

European Works Councils

The European Directive

2009/38/ EC of 6 May 2009

By

Roger Blanpain

72

D950.3
E89

KLUWER LAW INTERNATIONAL

BULLETIN OF COMPARATIVE LABOUR RELATIONS – 72

European Works Councils

The European Directive 2009/38/EC of 6 May 2009

Editor: Roger Blanpain



E2010001047



Wolters Kluwer

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by:

Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspublishers.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-3208-6

© 2009 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: permissions@kluwerlaw.com

Printed in Great Britain.

European Works Councils

Introduction

The Directive 2009/28/EC of 6 May 2009 amends Council Directive 94/45/EC of 22 September 1994 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. This Directive was extended to the United Kingdom by Council Directive 97/74/EC of 15 December 1997 and adapted by Council Directive 2006/109/EC of 20 November 2006 because of the accession of Bulgaria and Romania.

Article 15 of Directive 94/45/EC provided that the Commission, in consultation with the Member States and with management and labour at the European level, was to 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 not later than 22 September 1999. In its Report (2000) from the Commission to the European Parliament and the Council on the application of Directive 94/45/EC, the Commission stated that it would take a decision on a possible review of the Directive based on the required further assessments and the evolution of the other legislative proposals on the involvement of employees.

Fifteen years from the adoption of Directive 94/45/EC, approximately 820 EWCs were active, representing 14.5 million employees with a view to providing them with information and consultation at the transnational level.

However, there were some problems with the practical application of Directive 94/45/EC. The right to transnational information and consultation lacked effectiveness because the EWCs had been set up in only 36% of undertakings that fell within the scope of the Directive. There were legal uncertainties, particularly with regard to the relationship between the national and transnational levels of consultation and in cases of mergers and acquisitions. Lastly, the consistency and linkage of the various Directives on the information and consultation of employees were insufficient.

The objective of the 2009 Directive is, thus, to ensure that employees' transnational information and consultation rights are effective, to increase the proportion of EWCs established, legal certainty, and to ensure that the Directives on information and consultation of employees are better linked.

The most important changes concern:

- (1) A definition of information.
- (2) Change of the definition of consultation:
 - (i) the notion transnational;
 - (ii) links between various levels of employee information and consultation.
- (3) Passing on information to local representatives of employees:
 - (i) training to EWC members;
 - (ii) composition of the special negotiating body (SNB);
 - (iii) facilities to the SNB: pre- and post-meetings, the presence of experts – including trade union members – in the negotiation meetings;
 - (iv) informing the European social partners of upcoming negotiations
 - (v) rights for the employee representatives in the EWC to collectively represent the employees.
 - (vi) Timing to adapt existing Articles 6 and 13 (pre-existing) agreements.

In this study, we examine in the first chapter, the historical development and the genesis of the new 2009 Directive. In the following chapters, we mainly pay attention to the following aspects of the Directive:

- Objective and scope.
- Definitions and notions.
- Establishment of an EWC or a procedure.
- Prejudicial and confidential information – ideological guidance.
- Role and protection of employees.
- Subsidiary requirements.
- Agreements in force.

Three Remarks

A first remark concerns the legislative quality of the preparatory documents, namely, the documents emanating from the European Commission as well as the Reports from the European Parliament Committee on Employment and Social Affairs and from the European Parliament itself. One would expect that those documents would contain detailed information on the legal meaning of the various notions and changes introduced. This is, however, not the case. For example, the members of the EWC 'have the means required to apply the rights arising from the Directive, to represent collectively the interests of all the employees of the group' (Article 10(1)). Great! However, what rights are we talking about? One finds no guiding of any significance in the preparative documents or in the recitals. It is, thus, up to those who have to apply the Directive, either in practice or in court, to tell what this means. In the meantime, as commentators we do our best to analyse

their meaning with common legal sense. Other examples could be given, such as this one: Article 6(1)(e) provides that ‘Where necessary, a select committee will be set up.’ What does the European legislator mean by ‘Where necessary?’ Again, no help for a meaningful explanation is found in the preparatory documents. For us, there is only one way. Go ahead and row with the row oars at our disposal. No wonder the European Court of Justice has a very broad playing field when interpreting the meaning of the Directives.

Second, one of the objectives of the new Directive is to increase the number of EWCs. One wonders how this will come about. One of the main reasons that there are practically no EWCs in companies with less than 10,000 employees is the fact that the trade unions lack manpower to effectively assist workers in the setting up and running of EWCs. Will the fact that trade unions can act as experts and will be paid for doing so allow for more logistical support? This is a possibility.

Lastly, a real breakthrough leading to 2009 came when the social partners finally could agree on common proposals in order to amend the Directive. This opened the door, also for the Parliament and the Council, to agree and enact the new Directive. It underlines again the importance of the *social dialogue* if the social partners succeed in finding common ways.

Table of Contents

Introduction	ix
Chapter 1	
General Remarks	1
I. Involvement of Employees	1
A. During the 1970s	1
B. During the 1980s	2
C. In the 1990s	4
1. 1994: Information and Consultation in Community-Scale Undertakings	4
2. 1997: The Treaty of Amsterdam	4
D. The Years 2000–2009	5
1. Charter of Fundamental Rights of the European Union (7 December 2000)	5
2. The Five Sisters	5
II. The Directive of 6 May 2009	6
A. Review of the 1994 Directive	6
1. The 2000 Report of the Commission	6
2. The European Parliament and the Economic and Social Committee (2001–2007)	6
3. The European Social Partners	8
a. The European Trade Union Confederation (1999)	8
b. Union des Industries de la Communauté Européenne (UNICE)	9
c. ‘Lessons Learned’	9
d. No Negotiations	12

4.	The Commission Takes the Legal Initiative (2008)	12
a.	Status Questionis	12
i.	Insufficient Number of EWCs: Overview	12
ii.	Challenges and Objectives	14
b.	The Proposal for a Recast Directive of 2 July 2008 by the European Commission	15
c.	Advice of the European Social Partners	17
d.	The European Parliament	19
i.	The Committee on Employment and Social Affairs	19
ii.	Plenary Session	21
Chapter 2		
Objective and Scope		25
I.	Objective	25
II.	Scope	26
A.	Territorial	26
1.	The Twenty-Seven EU Member States	26
2.	The European Economic Area (27 + 3)	26
3.	Companies with Headquarters outside the EEA	26
B.	Personal: Which Companies?	27
1.	Numbers	27
a.	Community-Scale Undertaking	27
b.	Group of Undertakings	28
i.	Definition of 'Controlling Undertaking'	28
ii.	Community-Scale Group of Undertakings	29
2.	Central Management	30
3.	Merchant Navy Crews	30
Chapter 3		
Definitions and Notions		31
I.	Information and Consultation	31
A.	Information	31
1.	Notion	31
2.	Scope: Transnational	32
B.	Consultation	33
1.	Notion	33
2.	Scope: Transnational	34
II.	Representation of Employees	34
Chapter 4		
Establishment of an EWC or a Procedure		35
I.	The Obligation to Negotiate in a Spirit of Cooperation	37
II.	Responsibility and Initiation of Negotiations	37

A.	Responsibility of Central Management	37
B.	Initiation of the Negotiation	38
C.	One or More EWCs: Procedures	39
III.	The Negotiation of the Agreement	39
A.	Parties to the Agreement and the SNB	39
1.	Composition of the SNB	40
2.	Legal Personality of the SNB	41
3.	Task of the Negotiating Parties	41
B.	Experts and Costs	42
C.	Role of the Trade Unions and of the Employers' Associations	43
IV.	Nature, Binding Effect, Form, Language and Interpretation of the Agreement	43
A.	Nature and Binding Effect of the Agreement	43
B.	Form and Language of the Agreement	44
C.	Interpretation of the Agreement	45
V.	Content of the Agreement	45
A.	Scope	46
B.	The Setting-Up of an EWC	46
C.	The Setting-Up of a Procedure	49

Chapter 5

Prejudicial and Confidential Information – Ideological Guidance 51

Chapter 6

Role and Protection of Employees' Representatives 53

I.	Role of Employees' Representatives	53
A.	Representation of the Interest of the Employees	53
B.	Information of National Representatives or Workforce	53
C.	Training	54
II.	Protection of Employees' Representatives	54

Chapter 7

Compliance with the Directive – Links – Adaptation 57

I.	Compliance with the Directive	57
II.	Links	58
III.	Adaptation	58

Chapter 8

Subsidiary Requirements: A Mandatory EWC 61

I.	Composition of the EWC	62
II.	Competence	62
A.	General Information (Annual)	63
B.	Ad Hoc Information	63

III.	Procedure	63
IV.	Role of Experts, Trade Unions and Employers' Associations	64
V.	Expenses	64
VI.	Enforcement of the Subsidiary Requirements	65
VII.	Future Developments	65
Chapter 9		
Agreements in Force		67
I.	Pre-existing Agreements	67
	A. Timing, Form, Language and Format of the Agreement: Applicable Law	68
	1. Timing, Form and Language	68
	2. Nature, Binding Effect and Applicable Law	68
	B. Scope and Parties to the Agreement	68
	1. Scope	68
	2. Parties	69
	C. Content of the Agreement	69
	1. An EWC, a Procedure or Another Mechanism	69
	2. Competence: Information and Consultation	70
	3. Functioning	70
	4. Role of Experts	70
	5. Expenses	71
	D. Prejudicial and Confidential Information	71
	E. Status of the Employees' Representatives	71
	F. Duration of the Agreement	72
II.	Article 6 Agreements	72
Chapter 10		
Report of the Directive by the Commission		73
Chapter 11		
Transposition – Repeal – Entry into Force		75
I.	Transposition	75
II.	Repeal	75
III.	Entry into Force	76
Annexes		77
I.	Directive 2009/38 of 6 May 2009	77
II.	Social Partners	99
III.	European Economic and Social Committee	104
IV.	The European Commission	130
V.	European Parliament	259
Select Bibliography		285

Chapter 1

General Remarks

I. INVOLVEMENT OF EMPLOYEES

Involvement of employees remains an ongoing and vigorous concern of the European Union (EU).

‘Involvement of employees’ means, according to Council Directive 2001/86/EC of 8 October 2001, supplementing the Statute for a European company with regard to the involvement of employees ‘any mechanism, including information, consultation and participation, through which employees’ representatives may exercise an influence on decisions to be taken within the company’ (Article 2(h)).¹

A. DURING THE 1970S

It started in the 1970s. During the 1970s, called by some the golden years for European labour law, three Directives that were intended to protect workers against the functioning of the common market were adopted. I remember from the discussions we had in the group of experts on labour law from the different Member States that the reasoning underlying those Directives was the following: There is a larger market with an increase in scale to which the undertakings will have to adapt themselves; this means restructuring, mergers, takeovers, collective dismissals and bankruptcies.

It was indeed said that the worker should not have to pay the price for the establishment of a common, bigger market; rather the worker should be protected against the social consequences of this restructuring. Based on this reasoning, three Directives were proposed and, due to the then political composition of the Council, were adopted.

1. O.J. L 294, 10 Nov. 2001.

These Directives relate, respectively, to collective redundancies (1975), the transfer of undertakings or parts thereof (1977) and the insolvency of the employer (1980). One will notice, when analysing these Directives, that the managerial prerogative concerning economic decisions remains intact. There were at times proposals regarding collective redundancies to prohibit dismissals in conformity with the then prevalent French legislation, but these proposals were not retained. In short, the Directives only address the social consequences of restructuring.

B. DURING THE 1980s

Here we have to pay special attention to the so-called Vredeling proposal,² named after the then social Commissioner H. Vredeling, which the Commission adopted on 24 October 1980 concerning the information and consultation of employees employed in undertakings with a complex structure, especially multinational enterprises.³ The target of the proposal was both the national enterprise and the group as a whole, so that local management would be in a position to give the employees of the subsidiary a clear picture of the activities of the undertaking as a whole when this undertaking operates in various countries.

Second, the proposal intended to provide for the local workers' representatives to have access to top management when information at a local level would be insufficient. Finally, its purpose was that local management would be able to provide the workers' representatives with adequate information at a local level and with consultation opportunities regarding important decisions affecting local conditions that would be taken at distant headquarters.

According to the proposal, the management of the parent company would forward to the local management, at least every six months, information concerning the group as a whole and relating in particular to:

- (a) structure and manning;
- (b) the economic and financial situation;
- (c) the situation and probable development of business and production and sales;
- (d) the employment situation and probable trends;
- (e) production and investment programmes;

2. One should also mention the following proposals, which provide for a certain role to be played by workers (participation, or if not possible, at least information and consultation):

- Proposal for a Council Directive supplementing the Statute for a European association with regard to the involvement of employees, O.J. C 99, 21 Apr. 1992.
- Proposal for a Council Directive supplementing the Statute for a European cooperative society with regard to the involvement of employees, O.J. C 99, 21 Apr. 1992.
- Proposal for a Council Directive supplementing the Statute for a European mutual society with regard to the involvement of employees, O.J. C 99, 21 Apr. 1992.

3. See further for a more detailed study: R. Blanpain *et al.*, *The Vredeling Proposal, Information and Consultation of Employees in Multinational Enterprises* (Kluwer, 1983), 219.

- (f) rationalization plans;
- (g) manufacturing and working methods, in particular the introduction of new work methods;
- (h) all procedures and plans able to have a substantial effect on employees' interests.

The management of the subsidiary will forward this information to the workers' representatives. If the information is not available, then the representatives are allowed to request that information from top management (the famous bypass of local management by the employees).

Where the management of a dominant undertaking proposes to take a decision concerning the whole or a major part of the dominant undertaking or one of its subsidiaries that is liable to have substantial effects on the interests of its employees, it is required to forward precise information to the management of each of its subsidiaries within the Community. This information must be forwarded not later than forty days before the adoption of the decision, giving details of:

- the grounds for the proposed decision;
- the legal, economic and social consequences of such a decision for the employees concerned;
- the measures planned with respect to the employees.

This information must be given in the case of decisions relating to:

- (a) the closure or transfer of an establishment or a major part thereof;
- (b) restrictions, extensions or substantial modifications to the activities of the undertaking;
- (c) major modifications with regard to organization;
- (d) the introduction of long-term cooperation with other undertakings or the cessation of such cooperation.

The management of the subsidiary is required to communicate this information immediately to the workers' representatives and to ask for their opinion within a period of not less than thirty days. In the case of decisions likely to have a direct effect on the employees' terms of employment and conditions, the management of the subsidiary is required to hold consultations with the workers' representatives with a view to reaching agreement on the measures planned in respect of the employees. Where the information is not communicated or consultations do not take place as required, another access to top management is possible (another bypass of local management).

Few proposals have aroused such heated debate as the Vredeling proposal. Both camps entrenched themselves. Everybody proclaimed that employees were entitled to information and consultation. The way in which this had to be organized and the dimension involved were other matters. A consensus between the social partners seemed impossible; moreover, the governments were deeply divided. An amended proposal for a Directive on procedures for informing and consulting employees of 13 July 1983 was equally unsuccessful and the Vredeling proposal

was buried. The problem was postponed and was to be discussed in 1989, but nothing happened and Vredeling belongs to history. As indicated previously, the Commission would prepare an ‘instrument concerning the information and consultation of employees’ within the framework of the social action programme of 1990.

This took the form of a proposal for a Directive on the establishment of a European Works Council (EWC) in Community-scale undertakings or groups of undertakings for the purpose of informing and consulting employees and of a Directive on information and consultation.

C. IN THE 1990S

1. 1994: Information and Consultation in Community-Scale Undertakings

After so many years, the adoption of the European Directive of 22 September 1994 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 was a fact.⁴

Community-scale undertakings are legally obliged to have an EWC or an information and consultation procedure. The Directive applies to enterprises that occupy at least 1,000 employees and have at least two subsidiaries in two Member States of the EU (excluding the UK) and/or of the European Economic Area-European Free Trade Association (EEA-EFTA) countries each with at least 150 employees. It was estimated that some 1,800 companies would have to comply. From 15 December 1999, the Directive also applied to the UK.⁵ Council Directive 2006/109/EC of 20 November 2006 adapted Directive 94/45/EC on the establishment of an EWC or a procedure by reason of the accession of Bulgaria and Romania.⁶

2. 1997: The Treaty of Amsterdam

The European Top of 16–17 June 1997 led to the Treaty of Amsterdam, which includes a new specific chapter on Social Policy. There is an extension of social competence, which will be confirmed in the Treaty of Nice. Article 137(1)(e) of the Treaty Establishing the European Community (TEC) allows with qualified majority to support and complement the activities of the Member States in the following fields:

- (e) the information and consultation of workers.

4. (94/95 EC) O.J. L 254/65, 30 Sep. 1994.

5. Council Directive 97/74 of 15 Dec. 1997 extending to the UK Directive 94/45 (O.J. L 10/22, 16 Jan. 1998).

6. O.J., 20 Dec. 2006.

D. THE YEARS 2000–2009

1. **Charter of Fundamental Rights of the European Union (7 December 2000)**⁷

Under the Charter, information and consultation are proclaimed to be fundamental rights and well as follows:

CHAPTER IV. SOLIDARITY

Article 27

Workers' right to information and consultation within the undertaking

'Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation *in good time* in the cases and under the conditions provided for by Community law and national laws and practices'.

2. **The Five Sisters**

In the meantime, five important Directives were adopted, underlining the importance of the 'involvement of employees' in the EU:

- (1) Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.⁸
- (2) Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.⁹
- (3) Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.¹⁰
- (4) Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (Text with European Economic Area (EEA) relevance);¹¹ and the last and not the least important.
- (5) Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) (Text with EEA relevance).¹²

7. (2000/C 364/01). O.J. C 364/1, 18 Dec. 2000.

8. O.J. L 294, 10 Nov. 2001.

9. O.J. L 80, 23 Mar. 2002.

10. O.J. L 207, 18 Aug. 2003.

11. O.J. L 142, 30, Apr. 2004.

12. O.J. L 122, 16, May 2009.

II. THE DIRECTIVE OF 6 MAY 2009

A. REVIEW OF THE 1994 DIRECTIVE

Article 15 of Directive 94/45/EC provided that, not later than 22 September 1999, the Commission, in consultation with the Member States and with management and labour at the European level, was to 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.

1. The 2000 Report of the Commission

In its 2000 Report, the Commission to the European Parliament and the Council on the application of Directive 94/45/EC,¹³ the Commission stated that it would take a decision on a possible review of the Directive based on the required further assessments and the evolution of the other legislative proposals on the involvement of employees.¹⁴ These proposals were adopted in 2001, 2002 and 2003.

2. The European Parliament and the Economic and Social Committee (2001–2007)

On 18 February 2000, the European Parliament called on the European Commission to evaluate the application of the collective redundancies Directive and to speed up its current review of the EWC Directive. ‘This call was contained in a parliamentary resolution criticizing US-based tyre manufacturer Goodyear-Dunlop for not following redundancy and information and consultation procedures when closing its plant in Latina, Italy, and electricity suppliers ABB and Alstom for not following European-level information and consultation procedures when restructuring’.

The resolution called on the Commission to:

- undertake an evaluation of the application of the collective redundancies Directive and propose financial sanctions in the case of infringement;
- hasten its current review of the 1994 EWC Directive (94/45/EC) in order to improve measures on worker information and consultation; and
- authorize mergers or similar operations only if the companies involved respect European social legislation, mainly on worker information and consultation rights.¹⁵

The Parliament adopted on 4 September 2001 a Resolution¹⁶ on the Commission’s 2000 report, calling on ‘the Commission to submit a proposal for the revision of

13. COM (2000) 188; Mark Hall, ‘Commission reports on implementation of European Works Councils Directive’, eurofound.org/2000/05.

14. See Chs 1, §1, IV.

15. Neil Bentley, ‘Parliament seeks review of Directives on collective redundancies and EWCs’, www.eurofound.europa.eu/eiro/2000/03/inbrief/eu0003233n.htm.

16. A5-0282/2001 (Report W. Menrad).