that the trade unions consider this to be a role for them and are eager to assist employee representatives.

The European Trade Union Secretariats and the ETUC strongly support the moves for a European social dialogue. Trade unions can also play a role in training members of EWCs, and by acting as experts. Employers' associations can help to monitor and guide undertakings in similar ways.

5. Expenses

The operating expenses of the EWC are, according to the Annex, (paragraph 7) to the Directive, borne by the central management.

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

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

In compliance with these principles, the Member States may lay down budgetary rules regarding the operation of the European Works Council. They may in particular limit funding to cover one expert only (Annex, paragraph 7 (2-4)).

Member States (the applicable law) may make specific provisions on this matter. For example, they may reasonably limit certain expenses (travel or accommodation, translation, interpretation) or may provide a maximum global budget, provided that it is sufficient for employee-members of the EWC or procedure to perform their duties and exercise their rights in an adequate manner.

6. Enforcement of the subsidiary requirements

Member States have to ensure that the subsidiary requirements are respected whether the central management is situated in their territory or not.² So they have to enact appropriate measures and see that they are enforced. The Court of Justice is of the opinion that where a Directive does not specifically provide any penalty for an infringement, or where it refers for that purpose to national laws, the obligations of the Member States under the Rome Treaty are to require them to ensure that infringements of EC law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.³

7. Future developments

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

Articles 6 and 7 of the Directive shall apply, *mutatis mutandis*, if a decision has been taken to negotiate an agreement according to Article 6 of the Directive, in which case “special negotiating body” shall be replaced by “European Works Council” (Annex, paragraph 1(f)).

²See Article 11 of the Directive.

³8 June 1994, C-382/92 and 383/92, Commission vs. UK.

IX. Pre-existing agreements

As indicated above, the EU favours the voluntary establishment of an EWC or of an information and consultation procedure by encouraging the conclusion of agreements to that end even before the Directive entered into force.

With this objective in mind, Article 13 of the Directive declares as follows:

1. ... the obligations arising from this Directive shall not apply to Community-scale undertakings or Community-scale groups of undertakings in which, on the date laid down in Article 14(1) for the implementation of this Directive or the date of its transposition in the Member State in question, where this is earlier than the above-mentioned date, there is already an agreement, covering the entire workforce, providing for the transnational information and consultation of employees.

2. When the agreements referred to in paragraph 1 expire, the parties to those agreements may decide jointly to renew them.

Where this is not the case, the provisions of this Directive shall apply.

These so-called agreements in force or pre-existing agreements thus escape the obligations arising from the Directive. This on the condition that there is “an agreement providing for the transnational information and consultation of employees” (Article 13.1). For undertakings or groups of undertakings, which for reason of the extension of the Directive to the UK and Northern Ireland, fall under its scope, Article 13 agreements can be concluded up to 14 December 1999 (Article 2, Directive 97/74 of 15 December 1997).

1. Timing, form, language and format of the agreement — Applicable law

The agreement has to be concluded before implementation of the Directive in national law, i.e. 22 September 1996, or the date of its transposition in the Member State in question, where this is earlier than the above-mentioned date. Multinationals based in the UK can conclude Article 13 agreements until 15 December 1999.

Although Article 13 of the Directive does not indicate that the agreement should be in writing, this certainly seems to be the case, as the existing agreement will be examined to confirm that it qualifies as an agreement in force, escaping the obligations imposed by the Directive on the establishment of an EWC or a procedure for the purposes of informing and consulting employees.

As already noted above, the agreement may be drafted in various official languages of the EU. Special attention will have to be paid to the national legislation which is applicable to the agreement, especially if this legislation contains linguistic requirements.

2. Scope and parties to the agreement

A. Scope

Special attention has to be given to the (personal) scope of the agreement. Article 13 stipulates that the agreement should cover the entire workforce, a provision which leads to the following questions:

- Does the agreement cover all establishments/undertakings concerned by the definition of Community-scale undertaking or group of undertakings in Articles 2 and 3 of the Directive?
- Does the agreement cover all employees of all the establishments/undertakings concerned?

B. Parties

The parties to the agreement are evidently the representatives of the Community-scale undertaking or group of undertakings — central management on the one hand and employee representatives on the other hand.

Management representatives may be the chief executive officer (CEO), a managing director, a European human resources manager or another senior executive. Employee representatives may be shop stewards or members of existing works councils, which operate at national level, or employees elected or appointed for the purpose of representation at European level. Employee representatives may also be from national trade unions, from European Industry Committees such as the European Metal Workers' Federation, EuroFiet and others. Some preliminary negotiation will have to take place on who qualifies as a party to the agreement. As a general rule (international) management prefers to deal with employees only while trade unions like to play a role, preferably as a party to the agreement, in order to participate in monitoring the work of the EWC or the information and consultation procedure.

3. Content of the agreement

A. EWC, procedure or another mechanism

Parties have to decide whether they want to establish an EWC, a procedure for the purposes of information and consultation, or another mechanism, which may be given the title of their choice, such as forum, or liaison committee. In case of an EWC or similar arrangement, the parties have to decide on its composition: employees only (alternately) chaired by a representative of central management or an employee representative, or there may be a joint committee, composed of representatives of both sides.

Parties also have to agree on the number of members, taking account of certain requirements:

- one member from each Member State where the undertaking has an establishment;
- supplementary members according to the number of employees in the establishments/undertakings;
- substitute members.

There is also the possibility of creating a select or executive committee, representing the employee-members or the EWC as a whole. Such a committee could steer the EWC and/or be available for ad hoc interventions.

Decisions also have to be made on preliminary meetings, the role of experts and similar questions.

In case of a procedure instead of an EWC committee, similar questions arise: who will be involved, who will be informed and consulted and how will parties relate to each other? Again, maximum flexibility is allowed but at a given point employee representatives and those of management should meet and engage in a dialogue. The decisions on such points have to be recorded in writing.

B. Competence: Information and consultation

The content of the information and consultation is set out in Article 1 of the Directive and in the subsidiary requirements. Information and consultation have, in particular, to relate to transnational issues involving undertakings — establishments of at least two Member States.

C. Functioning

Parties have to decide when representatives of the (central) management and employee representatives will meet: annually and/or ad hoc in response to important events affecting the interests of the employees. They have to decide on meeting(s) of the select-executive committee and on preparatory meetings before the meeting with central management. Other points concern drafting the agenda (e.g. every party has the right to put points on the agenda), submitting documents, agreeing on the rules of the meeting, ways of formulating opinions, exchanging views, engaging in dialogue, writing the minutes of the meetings, and reporting feedback.

Employees' representatives may need secretarial services and modern office facilities. This may be included in the terms of the agreement, which might also cover the question of languages and interpretation facilities necessary for the information and consultation exercise. Obviously, all parties must understand the language(s) of the meeting.

D. Role of experts

Experts play an essential role in an EWC or a procedure. Employee representatives should be free to choose their experts. These may be other employees, trade union representatives or independent consultants. The agreement may include rules on the appointment of experts, their qualifications, numbers, access to documents, attendance at preliminary meetings or meetings of the EWC. Expert costs would normally be paid by the undertaking, unless trade unions benefit from EU subsidies towards that end.

E. Expenses

The expenses incurred by the EWC or a procedure should be borne by the undertaking. The expenses of employee representatives can be met by expense accounts or (partly?) by allocating a budget to them. Part of the expenses may be paid by central management and part by the local establishment. Wages are paid for activities taking place during working time.

4. Prejudicial and confidential information

These points could be addressed in the agreement: which information will be given and which information is prejudicial/confidential; which information can be passed on to local managers, to other employees, to trade unions (?), to government authorities and the public at large. The possibility of press conferences and/or press releases should also be envisaged.

5. Status of the employee representatives

The status of employee representatives may be addressed in the agreement. Parties can decide whether to include a provision indicating that employees cannot be discriminated against for reasons of opinions defended. The agreement may confer upon them the same protection as under national law.¹

In case of a dispute which parties cannot solve by negotiation and if there is no other voluntary mechanism for dispute settlement, such as mediation, conciliation or arbitration, parties will have to take action under the national law which governs the agreement. As the Directive does not apply to pre-existing agreements, the general principles of law and legal procedure will prevail. The national law will determine who qualifies as a litigating party, which judge is competent and what remedies are available. The normal course of action would be for the parties themselves to settle their differences in a spirit of cooperation instead of going to court.

¹See also the ILO Workers' Representatives Convention, 1971 (No. 135).

X. Review of the Directive by the Commission

“Not later than 22 September 1999, the Commission shall, in consultation with the Member States and with management and labour at European level, review its operation and, in particular, examine whether the workforce size thresholds are appropriate with a view to proposing suitable amendments to the Council, where necessary” (Article 15). This will bring us well into the twenty-first century. The information and consultation Directive may then, provided it survives the review, apply to more than 20 Member States with more than 500 million inhabitants. But that is still some way off.

XI. Overview of experience

1. The first councils (1985-94)

Between 1985 and 1994 European works councils (EWCs) existed exist in one form or another in some 30 enterprises. The first was established in Thomson Consumer Electronics (1985). Others were set up later in Bull, Volkswagen, Europipe, Pechiney, Nestle, BSN Group, Allianz, Rhone-Poulenc, Elf-Aquitaine, Saint Gobain, Scansped Group AB, Continental Car Europe, Airbus Industry, Eurocopter and others.¹ Analysis of agreements between the multinational groups and the European sectoral trade unions clearly shows that the councils' competence was generally limited to information and in a few cases to consultation. Europipe is an exception, having equal representation of German and French workers on the supervisory board, which has to give its consent before a number of important economic financial decisions can be taken. For a better insight into the significance of the councils we give two examples: Thomson Consumer Electronics and Volkswagen.²

Thomson Consumer Electronics is a multinational enterprise producing household electrical appliances, with subsidiaries in France, Germany, Italy, Spain and the UK. On 7 October 1985 two protocol agreements were signed between Thomson and the European Metal Workers' Federation (EMF), setting up a TCP-EMF liaison committee and a TCP European branch commission. These agreements, concluded on an experimental basis for a period of two years, were renewed in December 1987, this time for an open-ended period. The liaison committee is composed of representatives of the trade unions which are EMF members. The branch commission is composed of employee representatives from the different subsidiaries.

The liaison committee meets once a year on either Thomson or EMF initiative. With the agreement of both parties, the committee may meet on an ad hoc basis, even in a restricted form. The committee is composed of 13 trade union members and one EMF member. Thomson pays the costs of the meeting. The committee's competence is mainly of an information nature, covering economic and financial aspects, research and development. The committee is informed, prior to implementation, of major structural, industrial and trading modifications and changes in the economic and legal organization of Thomson. It is informed of the measures taken and planned for adapting the organization and the workforce to technological change, and for adapting employees' skills in the light of employment problems. Members of the liaison committee may express an opinion on all defined areas. The EMF has access to documents transmitted to the European branch committee. It undertakes to respect the confidential or secret nature of these documents, as the case may be, vis-à-vis third parties.

The branch commission is convened by Thomson once a year. It consists of 26 worker representatives. Thomson pays the expenses of the meeting; the salaries of staff delegates continue to be paid throughout the period of the meeting. Their term of office in the commission is for two years. The European branch commission is informed of the financial, industrial, commercial and research activity of Thomson. It is notified of measures taken or considered for adapting the personnel of subsidiaries in the countries involved to technological developments and it is informed of personnel qualification in regard to employment problems. The commission

¹See "Information and consultation in European multinationals" — Parts one and two, in *European Industrial Relations Review*, Nos. 228 and 229 (Jan. and Feb. 1993).

²See: Hutsebaut M., *The Social Dimension of the Internal Market*, Second Part: "Workers' rights in European companies", European Trade Union Institute, Brussels, Info 26, 1988; European Trade Union Institute, *The Social Dimension of the Internal Market. Part IV*, Brussels, 1991; European Foundation for the Improvement of Living and Working Conditions, *Report on European-level Information and Consultation in Multinational Companies — An Evaluation of Practice*, Dublin, 1992, by M. Gold and M. Hall.

is also informed, before implementation, of any significant structural or industrial modifications, if the decision is to be made at the level of Thomson. The commission is equally informed of any modifications to the economic or legal organization of Thomson (acquisitions, sales or subsidiaries).

On 7 February 1992 a cooperation agreement was concluded between the management of the Volkswagen group and the Volkswagen European group works council, which was set up on 30 August 1990. This council is composed of 17 members: eight representing Volkswagen AG; two representing Audi AG (ten German members); five representing Seat SA (Spain); and two representing Volkswagen Brussels SA (Belgium).

By this agreement the parties wish to establish a social dialogue at European level. They seek in this way "to make an active contribution to future understanding and structuring within the framework of the development of Europe into a political union of European States with a single market". With its European brands of Volkswagen, Audi, Seat and Skoda, and the setting up of new European production facilities, the Volkswagen group has accepted a degree of responsibility in the development of Europe. This includes a social obligation towards the workforces and locations on the basis of active collaboration with employee representatives and unions. The parties agreed that "successful social development is dependent on international competitiveness achieved through a high level of productivity and flexibility, making constantly increasing demands in respect of the quality and environmental acceptability of the products". Both parties regard this agreement as "a basis within the Volkswagen group for working together at European level in a spirit of constructive dialogue and cooperative surmounting of economic, social and ecological challenges and for jointly solving any conflicts which may arise".

Management and worker representatives meet at least once a year. The topics dealt with at the meetings, to the extent that they are of general importance for the European production plants, relate primarily to the following areas:

- security of jobs and plants, and plant structures;
- development of group structures;
- productivity and cost structures;
- conditions of employment (e.g., working hours, wages and salaries, job design);
- new production technologies;
- new forms of work organization;
- work safety, including plant and environmental protection;
- the effects of political developments and decisions of the Volkswagen group.

Discussion of these topics serves as an exchange of information on development trends and strategies and promotes progress to the benefit of all concerned.

The council is in due time informed about planned cross-border transfers of production (main investment emphasis, production scope, essential company functions). This applies to transfers which may have a serious effect on the interests of employees at production plants of the Volkswagen group in Europe. The council "has the right to comment within an appropriate period which shall be agreed upon by both parties in each case immediately on receipt of the information. In its comments the council can require explanation of the planned transfer in the framework of consultations jointly laid down. These consultations shall take place early enough for the views of the council to be taken into account in the decision-making process ... The rights and duties of the responsible company bodies in each case remain unaffected," indicating that managerial prerogative remains intact. Volkswagen undertakes to bear the costs of the works council.

Needless to say, experience over the years 1985-94 shows great diversity. Some agreements are formal and in writing, others are informal; in some there are agreed practices. Most are strictly informative. Unions do play a role in the composition of the councils, either as members themselves or in appointing the employee-members of the councils. The arrangements frequently

involve a joint employee forum; while the number of members varies from 12 (BSN) to 75 (Elf Aquitaine), although membership rarely exceeds 30. Meetings are usually on an annual basis, sometimes with preliminary meetings or ad hoc meetings. At first the agreements are concluded for a short period, e.g., of two years, and are then extended indefinitely. The companies take care of costs.

The meetings provide an opportunity for management to:

- explain corporate strategy;
- facilitate company restructuring;
- foster international contacts and exchange views;
- create a sense of belonging to an international company.

Employee representatives have an opportunity to:

- gather information directly from group headquarters;
- use information for national collective bargaining;
- improve international contacts;
- exchange information on best practice;
- set an example for other multinationals;
- develop a joint international policy.

2. Pre-Directive agreements (1994-96)

The possibility of concluding agreements to which the Directive would not apply undoubtedly spurred negotiations and the conclusion of more than 400 agreements. A total of 386 agreements which had been concluded before May 1995 were analysed in the “Review of current agreements on information and consultation in European multinationals” (1996).³ This overview gives a general picture of developments. Let us have a closer look at some of the items.

A. Countries of headquarters coverage

Article 13 agreements were concluded by undertakings or groups of undertakings headquartered in no less than 25 countries: Germany (89), US (59), UK (58), France (42), Sweden (22), Switzerland (19), Netherlands (18), Belgium (17), Finland (14), Italy (14), Japan (14), Austria (7), Norway (7), Denmark (6), Ireland (3), Spain (3), Luxembourg (2), rest of the world: (5).

Most agreements concern the Member States and the UK, which is included despite the fact that the UK was not covered by the 1994 Directive. In a few instances Central and Eastern European countries, such as Hungary, are included. Exceptionally, there are worldwide works councils as in the case of SKF and Nat West.

B. Parties to the agreements

Parties to the agreements are representatives of management and representatives of employees.

A great variety of employee representatives are involved:

- international or European trade secretariats (e.g., IMF-IUF-EMF);
- national trade unions;
- works council representatives or other employee representatives.

³Margison et al., 1998. Margison, 1998.

C. EWC or procedure

As a general rule, an institution is established and a “procedure”, allowing for even more flexibility, seems not to be a favoured formula. Most agreements do not use the term European works council, but have a variety of names such as forum, structure for dialogue, group committee, consultative council or dialogue.

D. Composition of the EWC

In two-thirds of cases, the EWCs are joint bodies with both management and employee representation.

The number of employee representatives varies widely from 70 members (Saint-Gobain) to 20 (BP Oil) and eight (Grundig). The vast majority have 10-40 members. Mostly, representatives are employees of the group who already have a representative function in the undertaking (shop steward, member of a national works’ council, etc.). So the representativeness of the employee members is in a sense guaranteed by the mandate they hold within their own country.

In a number of cases officials of national or international trade unions participate in the activities of the works council either as members or as guests.

The members are appointed or elected at national level or else they are nominated by trade unions. Direct elections are quite rare.

Management is represented by managers such as CEOs and group or general managers. In some agreements, it is specified that national management may attend or that guests can be invited.

E. Select committee

In 62 per cent of agreements (19) a select committee, comprising a few key members, has been set up. This is sometimes a bipartite group and sometimes a worker group (two-thirds). It performs a variety of functions including coordination, contact, and preparing the EWC meetings.

F. Duration of the mandate

Where the duration of the mandate is specified, the term ranges from two to four years.

G. Competence

The competence of the EWC evidently relates information and consultation. Topics include:⁴

- corporate strategy;
- the economic and financial situation of the undertaking;
- the situation regarding sales and turnover;
- production programmes;
- rationalization, reorganization and restructuring;
- production and working methods;
- closure of establishments;
- partial closure of establishments;
- take-overs and mergers at the level of the undertaking;

⁴Buschak, W., *European Works Councils. The EC Directive: ETUC analysis and comments*, 2nd enlarged edition, s.d., Brussels, p. 29.

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- the policy regarding technology;
 - market trends;
 - reductions in capacity;
 - the relocation of production;
 - the employment situation;
 - developments at branch level;
 - investment policy, both at the level of the undertaking and for each production line;
 - training;
 - safety and health protection; and
 - working conditions.

Information and consultation are usually confined to transnational issues.

H. Meetings

The majority of agreements provide for annual meetings, often completed in one day. Many agreements foresee the organization of preliminary meetings, which precede the (annual) meeting of the EWC.

Where an agreement mentions drafting the agenda for the meeting, it generally provides for a joint input. The same goes for the minutes of the meeting: in a number of cases, the minutes are forwarded to other interested parties (managers and national representatives of employees).

I. Experts

Three-quarters of the agreements contain a clause allowing access to experts' advice. Different formulas are used.

J. Confidentiality

A clause concerning confidentiality is contained in many agreements. In most instances agreements provide "that EWC members are covered by an obligation to treat as confidential any information presented as such by management or on any company secrets".

K. Costs

According to most agreements, the costs relating to the preliminary meetings and the meetings of the EWC are borne by the undertakings. In general, headquarters will pay for the meetings (location, interpretation, catering) while the subsidiaries cover expenses related to the participation of their respective employee representatives: travel, accommodation and sometimes pay. Occasionally expenses related to the participation of union agents are also covered. The same goes for meetings of the select committees. In some cases EWCs or committees have their own budget, allocated by the undertaking.

Usually representatives are given paid leave while attending meetings, while in a number of cases extra time off is provided.

L. Languages and training

The agreement is usually drafted in the native language of the company; in a large number of cases translations have been made into other languages.

The majority of agreements provide for simultaneous translation on request, into a number of languages. Sometimes, there is one major language such as English, French, German and translation is provided as appropriate. The same goes for the minutes.

A number of agreements provide for some training in languages, finance and economics. At times, specific courses are offered.

M. Duration of agreements

Here also there is a great variety in the pre-Directive agreements, so that only a few general points stand out. Thus, agreements are:

- for an indefinite duration;
- for a minimum period (up to five years);
- for a fixed term (one, two, four or six years).

Most agreements provide for a term of notice, e.g., of six months. Sometimes, a review process is provided for. In one (project) agreement there is a clause providing that management has the right to terminate the agreement if it is challenged by legal recourse.

N. Applicable law

In a number of cases (mostly French), the agreements indicate which national law is applicable. The case of National Westminster (a British multinational) is interesting as the agreement not only applies worldwide, including the US, but also provides that the seat of the works council will be in London and that English law is applicable to the agreement.

3. Further analysis of pre-existing agreements (1994-96)

The European Foundation for Living and Working Conditions regularly analyses agreements establishing an EWC. A study of 111 agreements contains a wealth of information. Some of the more important figures are reproduced below:

Nationality (home country) of the company

	%
Germany	27
France	22
UK	14
Nordic countries	13
US	8
Outside EU	7

Sector of activity

Metalworking	30
Chemicals	28
Food	10
Construction	9

Signatories

Trade unions	55
Central works councils	26

Coverage

15 Member States	40
Europe 33	
EEA	10
Worldwide	2
Outside Europe	33
Group as a whole	80
Divisional	15

Composition

Employees only	25
+ management	75

Employee representatives:

0-10	7
11-20	31
21-30	42
31-40	8
41-50	7
51 +	5

Nomination:

by trade unions	64
by works councils	55
direct elections	19

External members:

trade unions	22
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Select Committee:

agenda	67
preparing	53
coordination	50
minutes	28
time place	23
specific	42
extraordinary meeting	7

Competence (information and consultation)

Economic and financial situation	87
Employment/social issues	85
Business, production, sales	65
Investment	50
Structure	47
Transfer, mergers, redundancies	40
Organization	38
Health and safety	33
Environment	30
Training	23

Meetings

Yearly	88
Twice a year	9
Extraordinary	74

Chair:

Management	54
Employee	18
Joint/rotating:	6

Feedback

Overall	55
Joint communiqué:	
workforce	30
representatives	6
managers	3
Distribution of minutes:	
workforce	7
managers	8
representatives	9

Expert

Overall:	84
Preparatory meetings	41
Meetings	66
Select committee	5
Agreement of management	58

Confidentiality

Overall 77

Protection

Overall 43

4. The Renault case

The sudden announcement of the closure of the Renault plant at Vilvoorde, Belgium, on 27 February 1997, gave rise to mass demonstrations, public condemnation, to court cases and to new legislation in Belgium. Renault was accused of not living up to national, European and international standards regarding information and consultation.

On 21 March 1988, the French CEO of Renault (Paris) was condemned by the criminal court of Brussels to pay a fine of 10 million Belgian francs. Two trade unions and 11 employees, who had claimed damages, obtained a symbolic franc. A substantial social plan had been concluded by then, after difficult negotiations. In the meantime, the company had been ordered in both France and Belgium, to start the process of collective redundancies, including information and consultation, over again from the beginning.

In Belgium, Renault was accused of breaching the 1975 EC Directive on collective redundancies, implemented in Belgium through an industry-wide collective agreement, extended by a Royal Decree. In France, Renault was under fire for contravening French legislation implementing the Directive on European Works Councils because it had not respected the right of the Renault European works council, known as the European group committee, to be informed and consulted prior to the company's decision to close.

On 3 April 1997 the Brussels Labour Court ruled that Renault's behaviour was in breach of Belgian law. Renault was condemned to start the process over again, so as to try to prevent redundancies and to alleviate the social effects.

On 4 April 1997 the French District Court of Nanterre ruled that the mother company had not respected its obligation to inform and consult with the Renault EWC and prohibited management to pursue, including through its subsidiaries, implementation of the closure of the Vilvoorde factory, until it had fulfilled its obligation of information and consultation toward its European group committee. This ruling was upheld by the Versailles Court of Appeal (7 May 1997).⁵

Renault maintains that it acted in accordance with national and European law. The French case has been referred to the "Cour de Cassation", the highest court in France.

The Renault case led to new legislation in Belgium, toughening the current Belgian law on collective dismissals, making it more detailed and giving it more bite. Chapter VII of the 13 February 1998 Act concerning the promotion of employment deals with this; it applies to companies employing at least 20 workers. The new Act obliges the employer who is considering collective redundancies to:

- present a written statement to the works council of the intention to close or, in the absence thereof, to the trade union committee;
- prove that several meetings were held with representatives of the employees, where this intention was discussed;

⁵Bruggeman, F., "The Renault ruling examined", *European Works Councils Bulletin*, issue 12, Nov./Dec. 1997, pp. 15-16; X., "The Repercussions of the Vilvoorde Closure", *European Industrial Relations Review*, issue 289, Feb. 1998, pp. 22-25.

- ensure that the workers' representatives have the possibility to ask questions concerning the intended collective dismissal, to formulate arguments and counter-proposals;
- prove that management has examined these questions, arguments and counter-proposals;
- inform the public authorities of the intention to proceed with collective redundancies;
- forward a copy of that information to the works council or, in the absence thereof, to the trade union committee; the information has also to be posted in the enterprise and forwarded to employees subject to collective dismissal, by registered mail.

5. Article 6 agreements

Although no exact figures can be put forward, the majority of agreements providing for information and consultation rights in European multinational enterprises, have still to be concluded. One estimate indicates 700-800 multinationals. At present some 50 Article 6 agreements have been concluded, and it seems that many more are under way.⁶ Thus, it is too early to draw up any far-reaching conclusions. What follows is based on examination of a few agreements only.

One main difference between Article 13 and Article 6 agreements resides in the negotiation of the agreement from the employee side. In the case of Article 6 agreements, the employees are represented by a special negotiating body (SNB) of elected or appointed representatives from the countries covered by the Directive. In most cases SNB members are employees from the European enterprise and this may mean a reduced role for trade unions in lesser negotiating agreements. A study of six agreements indicates, however, that this is not necessarily the case.⁷

Article 6 agreements closely resemble Article 13 agreements in their content. This is to be expected, as Article 6 of the Directive merely indicates points which have to be dealt with, such as the coverage of the agreement, composition and venue, as indicated above. The content of Article 6 agreements is undoubtedly influenced by the subsidiary requirements, which are, at least for employee representatives, a kind of minimum from which negotiations have to start.

Some specific tendencies are reported, including:

- the continuing option of establishing divisional as well as whole group EWCs;
- a concern with making provisions to adapt agreements in response to changes in group structure and size;
- a distribution of employee representatives based more on geographical criteria than size of workforce, and with less proportional representation for larger national operations;
- little change in the nature or form of information and consultation; tough provisions on extraordinary meetings seem more common under Article 13;
- considerable detail on matters such as the venue and duration of meetings, and financial and material resources (especially for training);
- detailed provisions on the duration and renegotiation of agreements;
- extra themes for information and consultation, notably the environment and health and safety;
- extensive confidentiality clauses;
- a more "legalistic approach", with frequent references to the Directive and national implementing measures.

It remains to be seen whether these tendencies will prevail in forthcoming agreements.

⁶"National European Works Council Provisions compared", *European Works Councils Bulletin*, issue 14, Mar.-Apr. 1998, 12.

⁷"Article 6 agreements – A preliminary view", *European Works Councils Bulletin*, issue 11, Sep./Oct., 1997, pp. 12-17.

Conclusions

The European Directive on Information and Consultation of Workers in Multinational Enterprises which Operate in the European Economic Area, is of major significance for industrial relations and human resources management in Europe. This applies to the method of assuring information and consultation rights, as much as to the content and outcome.

The voluntary approach to establishing European works councils (EWCs) or procedure has undoubtedly strengthened the social dialogue in the EU. Hundreds of EWCs have been established through a collective agreement between parties across national boundaries. Of course it should be borne in mind that if no agreement is concluded, a mandatory set of information and consultation rules apply. But the success of the method is undeniable. It gave the parties an opportunity to forge together an instrument geared to their specific situation and needs. The voluntary approach is inspiring, as the Davignon (1997)¹ report on workers' participation in the European company demonstrates; the report has been well received by the European social and political actors. The method, first bargaining, then agreements and then a mandatory framework, has now been approved as one of the ways to establish worker participation in the European Company Statute. An agreement on the mandatory framework, however, still needs to be negotiated in the European Council of the Ministers of Employment and Labour. The European Company Statute is a Commission proposal designed to ensure that the structures of production are adapted to Community dimensions. At present companies still have to choose a form which is governed by a particular national law. The essential objective of the legal rules governing a European company is to make it possible for companies from different Member States to merge or to create a holding company, and to enable companies or other legal bodies carrying on economic activities and governed by the law of different Member States, to form a joint subsidiary. Companies may be formed throughout the Community under the form of a European public limited company.

Since 1994, hundreds of agreements have been concluded providing for international information and consultation; more are coming. This, undoubtedly, constitutes a success. This has to do not only with the voluntary approach but also with the conviction of the actors involved that information and consultation of employees are an integral part of mature industrial relations and human resources management.

Whether the information and consultation procedures will be adequately applied and will improve understanding and cooperation between the partners will depend on those involved. The outcome of the Renault case has demonstrated that information and consultation should be taken seriously. But it also shows that EWCs, in the end, do not really affect managerial prerogative. The establishment of EWCs has not restored the balance of power between management and labour, which has been dramatically affected by globalization of the economy. On the other hand, an EWC, or an information or consultation procedure, offer a bridge for social dialogue across boundaries, which otherwise might not be there.

Much of the success of this European information and consultation exercise will depend on the ongoing training, which representatives of enterprises and employees will be given, in order to participate with more competence and vision in a constructive dialogue on tackling the challenges ahead. This goes with fostering the well-being of the enterprise, employees included, and of society at large. This is especially relevant on the eve of the twenty-first century, in the era of the information society and the creative worker.

¹Group of Experts: *European system of worker involvement (with regard to the European Company Statute and other pending proposals)*. Final report, European Commission, Employment and Social Affairs, May 1997, 25 pp.

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