

TANDEM
**EUROPEAN WORK COUNCIL AND SECTORAL SOCIAL DIALOGUE:
GOING ALONG TOGETHER TO OVERCOME THE CRISIS.**

BUDGET HEADING 04.03.03.01
INDUSTRIAL RELATION AND SOCIAL DIALOGUE

Exploring
IN THE MARGINS OF THE WORKSHOP ON “*EUROPEAN WORKS COUNCIL AND SECTORAL SOCIAL
DIALOGUE: PROCEED TOGETHER TO OVERCOME THE CRISIS*” (Seville 3 - 4 Mar. 2011).

by
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As agreed with the leaders of the project in the pre-meetings of the Spanish workshop, the Seville Workshop was planned to focus on the reconstruction of the regulatory framework to be used as the basis for any implementation profiles and on which the discussion among social partners had to be based and developed. The brief notes that follow do not intend to reconstruct all the topics covered during the discussion, but want to be seen as a link between the requirements of the Directive, the comments made by the participants in the Seville workshop about the implementation of these requirements and their experience in this field.

1) TRANSNATIONAL ISSUES CONCERNING THE COMPANY (Article 1 paragraphs 3 and 4 and 15th and 16th preambles, Directive 2009/38).

The first consideration that has emerged from the debate concerns the introduction, in the new Directive 2009/38, of the concept of "transnational issue" falling within the EWC competence. As you know, pursuant to art. 1, paragraph 3 of the Directive, information and consultation of the EWC are limited to transnational issues, and by transnational issues the Directive means those concerning a Community-scale undertaking or Community-scale group of undertakings as a whole or at least two undertakings or establishments of the undertaking or group located in two different Member States.

In their comments, participants expressed a certain regret at losing the broader and more complete notion of transnationality contained in the preamble that refers to issues that, regardless of the number of states involved, are important for the European workforce in terms of scope of their potential effects or that involve the transfer of assets between member states. It seems that the definition present in the preambles is more precise than the one contained in the body of the Directive and this has called for an intervention by the EU Court of Justice to seek an interpretation able to establish consistency between the preamble and the normative part.

2) INFORMATION AND CONSULTATION METHODS

Much attention has been given to how information and consultation of the EWC are carried out. Here the situations described by the participants vary and, although with some simplification, two opposing trends of employers emerge.

On the one hand, in fact, there is the EWC of Unicredit receiving information and offering consultation in order to make it possible to formulate, in due time, an opinion for the company without compromising the ability of adaptation of the latter. The actual involvement of workers' representatives makes it possible to anticipate and manage change in the company.

The experience of the members of the Deutsche Bank EWC seems to be less positive. According to this EWC delegate, eleven years after the formation of this European Works Council, the involvement of workers' representatives did not produce the effective participation in company decisions which could be expected from a German parent company, used to implement co-decision making processes.

The disappointment of a member of the EWC of the Banco Santander appeared to be very marked:: in his view, in fact, the employer is clearly contrary to any EWC activities. It seems that the employer Banco Santander has also decided to set up the EWC under the English law, although in fact this is a Spanish company, to benefit from more lax regulations.

3) CHARACTERISTICS OF INFORMATION AND CONSULTATION

Workers' representatives manifested the need to receive timely information so to be able to prepare, as required by law, an opinion on the issue to deliver to the company.

Preamble 14 states that the establishment of the consultative dialogue, a necessary tool for the information and consultation procedure to produce positive effects, should not undermine the ability of adaptation in that company. In other words, the information and consultation procedure must not delay the decision-making process of the enterprise. In this regard, the interpretation of Preamble 14 (the result of the debate) is very interesting, alleging that the company is the first beneficiary of this prescription, since, through a timely information, it enables its workers' representatives to consider the matter in a relevant way. Contrary to what appears, then, it is the enterprise that must meet the requirement of information and consultation in a scrupulous way so not to suffer from any delays caused by the proper implementation of the procedure. In other words, it has to implement art. 9 of the Directive which says that the enterprise and workers' representatives work in a spirit of cooperation and comply with their respective rights and obligations.

4) LEVEL OF ENFORCEMENT OF THE DIRECTIVE.

During the Seville meeting, attention was also paid to the difference between established EWC and Community-scale undertakings and / or Community-scale groups of undertakings to which the Directive applies.

The available data reported about 1470 multinationals without an EWC, or 65% of all transnational undertakings. These figures date back to 2006, but even a newer version do not exceed the threshold of 50% of companies falling within the scope of the EWC directive.

On the other hand, with regard to companies that have an established EWC, there are no significant data on companies that promote the establishment of EWCs.

Art. 5 paragraph 1 of Directive 2009/38/EC entrusts the initiative of the establishment of EWCs in Community-scale undertaking CAE to three subjects:

- The central management,

- At least 100 employees in at least two undertakings or establishments in at least two different Member States, upon their written request,
- Workers' representatives in at least two undertakings or establishments in at least two different Member States, upon written request.

As mentioned, the hypothesis of the establishment of an EWC upon initiative of the employer cannot be quantified. In almost all cases, therefore, the initiative for the creation of an EWC comes from the employees or their representatives.

5) CONFIDENTIAL INFORMATION (Article 8 of Directive 2009/38)

The debate highlighted an emblematic aspect of the correct application of the confidentiality provision by the employer. The text of the Directive provides that the members of the special negotiating body and of the European Works Council, and the experts who assist them, are not authorized to disclose the information given to them as confidential information. The European Works Council of Unicredit, established in 2007, received from its management some information classified as "confidential" on only one occasion; it was about the launch of the business plan and the EWC received that information prior to its disclosure to the financial markets. This, as mentioned, shows on the one hand the correct application of the legislation cited by the parties, on the other hand, it shows that the possibility to receive confidential information is not likely to occur so often. The application of the confidentiality provision under the Directive made it possible for Unicredit to say that the information they received was confidential only once in nearly four years of operation of their EWC.

Hence the question about the correctness of the implementation of the law by those employers (of which several examples have been done) that, on the contrary, often provide information classified as confidential and, therefore, not be disclosed by the EWC .

In fact, a trend can be detected for employers to classify that information as confidential in order to prevent its disclosure and not to make possible for the interested workers to know it. The confidentiality clause, in fact, obliges the EWC members not to transfer information to third parties, and therefore also to the workers

of the company. This clause, then, breaks the link between workers' representatives and the employees themselves, as in this case the flow of information from representatives to employees is stopped. It can therefore be possible for the company to take serious decisions affecting its workers without informing them in advance, and that such decisions be made public without the previous compliance with the information and consultation procedures.

6) ROLE OF EXPERTS (Article 5, paragraph 4 of Directive 2009/38)

As everybody knows, the recast directive introduces a provision on the role of experts and the union in the establishment of an EWC. The 1994 directive did not make express reference to the role of the union.

Article. 5, paragraph 4 of Directive 2009/38 states that : << For the purpose of the negotiations, the special negotiating body may request assistance from experts of its choice which can include representatives of competent recognised Community-level trade union organisations. Such experts and such trade union representatives may be present at negotiation meetings in an advisory capacity at the request of the special negotiating body>>.

Preamble 27 states that << Recognition must be given to the role that recognised trade union organisations can play in negotiating and renegotiating the constituent agreements of European Works Councils, providing support to employees' representatives who express a need for such support. >>.

The experiences of the participants who contributed to this debate have shown that the new provision of the recast directive is relevant for an effective development and deployment of EWCs and social dialogue. All the speakers, in fact, have highlighted the need for the workers' representatives to take advantage of experts able to assist them during the negotiations for the establishment of an EWC and in subsequent phases in the event of significant changes to the enterprise and in cases of modifications to the regulatory framework.

7) TRAINING (Article 10, last paragraph, Directive 2009/38)

Training is closely related to the recognition of the role of the union referred to in the preceding paragraph. The provision stated in Article 10, paragraph 4, in fact, requires that the members of the special negotiating body and of the European Works Council be provided with training without loss of salary (see preamble 33). The discussion showed that the training and, in general, all the assistance provided to members of the EWC and of the SNB must be supported by the union because of the experience that the union can use during the

negotiation of the agreement, which, in the opinion of respondents, represents the most delicate phase in the establishment of an EWC. Once again the most significant experience seems to be that of the Unicredit EWC which includes among its members some delegates engaged in European and national organizations.