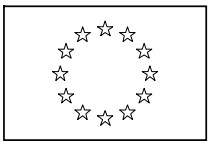

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 04.04.2000
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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the application of the Directive 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 (Council Directive 94/45/EC of 22 September 1994)

1. INTRODUCTION

Directive 94/45/EC 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 was adopted by the Council on 22 September 1994. Its legal basis is Article 2 (2) of the Agreement on Social Policy annexed to Protocol 14 on Social Policy appended to the Treaty establishing the European Community. The Directive thus applies to all the Member States of the European Community except the United Kingdom of Great Britain and Northern Ireland.

Council Directive 97/74/EC was adopted on 15 December 1997, extending application of Directive 94/45/EC to the United Kingdom of Great Britain and Northern Ireland.

Directive 94/45/EC was due to be transposed by the Member States, with the exception of the United Kingdom of Great Britain and Northern Ireland, by 22 September 1996. Directive 97/74/EC must be transposed by the United Kingdom of Great Britain and Northern Ireland and all Member States, by 15 December 1999 at the latest.

Consequently, this report deals only with the status of transposition of Directive 94/45/EC. A further report covering transposition of Directive 97/74/EC will be presented in due course.

In its analytic part concerning the national legal implementation, the report follows the logic and structure of the Directive itself.

2. IMPLEMENTATION BY LEGAL MEASURES AND EVALUATION OF THE PRACTICAL APPLICATION

The vast majority of countries made a major effort not only to meet the deadline for implementation, i.e. 22 September 1996, but also to integrate the Directive faithfully into their national law.

Five countries met the deadline for transposition (Denmark, Finland, Sweden, Ireland and (partly) Belgium)[1], all of which adopted a transposition text which took effect on 22 September 1996.

They were closely followed by Austria (17 October 1996), Italy (partial transposition 6 November 1996), France (12 November 1996) and Germany (1 November 1996). Transposition in the Netherlands (5 February 1997), Greece (1 March 1997) and Spain (24 April 1997) came somewhat later.

Portugal was very late in adopting a transposing act (it was published on 9 June 1999 and entered into force on 9 July 1999).

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[1] The country abbreviations used in this report are as follows: A:Austria, B:Belgium, D:Germany, DK:Denmark, EL:Greece, E:Spain, FIN:Finland, F:France, IRL:Ireland, I:Italy, L:Luxembourg, NL:Netherlands, P:Portugal, S:Sweden.

The Luxembourg text is currently being implemented.

In Italy, the Directive has only been partly transposed, through the signing of an interconfederal agreement on 6 November 1996, and this has to be supplemented by a law extending the collective agreement *erga omnes* and adopting, *inter alia*, rules on sanctions and court jurisdiction. The interconfederal agreement represents only partial implementation of the Directive, as its content and scope are limited (not all occupational sectors are covered).

In Belgium, the collective agreement has been supplemented by two laws.

The manner in which the Directive is implemented is in keeping with each country's domestic legal order. As a rule, laws (acts) have been adopted by parliament. In Italy and Belgium, collective agreements (supplemented in Belgium by an extension procedure) have been preferred.

The social partners have often been involved in the transposition procedure, either formally or informally.

2.1. Evaluation of implementing legislation

The evaluation of the quality of implementing measures, even though it is not long since the entry into force of the Directive, is clearly very positive.

In this connection, the expert group responsible for ensuring proper implementation played a pioneering role, with the Commission providing coordination. This method of following up the transposition work should be adopted generally, in the light of the results obtained in implementing this Directive - a Directive that was particularly complex because of its transnational nature and the combined use of Community concepts and rules of private international law.

However, full results cannot be provided until the remaining countries have completed transposition (Luxembourg and Italy).

Infringement proceedings were started against Luxembourg and Portugal. In the latter case the Commission has suspended the proceedings following entry into force of the transposing act.

Unless Italy takes appropriate action to supplement the interconfederal agreement signed in 1996, the Commission will open infringement proceedings for incomplete transposition.

This report draws attention to a number of minor discrepancies between the Directive and the transposing acts (method of counting part-time workers, number of representatives in the SNB (Special negotiating body) higher than the limit laid down in the Directive) or aspects where there is a lack of detail (preparatory meetings). In any event, these discrepancies must be interpreted as being in the spirit of the Directive.

There were no difficulties in integrating the Directive into domestic legal orders, firstly because the Directive very often refers to internal mechanisms in each Member State, and secondly because it has enshrined the principle of collective autonomy which in many cases is at the basis of employment law in the European

Union. Even in countries such as Ireland, where representation mechanisms are optional, the Directive was well received.

However, regardless of the quality of implementing measures, there is a need for further interpretation of some issues, which have already been identified and relate to:

- the concept of "controlling undertaking";
- the effects of geographical and proportional criteria;
- the conditions for renewing agreements already in force (Article 13);
- changes in the structure of the group;
- the very concept of "expert".

In a significant number of cases those issues have been solved or will be solved by the parties concerned. In other cases the specific nature of each individual problem of interpretation means that they can best resolved by the courts.

As regards legal analysis, problems arise in determining the legal personality of the EWC in many countries, the law applicable to agreements and, naturally, the legal status of these agreements, all of which has a direct impact on the rules on international jurisdiction.

2.2. Evaluation of the practical application of the Directive outlook

2.2.1. General considerations

Clearly, it is very difficult to produce a genuine summary of how the Directive has been implemented in practice, as this took place very recently, and the Annex to the Directive, which establishes subsidiary requirements, has not yet been applied. However, a number of general observations can be made on the basis of experience to date.

As already emphasised, up to now the Directive has been smoothly integrated into the industrial relations systems of the different countries, thanks to the Member States' freedom as regards the choice of representation mechanisms.

The attempt to ensure a harmonious link between worker representation at national level and at transnational level was one of the legislators' main concerns in transposing the Directive. In a large majority of countries the trade union organisations have been recognised as key players, so that they can preserve the role they play in national relations.

There is every reason why the transnational representation body should fit in well with the existing structures of worker representation, although it is stressed that besides the positive effects the creation of a transnational body may eventually create certain problems. Naturally it is to be hoped that the EWC (European Works Council) will give a new impetus to consultation and that a fresh dialogue will begin between the elected bodies, the trade union organisations and the "European" bodies. But there is also the possibility of conflicts with transnational repercussions, such as the closure of establishments, and possible friction between the positions of "national" and "European" workers' representatives.

Some countries have tried to strengthen the part played by the social partners. In particular, the provision in the Directive allowing for the appointment of an expert to

assist the SNB and EWC has facilitated the participation of the Social Partners in the process.

Another point to note is the practical benefit, as regards cohesion and consultation, of national measures which require details of the composition of the SNB and EWC to be sent to all the group's decentralised levels, local management and national workers' representatives.

Repeatedly the importance of opening up employment relations to the transnational dimension both with regard to worker representation and in the context of collective bargaining has been stressed.

On the purely conceptual level, it should also be noted that the Member States concerned have agreed to respect the sometimes innovative concepts enunciated in the Directive. In the field of workers representation, always a sensitive question at European level, such precision is important.

As regards common principles, the Directive and the implementing texts introduce an obligation to negotiate in good faith, based on a spirit of cooperation between the parties into European employment relations.

In the framework of construction of Europe, the pooling of knowledge, reciprocal influence and strategies, as well as the synergy of interests of workers belonging to the same group, are all positive factors.

Transnational information and transnational representation of workers constitute a new and essential response to the impact of the global economy on Europe.

In specific terms, the implementation of transnational representation is already effective in that nearly 600 groups with a Community dimension, including the largest ones, signed pre-Directive agreements before 22 September 1996 or signed agreements based on Article 6 of the Directive after that date.

Article 13 made it easier to sign pre-Directive agreements: it allowed their validation and made it possible for the social partners themselves, and transnational firms, to carry on their own negotiations. The European trade union organisations also played an essential role in this first phase of negotiating agreements. At the moment, there are very few contentious points relating to pre-Directive agreements.

2.2.2. Specific considerations

A major conference on "European works councils: practice and development" was organised in Brussels by the social partners (ETUC, UNICE and CEEP), with the support of the European Commission, on 28-30 April 1999. This event represented a unique opportunity for nearly 650 practitioners (representatives of undertakings which have set up a European works council, EWC members, representatives of employers' and workers' organisations at national and European levels, and representatives of the Member States) to take stock of all the experience acquired in implementing the Directive.

Although none of the above social partner organisations called for an immediate revision of the Directive, the debates highlighted a number of legal and practical

problems relating to its application. The following list of problems should not be regarded as exhaustive:

a) The Directive is based on the principle of quasi-absolute priority and the freedom of the social partners to negotiate appropriate agreements. This approach has proved effective and is the reason why so many agreements have been signed. However, some of these agreements seem to guarantee only a very low level of transnational consultation and information.

b) A merger of undertakings or groups of undertakings might result in there being two or more European works councils in the new undertaking or group. The Directive does not currently require existing agreements to contain an adaptation clause covering changes in the make-up of the undertaking or group. However, the spirit of the Directive is that agreements must cover all workers at all times. Some Member States have in fact already made provision for adaptation clauses to existing agreements.

c) Between adoption of the Directive (22 September 1994) and transposition (22 September 1996), some 450 "pre-Directive agreements" were signed. After 22 September 1996, the frequency and number of agreements signed fell sharply. The success of pre-Directive agreements is explained by the extensive involvement of European trade unions in the negotiating process leading up to most of these agreements, which is not the case with agreements negotiated on the basis of Articles 5 and 6 of the Directive.

Another reason for the fall in the number of negotiations and agreements might be the fact that most large undertakings already have an agreement, and it is now the turn of small and medium-sized multinationals to establish European works councils. These undertakings have specific characteristics and requirements, and often only a small proportion of their employees are members of a union.

d) Although the Directive on European works councils has given rise to few disputes, considering the novelty of the transnational provisions designed to set up a cross-border system of information and consultation, one case in particular has highlighted the problem of whether the present text is sufficiently clear with regard to ensuring that information is provided and consultation takes place "within a reasonable time limit" and in any event before a decision is taken.

e) During the debates on the practical application of the Directive, repeated reference was made to the importance of the right to training for members of the special negotiating body and the European works council. The main argument put forward is that the Directive on the European works councils is an instrument of transnational representation opening up new possibilities for the representation of interests and for transnational communication. Consequently, a certain skill level is needed by the members of the European works council.

f) Another problem raised during the discussions on the practical application of the Directive concerns the effectiveness of the flow of information between the different levels of worker representation. In order to exchange information and be consulted effectively at Community level, it is necessary for efficient information and consultation systems to exist at national level and for the different levels of worker

representation within undertakings or groups of undertakings to be linked with each other.

Article 15 of Directive 94/45/EC on the establishment of a European works council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purpose of informing and consulting employees states that:

"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".

In order to comply with this Article, the Commission consulted the Member States and the social partners at European level.

The review process will continue taking into consideration the debates in the Council and in the European Parliament on the dossiers closely linked with the Directive (proposal for a Directive establishing a general framework for informing and consulting employees in the European Community (COM(98)612 final, 11.11.1998), Draft Directive on employee involvement within the European Company).

On the basis of the results of this review as well as on the basis of the evolution of the other dossiers the Commission will at the given moment decide on the possible revision of the Directive.

3. ANALYSIS OF NATIONAL IMPLEMENTATING MEASURES

3.1. Scope

3.1.1. Material and geographical scope

a) All Member States stipulate that the territorial scope is the European Union and the European Economic Area. As some of them have specifically excluded the United Kingdom, their provisions must be amended before 15 December 1999 following the extension to the United Kingdom of Directive 94/45/EC under the terms of Directive 97/74 of 15 December 1997.

b) In certain countries, the scope of the transposition text implicitly or explicitly includes the merchant navy (B, E, IRL, FIN, S, D, A, P), whereas other countries (EL, I) exclude this sector. In Denmark and the Netherlands, persons working in the merchant navy are not excluded from the scope of the transposition text, but they may not be elected or appointed as members of the special negotiating group or European works council.

c) All Member States respect the material domain of application laid down by the Directive, both as regards the number of employees which Community-scale undertakings and groups must have (1 000 in total, and at least 150 in two subsidiaries or establishments) and the requirement that there must be units in at least two Member States.

d) In calculating the size of the workforce, all countries use the definition of "employee" provided by their national law, in accordance with the *lex fori* qualification procedure authorised by the Directive. The essential criteria applied for defining an employment relationship are the payment of a remuneration and a subordination relationship.

In calculating workforce numbers as such, reference is made directly or indirectly to a period of two years.

There are differences in the way part-time employees are taken into account. In Belgium the calculation method used diverges slightly from the *pro rata temporis* rule[2]. In Ireland, if workers have worked less than eight hours a week for less than 13 weeks, they are not taken into account in calculating the workforce. In Spain, part-time workers may or may not be counted depending on the length of their employment contract[3]. Employees are counted as full-time workers in seven countries (A, D, EL, F, FIN, NL, P), while elsewhere the *pro rata temporis* rule applies (I).

Certain categories are excluded, such as apprentices (I, IRL), homeworkers (I), seasonal/casual workers (FIN), or management personnel (A, D, IRL).

e) All countries except France, Finland, Denmark, the Netherlands and Sweden make provision in their transposition text for the powers and responsibilities of the European works councils and the scope of procedures for information and consultation of workers to relate, in the case of a Community-scale undertaking, to all establishments situated in the Member States and, in the case of a Community-scale group of undertakings, all the member undertakings situated in the Member States; nevertheless, the agreement referred to in Article 6 of the Directive may provide for a wider scope.

3.1.2. Concept of undertaking or group of undertakings

a) In many countries, the concept of "undertaking" as such is not defined; those countries refer explicitly (EL, IRL, I) or implicitly to the definition adopted by the Court of Justice of the European Communities (CJEC).

The concept of "establishment" is spelt out in Ireland on the basis of a criterion of geographic separation. In Belgium, an establishment is a part of an undertaking which does not possess legal personality. The Austrian transposition text refers to section 34 of the Work Organisation Act.

Only the Spanish and Swedish transposition texts explicitly mention the case of public-sector undertakings. Public-sector undertakings are not covered in Italy and Belgium, where the Directive has been transposed into national legislation by means

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2 If employees work three-quarter time they are counted as full-time workers, if not they are counted as half-time workers.

3 Part-time workers with open-ended contracts or contracts for more than two years are included in their undertaking's permanent workforce. Fixed-term contracts of less than two years are taken into account on the basis of the number of days worked over the last two years preceding the date on which the negotiation procedure started. One additional worker is counted for every 400 days or part-days worked.

of collective agreements (in Belgium supplemented by a royal extending decree which does not cover public-sector undertakings). This gap must be plugged.

b) The concept of "controlling undertaking" is sufficiently developed in the text of the Directive, such that the transposition texts have not sought to amend it. The text has been incorporated as it stands by Italy, Greece, Sweden, Ireland, Belgium, Austria, Denmark and Portugal. Sometimes the terms used are different, although they tally with the presumptions of the Directive and their hierarchy; this is the case in Ireland, Germany and Spain and also, with some additional qualifications, in France.

The transposition acts also frequently refer to ordinary company law, either in fleshing out or in supplementing the general mechanisms of the Directive.

In the Netherlands, for example, the Directive's presumptions, as well as their hierarchy, are respected, but the text, in determining capital and voting rights, excludes situations in which an undertaking holds rights on behalf of another (indirect participation). On the other hand, bonded shares are allocated to creditors.

In Finland the reference to company law would suggest that the Directive's presumptions are also upheld, as well as the criterion of "controlling interest" in describing control of subsidiaries.

The Irish text has the merit of addressing the difficulty created by the inclusion of joint ventures (50%/50% holdings).

3.2. Request to open negotiations

All countries comply with the Directive's requirements as regards both the obligations incumbent on the central management and selection of the bodies entitled to initiate negotiations (100 employees or their representatives in at least two States).

Italy's provisions also stipulate that the trade union organisations which have signed the collective agreement applicable may request the creation of a special negotiating body.

The obligations incumbent on the central management are spelt out in detail in Sweden and reinforced in the Netherlands, Germany and Austria as regards the circulation of information to local management and trade union organisations. In Austria, requesting parties are entitled to ask central and local management how many persons are employed in the undertaking or establishment. These details are of interest in that information concerning the creation of an SNB is then conveyed to all interested parties in the Community-scale group.

3.3. Special negotiating body (SNB)

3.3.1. Geographical and proportionality criteria

All countries comply with the Directive as regards the geographical distribution of SNB members (one per country) and the proportional distribution of additional members as a function of the size of the workforce in each country. Several Member States have introduced a finer-grained breakdown (six workforce size classes), and Denmark has established thresholds for the additional members (thresholds of 2 000,

then 5 000), but the principle of proportionality seems to have been respected in all cases.

3.3.2. Number of representatives

The number of representatives on the SNB (3-17) is often stipulated (DK, EL, FIN, I, IRL, NL) but sometimes omitted (B, D, E, S, A, P). In some cases distribution is not consistent with the maximum of 17 members stipulated in the Directive (A, D, E, F), but the group has to be established in more than 14 States for the maximum of 17 to be exceeded in these countries.

3.3.3. Modification of the structure of the group during negotiations

Most countries do not provide for changes to the composition of the SNB during negotiations (A, F, FIN, I). However, specific rules have been laid down in Spain, the Netherlands, Portugal and Greece covering changes to the structure of the Community-scale undertaking or group of undertakings.

3.3.4. Representatives of third countries

Most Member States provide for including representatives of third countries, but procedures differ from country to country. They may be included as observers without voting rights (EL, E, F, NL, P), they may be entitled to be elected or appointed as full members in accordance with national legislation (DK), or provision may be made for details concerning their appointment and status to be set out in an agreement signed by the central management and the SNB (A, D, EL). In Portugal, the central management is not obliged to cover observers' costs.

Finland, Denmark, Italy and Belgium do not have any provisions concerning third countries outside the EEA.

3.3.5. Information on the composition of the SNB

Most Member States require the central management to be informed of the composition of the SNB, but others (e.g. Finland) widen the scope of this information obligation to include all employees. The scope has been extended in Italy to include trade union organisations and local management, and in Austria it includes local management. Similarly, in Germany, the central management must inform local management, employee representatives, and trade unions present in establishments located in Germany.

3.3.6. Composition of the SNB

In each country the appointment of SNB representatives depends on and is in line with the country’s existing representation arrangements.

Belgium: Election by the members of the works council if there is one, or otherwise by the health and safety committee. Failing this, the joint committee may allow the trade union delegation to select the SNB members for Belgium.

Denmark: Election by the representatives of the cooperation committee, otherwise by the shop stewards, or failing that by the employees.

Germany: Appointment by the existing structures in the following order of priority: group committee, central works council (*Zentralbetriebsrat*), works council (*Betriebsrat*), or works committee (*Betriebsauschuss*).

Greece: Election in the following order of priority: by the trade union organisations, in their absence by the works council, or failing that by the workers.

Spain: Appointment by joint agreement among the trade union representatives, who together form the majority of members of the works council(s), or the employee delegates where appropriate, or by agreement of the majority of the members of those councils and delegates.

France: Appointment by the trade union organisations from among the elected members of the works council or establishment council or from the trade union representatives in the group; in the absence of a trade union organisation in the group in France, election by the employees.

Ireland: Appointment or election by the employees, possibility of an agreement between central management and employees.

Italy: Appointment by the trade union organisations that have signed the collective agreement. Otherwise, agreement between the trade union organisations and the central management on the appointment of members.

Netherlands: Election by the highest-level council: group council, central council, works council; if not all the works councils are represented in these other councils, the appointment must be made jointly by the councils that are not represented and the group council; if some of the workers are not represented on the works council, they must be consulted on the choice of SNB members; in the absence of a works council, election by the employees.

Austria: Appointment by existing structures in the following order of priority: group committee, works council or works committee; trade union representatives may be appointed as SNB members even if they are not members of a committee or council.

Portugal: Appointment by joint agreement between, in order, the elected bodies and trade unions, between the elected bodies if no trade unions are represented in the undertaking or establishment, between the trade unions representing at least two thirds of the workers, or between the trade unions representing at least 5% of the workers; failing agreement, if no representatives are appointed, if there is no elected body or trade union, or if at least one third of the workers so request, the SNB members are directly elected by secret ballot, on the basis of lists presented by at least 100 or 10% of workers.

Finland: Organisation of an election by agreement; in the absence of an agreement, the election must be organised by the health and safety delegates and the most representative workforce delegates.

Sweden: Election by the trade union which has signed the collective agreement with the controlling undertaking; if there are several such unions they must negotiate an agreement to organise the election; in the absence of agreement, the most representative union makes the appointment.

Hence, in all the countries which give the works council or elected representatives a major role in the representation of workers, notably as regards information and consultation of workers (or co-decision), it is they who appoint the members of the SNB. Thus the central role is vested in the works council (or central council or group council) in Germany, Austria, Denmark, Finland, France, the Netherlands and Belgium, while workforce delegates or shop stewards play a subsidiary role in Denmark and Belgium.

The trade unions play a central role in appointing members in Italy, Greece, Portugal and Spain, jointly with the works council.

But they also have an indirect role, either because the trade union organisations draw up the lists of candidates (F, S), because they play an essential part in constituting the works council or group council, or because the members of the SNB must have been elected from the lists prepared by the trade union organisations (F) or appointed on a delegation basis (B).

The trade union organisations also play an important role in Sweden, where elections are organised amongst the representatives of the unions which have signed the collective agreement applicable.

Because of the voluntary approach to representation in Ireland, the election system there is not grounded in already existing representation. Election by all employees may thus be replaced by an agreement signed by the employees and management of each undertaking concerned by transnational representation.

In the absence of the body chiefly responsible for appointing or electing SNB members, the Member States rely on various systems: either appointments are made by the workforce delegates (B, DK) or the health and safety delegates (B, FIN), or the members are appointed by agreement between the central management and the trade union organisations (I) or employees (IRL), or they are elected by all the employees (F, NL, P). In Sweden, in the absence of a trade union bound by a collective agreement with the controlling undertaking, the local employees' organisation representing the greatest number of employees assumes responsibility for appointing the members.

Only three Member States have failed to provide for subsidiary mechanisms, namely Spain, Germany and Austria. In these countries workers have the right to establish representations, and it is their responsibility if there is no works committee. The threshold for the creation of such a committee is very low (five employees in Austria and Germany, and six in Spain).

Finally, all Member States have taken measures to ensure worker representation and establish a system for the appointment of SNB members which is in keeping with their domestic representation arrangements and the role handed down to the trade union organisations in each country.

3.4. Agreements - Article 6

Most Member States comply with the Directive's provisions concerning the content of the agreement resulting from negotiations between the central management and

the SNB. However, several of them have inserted in their national texts certain rules which are not laid down in the Directive:

- rules concerning the selection of workers' representatives for the negotiations and the establishment of the European works council are provided for in Spanish, Finnish, French, Irish and Italian legislation;

- concerning the content of the agreement establishing the European works council, the Spanish and Greek legislation requires full identification of the parties to the agreement; the Italian interconfederal agreement requires the content of information and consultation to be laid down in the agreement; the Irish act requires the agreement to specify how the information given to employees' representatives is to be passed on to employees in the Member State concerned and how employees' opinions on that information are to be recorded; Portuguese legislation allows the parties to specify the law applicable to the agreement and the subjects to be treated as confidential;

- concerning the content of the agreement establishing the information and consultation procedures, French, Irish and Netherlands legislation requires the agreement to stipulate the establishments to which the procedure is to apply, the way in which workers or their representatives are to be informed and consulted on transnational questions significantly affecting the workers, the material and financial resources allocated for the procedure, the duration of the agreement and the procedure for renegotiating it. Austrian legislation requires the agreement to specify the consequences to the EWC in the event of restructuring.

Most of the transposition texts refer to the principle of collective autonomy. The others assume it implicitly. Hence in all countries the agreement must lay down all the conditions for the creation and operation of the transnational representation body chosen.

Several texts establish the principle of negotiating in good faith or in a climate of cooperation[4]. In Spain there is an express provision that negotiations may be suspended in the case of bad faith on the part of one party, which is regarded as equivalent to refusing to start negotiations.

Belgium, in addition to the compulsory particulars required under the Directive, prescribes the preparation of a protocol laying down all the concrete rules governing the operation of the European works council. In the other countries these rules are set out in detail in the works council’s rules of procedure.

With regard to the operation of the European works council and the worker information and consultation procedures in their relations with the central management, the Danish, French, Finnish and Netherlands texts do not explicitly impose an obligation to work in a spirit of cooperation in compliance with their reciprocal rights and obligations.

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[4] In their transposition texts, Finland, France, the Netherlands and Sweden omit any reference to negotiating in a spirit of cooperation. However, in some States, including the Netherlands, negotiating in a spirit of good faith is a general principle of civil law. Furthermore, given the legal scope of the preamble and national case law on the subject, the absence of this concept in certain transposition texts does not limit its legal scope.

A two-thirds majority is required in several countries (A, D, F, I, E, P) in order to decide not to start negotiations or to suspend negotiations in progress. This point is not specifically covered in the other Member States' transposition texts.

3.5. Subsidiary requirements

All Member States respect the conditions for application of the subsidiary requirements (refusal to commence negotiations within six months of being requested to do so and failure to reach an agreement within three years). Sometimes there are variations.

Finland, Italy and Sweden make provision for the application of the subsidiary requirements where an expired agreement predating the Directive has not been renewed within six months of termination (FIN) or expiry (S).

Spain and Sweden make provision for the application of the subsidiary requirements where an agreement post-dating the Directive has not been renewed within six months of the expiry of its period of validity.

3.5.1. Composition of the European works council

All Member States have adopted rules governing appointment to the European works council which are identical to those used for the SNB.

The rules on geographical distribution are also identical to those for the SNB (one member per country). The same applies to the proportional distribution of members as a function of workforce size.

All Member States provide for the possibility of appointing a select committee of three members. In some (B, E, IRL), the select committee may be enlarged in exceptional circumstances.

Most Member States expressly prescribe a minimum of three and a maximum of thirty members (not specified in B, NL and P).

Austria and Denmark permit the presence of permanent trade union representatives if they are already members of a works council.

3.5.2. Information and consultation

All Member States provide for information and consultation of workers within the meaning of the Directive, including (in Italy, France, Spain, Greece and Portugal) the right to express an opinion in exceptional circumstances. In the Netherlands an opinion may be delivered within a reasonable time limit after a meeting.

Certain Member States (e.g. IRL) specify that the SNB must be informed and consulted in good faith. Even if texts do not spell out the need for this spirit of cooperation, it may be considered as implicit, or as resulting from the spirit of the text or from general legal principles.

Austria and Germany partially exclude ideologically oriented enterprises from the domain of information and consultation of the EWC. Sweden merely excludes them in relation to the objectives and direction of their activities.

3.5.3. Competence of the European works council

The competence of the European works council as prescribed by the Directive, as regards both the annual meeting and exceptional circumstances, have been faithfully reproduced by all Member States. As regards the transnational dimension of the subjects dealt with, the wording of national provisions sometimes differs slightly from that of the Directive.

As regards the annual meeting, besides the requirement on the prior circulation of an information report, the provisions governing general competence are taken over almost verbatim by all Member States. Italy adds equal opportunities, while the Netherlands adds the environment. As in the Directive, the list of subjects is not exhaustive.

Exceptional circumstances within the meaning of the Directive (or similar terms, as in Italy, where reference is made to a substantial impact on workers' interests) are valid grounds for extraordinary meetings in all Member States.

Finally, preparatory meetings are explicitly provided for in certain national texts (A, B, IRL, P) to enable the European works council to be convened before meeting the central management. Other Member States do not mention this possibility, even though preparatory meetings are specifically provided for in the Directive. But the lack of appropriate provisions does not entitle the central management to disallow such meetings, or any other measure, if they are necessary for the operation of the European works council.

3.5.4. Temporal organisation of information and consultation

The terms used in some transposition texts concerning the moment of consultation in the event of exceptional circumstances are different, but all are inspired by the principle of timely fulfilment of obligations enshrined by the CJEC. Consultation must take place either as soon as possible (IRL, FIN, NL, P) or soon enough to have a useful effect (E).

The absence of specific provisions does not detract from the obligation on the central management to comply with its information and consultation obligations "in good time", in line with the CJEC's interpretation of the obligation to ensure that Community legislation has a useful effect. This interpretation is also binding on national courts.

Several Member States (A, I, F, NL, P) also require negotiations to be reopened within four years of the application of the subsidiary requirements with specific provisions. In Germany and Austria, the EWC must make a decision with a view to reopening negotiations based on Article 6 of the Directive.

3.5.5. Changes to the structure of the group

Adjustments to the composition of the European works council are provided for:

in Denmark, Germany and Portugal as a function of the number of employees in the different countries;

in France when a new European works council is appointed (every two years);

in the Netherlands when justified by changes (integration of additional members).

3.5.6. Chairing of the EWC

Specific rules have been adopted in some Member States for selecting the chairman of the European works council. He or she may be appointed on the basis of an agreement between the central management and the European works council (EL, E, IRL), the chair may alternate between the management and the European works council (NL), the rules of procedure may cover the matter (B), the members of the European works council may elect the chairman (A, D) or the head of the controlling undertaking may take the chair (F).

3.6. Agreements in force - Article 13

All Member States comply with the requirements of Article 13 of the Directive concerning the applicability of agreements already in force. In several countries there is a gap between the date laid down in the Directive (22/09/1996) and the date of entry into force of the transposition text validating these agreements (D, F). The Austrian legislation backdates the validity of agreements to the date stipulated in the Directive. Italy and the Netherlands make provision for the validity of agreements signed after 22 September 1996; in Italy, agreements signed by November 1996 are valid, in the Netherlands those signed by February 1997.

The Portuguese act explicitly recognises agreements entered into in third countries, provided they comply with the conditions laid down there, wherever national law is applicable.

The conditions set out in the Article are spelt out explicitly in Belgium (where all situations in which signatures validate the agreement are provided for[5]), in Germany and the Netherlands (where appropriate worker participation is required) and in Spain (where the legitimacy of signatories is checked)[6].

In addition, some Member States have introduced additional criteria to those laid down in Article 13 of the Directive for the validity of agreements in force. In Ireland, the agreement must have been accepted by the majority of the workforce to which it applies. In Austria, the protection of workers' representatives applies *ex lege*, also in the case of Article 13 agreements, and all bodies representing staff must be informed of the text of the agreement. In Denmark, the agreement must relate to information and consultation on matters concerning undertakings or establishments located in several Member States.

Certain Member States (A, B, D, FIN) allowed revision of agreements in force within the six months following 22 September 1996, with a view to making them compatible with the requirements of Article 13.

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5 Signature by the trade unions that have signed the collective agreement and are represented in the group, by the majority of workforce delegates in the country concerned, by the majority of employees, by a European organisation acting on behalf of the undertaking's trade union organisations. This presumption of validity for certain types of signatory also exists in Germany, France and Italy.

6 Provision for checking the legitimacy of signatories is also made in Finland and the Netherlands.

In Greece and Belgium, conditions governing the written form of agreements have been added to authorise their validation.

Ireland, Austria, France, Germany, Belgium, Spain and the Netherlands provide for the possibility of renewing these agreements. The provisions differ, depending on whether or not agreements were concluded for a specific period.

Finally, some Member States provide for incorporating changes in the structure of the group into the system established through earlier agreements (NL after five years).

3.7. Experts

All countries have provisions authorising the SNB and the European works council to consult experts. Most countries stipulate that recourse to experts must be essential (EL, DK, FIN, S) and/or that the associated costs may be charged to the central management in respect of one expert only (A, D, B, EL, F, IRL, NL, P). Netherlands law specifies that this means one expert per agenda item. The right to consult several experts, even if the central management must pay for only one of them, means that SNBs and EWCs can draw on the assistance of trade union representatives belonging to national or European confederations, while at the same time seeking the help of a "technical" expert.

In agreements concluded pursuant to Article 6, the consultation of experts and rules on the covering of costs are clearly matters for negotiation.

3.8. Other operating rules

3.8.1. Material and financial resources

All countries stipulate that the central management shall bear the operating expenses of the transnational representation bodies.

As regards the SNB, it is generally specified that these expenses include the material and financial resources it needs to perform its task (DK, FIN, P, A). Even if this is not spelt out, it is clear that the expenses to be borne by the central management are those essential to the functioning of the SNB.

Sometimes, these are set out in detail (I, IRL, P, A): meetings, equipment, travel, translation, accommodation, experts' costs. In Sweden and Spain, the costs of appointing the SNB members are also mentioned.

As regards EWCs set up under the subsidiary requirements, the same general formula applies: the central management has to cover essential operating expenses. These are almost always specified: travel, translation, organisation of meetings, accommodation, equipment (without details as regards fax machines, telephones or computers). In Germany, the central management has to provide premises.

All countries anticipate disputes as to whether costs incurred by the EWC are necessary and/or reasonable. The national courts carry out an assessment based on the objective utility of operating expenses in the context of transnational representation.

3.8.2. Resources given to the representatives

In all countries, representatives are entitled to paid absence to perform their duties. However, the number of hours granted varies tremendously: 20 hours a month in France, eight hours every four months in Italy, two hours a week in Greece, 60 hours a year in Spain, necessary absence in Austria, reasonable absence in Ireland, a non-specified general entitlement in the Netherlands, and absence agreed between the employer and the representative employees' organisation in Sweden.

3.9. Confidentiality

3.9.1. General confidentiality requirement

With the exception of Belgium, where the confidentiality requirement is contained only in a text accompanying the transposition act, all countries' transposition texts impose confidentiality requirements on SNB and EWC representatives and experts.

The requirement is a general and continuous one, generally of unlimited duration, but sometimes limited in time (end of all terms of office in Ireland, three years in Italy). Naturally the confidentiality requirement covers representatives' and experts' relations with third parties, but in Sweden and Austria the it does not bind representatives *inter se*, so as to avoid disputes concerning the circulation of information within the EWC.

3.9.2. Right to withhold confidential information

The central management's right to withhold information it deems to be confidential (Article 8) has been enshrined in Denmark, Sweden, Italy, Greece, Ireland, Spain, the Netherlands and Portugal.

France and Austria have not made use of this possibility, and Germany has not used it for the SNB.

The confidential nature of information must be assessed on the basis of objective criteria. Besides standard legal procedures, specific procedures are sometimes provided for in Greece, Belgium and Portugal, while Finland makes provision for arbitration.

3.9.3. Penalties for infringement of the confidentiality requirement

All countries provide for penalties, but their nature differs from one country to another. Sometimes civil penalties are stipulated (F, P), but as a rule sanctions are of a penal nature: Ireland ("offence"), Germany, Finland, France ("manufacturing secrets").

Spain and Greece do not make specific provision for penalties. In Denmark, penalties are set out in a separate text (not in the transposition text).

Several countries have specific (often emergency) procedures for disputes relating to infringement of manufacturing secrets (notably France, Germany and Belgium).

3.10. Protection of workers' representatives

Protection is provided in all countries for workers exercising representative functions.

The principle of equal treatment is expressly reiterated in certain countries (D, EL, IRL) as a fundamental guarantee of performance of the functions in question.

In each country, protection is organised in line with the rules governing worker representation. Sometimes, this protection results from a collective agreement (DK), but as a rule the transposition text contains a reference to the country's general rules governing representatives (shop stewards or trade union representatives) (B, E, F, I, NL, S, A, P).

Representatives may be dismissed only on serious grounds not related to the activity, or for serious misconduct (FIN, F). Grounds which the employer may not invoke are specified in Finland (illness, strike, religious opinions, etc.).

Specific procedures concerning prior authorisation of dismissal exist in France, Germany and Finland.

3.11. Penalties

All countries prescribe penalties in the event of infringement of the Directive's requirements, as regards both the obligation to set up a special negotiating body (SNB) and obligations concerning the operation of the transnational representation body.

There are various systems: penalties for infringement of collective agreements (DK, S), or general procedures under employment law.

Some countries impose penalties in the form of various types of fine ("compensatory fine" in DK, "conditional fine" in FIN) or, more broadly, penal sanctions which in some cases allow the court to impose a range of penalties: IRL ("offence"), EL, E ("administrative offence"), B ("administrative fines"), A and D ("administrative offence"), F ("obstructionism"), P ("quasi-offence").

Not all countries specify how these penalties are to be applied in the case of infringement of obligations entered into under an earlier agreement, and so it may be assumed that they also apply in this case, except in Denmark and Sweden, where agreements already in force are not covered by the system of penalties.

As a rule, penalties are imposed by the general courts. In Greece it is the prefectoral administration that is responsible, and fines are paid into a workers' welfare fund.

3.12. Remedies

Jurisdiction in all countries lies with the courts that adjudicate on disputes concerning worker representation.

These are usually (A, B, D, E, EL, F, I, S, NL, P) the employment tribunals for individual disputes and/or the general courts (DK, FIN, F for collective disputes), or courts dealing with company law (NL).

In Ireland, arbitration is the rule. This should be emphasised in the light of the transnational nature of disputes (appeals possible only if questions of law are involved).

Finally, some countries have particular rules. In Finland, the Ministry of Employment has a supervisory role, while in Italy the interconfederal agreement provides for the creation of a special committee to deal with questions connected with the transnational body.

ANNEX

References of measures transposing Directive 94/45/EC on European works councils

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